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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 28th MARCH, 2019

+ BAIL APPLN. 657/2019

A. C.

..... Petitioner

Through: Mr. Gaurav Bharadwaj, Mr. P. Sharma, Mr. Gulshan Garg and Mr. Sahil Sharma, Advocates

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Sanjeev Sabharwal, APP with SI Aaditya Sharma, PS Krishna Nagar

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. The petitioner, born on 03.07.2001, is facing proceedings in criminal case (SC no.300/2019) in the court of the Additional Sessions Judge, designated as Children's Court under the Commissions for Protection of Child Rights Act, 2005 on the basis of accusations founded on evidence statedly gathered during investigation of first information report (FIR) no.214/2018 of police station Krishna Nagar, involving offences punishable under Sections 377, 506, 363 of Indian Penal Code, 1860 (IPC) and Sections 4 and 8 of Protection of Children from Sexual Offences Act, 2012 (POCSO Act), the acts constituting such offences having been committed on 14.09.2018, the victim also being a child (having been born on 29.07.2003). The particulars of the petitioner and the victim are being withheld, the former being herein referred to as "A.C" or "*child in conflict with law (CCL)*".

2. The petitioner had been earlier brought before the Juvenile Justice Board (JJB) on the basis of report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) dated 09.11.2018, some further material (forensic reports) having been later added by a supplementary report dated 20.02.2019. The CCL is contesting the case pleading his innocence before the JJB.

3. An inquiry was held on the request of the prosecution, for preliminary assessment in terms of Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short, “JJ Act, 2015”), the offences involved, particularly those punishable under Section 377 IPC and Section 4 of POSCO Act, being “*heinous offences*” within the meaning of the expression used in the said law, the petitioner being a child who, *prima facie*, had completed the age of 16 years on the crucial date when the said offence took place. The JJB, after taking into account the facts and circumstances of the case, the mental and physical capacity of the CCL, his ability to understand the consequences, and other relevant facts, decided, by its order dated 19.01.2019, that there is a need for he to be tried “*as an adult*”, and in the consequence decided to transfer the trial of the case under Section 18(3) of the JJ Act, 2015 to the jurisdictional Children’s Court.

4. The case, upon being brought before the District & Sessions Judge (East), was made over by his order dated 25.01.2019, to the court of the Additional Sessions Judge-06 of the East district, which, the report of the Registrar (vig.) dated 19.03.2019 confirms, is the designated Children’s Court for the area in question.

5. The petitioner applied for release on bail pending proceedings in the case before the Children's Court, invoking the jurisdiction of the said court under Section 439 Cr. PC. The application was declined by order dated 28.02.2019, the Additional Sessions Judge presiding over the children's court setting out his reasons as under :-

"4. The statement of the victim was recorded u/s. 164 Cr. PC and in his statement he has stated about unnatural sex committed by the applicant with him. There are allegations of committing oral sex by the applicant with the victim. As per allegations the victim has discharged the siemen (sic) in the mouth and private part of the victim. There are also allegation of giving threat by the applicant to victim. I am of the view that there are serious allegations against the applicant and no ground is made out to grant bail to the applicant. The bail application is without any merits and same is hereby dismissed."

6. Feeling aggrieved, the petitioner has come up to this court by the present application invoking the jurisdiction under Section 439 read with Section 482 Cr. PC.

7. The petition has been resisted by the State, the prime submissions made being that the offences committed by the petitioner are quite serious in nature, the opinion recorded by the JJB for purposes of transferring the case to the Children's Court indicating the need to try the petitioner as an adult, and this, in the argument of the Additional Public Prosecutor, itself being a good reason why the approach of the Additional Sessions Judge (Children's Court) ought to be respected and not interfered with.

8. The submission of the counsel representing the petitioner, on the other hand, has been that notwithstanding the opinion recorded by

the JJB as to the physical or mental capacity of the petitioner, he remains a child, or a juvenile, in conflict with law, and merely because he has been brought before the Children's Court for trial, it should not result in he being denied the benefit of the benevolent provisions of the JJ Act, 2015 particularly in the matter of right to be released on bail.

9. Section 12 of the JJ Act, 2015 which deals with the subject of bail, reads as under :-

“12. Bail to a person who is apparently a child alleged to be in conflict with law

1. When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

2. When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

3. When such person is not released on bail under sub-section (1) by the Board, it shall make an order

sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

4. When a child in conflict with law is unable to fulfill the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail.”

10. At the hearing, endeavour was made by the State through the Additional Public Prosecutor to highlight that the procedure undergoes a change in cases of heinous offences, as the present case involves, upon it being found during preliminary assessment that the CCL has the requisite mental and physical capacity to commit the offences he is accused of, he being referred eventually for trial as an adult to the Children's court, in the event of the need to do so being felt, the pre-requisite being that the CCL should be above the age of 16 years.

11. But the Additional Public Prosecutor fairly conceded that there is no provision in JJ Act, 2015 requiring a departure to be made from the general provision contained in Section 12 quoted above in the matter of release on bail of a CCL who has been referred to be tried as an adult. To put it simply, the above referred provision of Section 12 governs the field for all children in conflict with law, irrespective of the age bracket to which they belong, and notwithstanding the fact as to whether the case against them is being inquired into by the JJB or by the Children's Court to which it may have been referred under Section 18(3).

12. The impugned order of the Children's Court, in above view, fails to pass the muster of Section 12 and, thus, cannot be upheld. The

relevant observations of the Children's court in denying release on bail to the petitioner have been extracted above in *extenso*. Having regard to the provision contained in the main clause of sub-Section (1) of Section 12, bail is the general rule. The circumstances in which denial, by way of an exception, is to be adopted, are indicated in the proviso to the said sub-section. Pertinent to note here that the circumstances in which such person (CCL) is not to be released on bail include the existence of reasonable ground for believing that :

- (i). the release is likely to bring the CCL into association with any known criminal;
- (ii). expose the CCL to moral, physical or psychological danger; or
- (iii). it would defeat the ends of justice.

13. The Children's Court while declining the release on bail has not examined the issue in the overall facts and circumstances of the case on the touchstone of any of the above three aspects.

14. In the foregoing facts and circumstances, the order dated 28.02.2019 of the Children's court is hereby set aside. The application of the petitioner for release on bail is revived on the file of the said court. The said application shall be taken up for hearing and consideration on 15.04.2019, whereafter a fresh order in accordance with law shall be passed.

15. Before parting, it needs to be added yet again in this case that some confusion arose at the hearing on this petition on account of the trial court describing itself in the impugned order simply as "ASJ-06 (East)". While presiding over the proceedings in the case in question,

against the above backdrop, the Additional Sessions Judge in question is not sitting as a court of Sessions. Instead, it is a Children's Court established under the Commissions for Protection of Child Rights Act, 2005.

16. The petitioner, at one stage, had argued that the entire proceedings before the concerned court were vitiated for want of jurisdiction. This argument has been abandoned in the wake of the report dated 19.03.2019 of the Registrar (Vig.) confirming that, amongst others, the court of the Additional Sessions Judge-06 of East District has been notified as the Children's Court under the above mentioned special law. Such confusion or irrelevant arguments would not have arisen if the concerned court had described itself properly in the proceedings drawn by it.

17. It is hoped that care and caution will be taken in above regard by all courts in future.

18. The petition is disposed of in above terms. The trial court record shall be returned forthwith with a copy of this order.

R.K.GAUBA, J.

MARCH 28, 2019/yg