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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on:- 28th February, 2019

+ BAIL APPLICATION no.3045/2018

RIHAN KHAN

..... Petitioner

Through: Mr. Akhil Sibal, Sr. Adv. with
Mr. Javed Ali, Mr. Pradeep, Mr.
Prinay Vasandani & Mr. Amit
Kumar, Advs.

versus

STATE

..... Respondent

Through: Mr. K.S. Ahuja, APP for the
State with Insp. Ram Niwas,
SHO Nabi Karim.
Mr. Sumit Kumar & Mr.
Rabindra Nath, Advs. for
complainant with complainant
in person.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. This petition for release on bail under Section 439 of the Code of Criminal Procedure, 1973 (Cr.P.C.), in case arising out of first information report (FIR) no. 224/2016, involving offences punishable under Sections 354A/365/367/376/377/342/506 of Indian Penal Code, 1860 ("IPC") and Section 4 of Protection of Children from Sexual Offences Act, 2012 ("POCSO Act") of police station Nabi Karim, has brought to light a very disturbing background.

2. The petitioner is facing trial as accused in two session cases (nos. 67/2014 and 29031/2016), each having arisen on the basis of reports (charge-sheets) presented by station house officer of police station Nabi Karim under Section 173 Cr.P.C., upon conclusion of investigation into two different FIRs, they being FIR no. 218/2014 registered on 11.05.2014 and FIR no. 224/2016 registered on 20.10.2016. Each of the said cases involves, *inter alia*, offences under Section 6 of POCSO Act, the prosecutrix in each case being the same, the evidence showing her date of birth to be 15.01.2001 and, thus, she at the time of alleged offences being a little over 13 years and about 15 years 9 months old respectively.

3. The trial in the first sessions case (arising out of FIR no. 218/2014), on the charge for offences under Section 376 (2) IPC read with Section 6 of POCSO Act, against the petitioner (the other two co-accused person having been charged with offence under Sections 23 of Juvenile Justice Act read with Section 34 IPC) was underway, it being at the stage of recording of evidence for prosecution (the prosecutrix having been examined) when the other FIR (leading to the second case before the Special Court) was registered.

4. It is pointed out that the petitioner had been released on bail in the first case (SC 67/2014), by the Special Court, by order dated 13.11.2014. The petitioner having been arrested in the second FIR on 21.10.2016 had moved the court of Sessions for release on bail, but the same was declined. In due course, charge-sheet came to be presented and he was put on trial, in the second case on charges

framed for offences under Sections 365/367/376/377 IPC and Sections 4 and 6 of POCSO Act, by order dated 27.04.2017.

5. After some evidence had been recorded in the second case, the petitioner moved another bail application before the trial court, referring, *inter alia*, to some part of the statement of the prosecutrix and certain other evidence (primarily medical evidence). The said application was also dismissed by the trial court by order dated 14.09.2018. The application at hand was filed in the wake of said rejection of the prayer for release on bail.

6. When this application came up for consideration on 21.12.2018, in light of the facts which had been brought out, amongst others by the status report that was submitted, the following order was passed:-

“Status report filed. Heard for some time.

The case arising out of FIR no. 224/2016 of police station Nabi Karim involving offences under Sections 354A/365/367/376/377 IPC and Section 4 of Protection of Children from Sexual Offences Act, 2012 presents a sordid story of the same person being accused again of committing rape, in fact, gang rape, against the prosecutrix child, who had earlier accused of such acts, it forming part of case arising out of FIR no. 218/2014 of Police Station Nabi Karim. Both the cases are pending trial in the same court.

The prosecutrix had supported the case for prosecution in her examination-in-chief and also in part cross-examination, the same having been deferred. It appears she made certain statements in the continued cross-examination on the basis of which the petitioner alleges false implication and seeks to be enlarged on bail pending remaining trial. It is submitted that he is on bail in the previous case.

The status report submitted today does not bring out the facts concerning the previous case in entirety. Given the above facts, it is essential that the said background facts are also kept in consideration. A detailed report concerning both the cases shall be submitted by the State on the next date of hearing.

Given the facts concerning the present case, question also arises as to whether the petitioner should have continued to be on bail in the previous case. He is, thus, also put to notice as to why the bail in the previous case be not cancelled. He may submit his response well in time before the next date of hearing.

Be listed on 8th February, 2019.”

7. Pursuant to the notice for show cause to which petitioner had been put *vis-à-vis* his release on bail in the first case, the petitioner has submitted his reply dated 06.02.2019 through his *paikar* and along with the said reply, he has placed on record some documents indicating his plea of *alibi* in the context of the second case based on the claim that at 11.13.57 hours on 20.10.2016 he was making withdrawal of money against his debit card from an automated teller machine (ATM) at “DGB Road, Paharganj”, this according to his submission belying the allegation of his complicity in the crimes allegedly committed elsewhere.

8. The submissions of the petitioner on the prayer for release on bail in the second case, and against the cancellation of the order of his release on bail in the first case, as advanced through senior counsel, have been heard, the additional public prosecutor for the State and prosecutrix, through her counsel, assisting him strongly contending

that there is no good reason as to why the petitioner should be, or remain, enlarged on bail in either case, given his conduct.

9. In the above context, reference was also made to a complaint lodged on 16.07.2018, vide DD no. 35A of police station Nabi Karim, by the father of the prosecutrix alleging that, in continuation of such threats extended earlier, on behalf of the petitioner, by his kith and kin, another threat to kill had been given on 16.07.2018, it coinciding with the date on which the deposition of the prosecutrix was scheduled to be recorded by the trial court. Inspector Ram Niwas, station house officer of the police station Nabi Karim also present in the Court has informed that he is obliged under the law and, therefore, intends to register an FIR formally taking note of the offences which have been committed by such threats being extended, the same attracting penal clauses in Sections 195 and 506 (part II) of IPC.

10. The learned senior counsel for the petitioner argued that both the cases are based on false accusations, there being sufficient material to show that the prosecutrix had been involved in a love affair with the petitioner and had eloped with him, out of her own free will and volition, against the wishes of her parental family, the first case having been engineered at their instance. It is argued that the second case has also been lodged falsely, at the behest of the parental family of the prosecutrix, the allegations in FIR being unfounded not supported by medical evidence, the prosecutrix herself having vacillated in the course of her ongoing testimony rendering her word incredible. It was argued that the report obtained from the concerned bank (Kotak), coupled with eight photographs showing presence of the petitioner for

withdrawal of the money from the afore-mentioned ATM at the afore-mentioned time on 20.10.2016, belies the case of the prosecutrix about the petitioner being present elsewhere so as to be involved in her kidnapping, wrongful confinement or sexual offences committed in such wake.

11. It does appear that there is some evidence available indicating that the prosecutrix may have gone with the petitioner out of her own will in December, 2013. It also does appear that the petitioner had approached the parents of the prosecutrix, at least three-four times, asking for they to arrange their marriage but he was sent away. The petitioner and the prosecutrix appear to have taken certain steps which are described as “*Nikah*”. The FIR No. 218/2014 was registered on 11.05.2014 in the wake of which development the prosecutrix was recovered and her statement under Section 164 Cr.P.C. was recorded, the investigation showing her age to be about 13 years at the relevant point of time. Since the investigation had also brought to light evidence confirming that the petitioner had subjected the prosecutrix to penetrative sexual intercourse, the first FIR registered under Section 363 IPC was treated as one also involving offence under Section 6 of POCSO Act.

12. The additional sessions judge, presiding over the trial in the first case, framed the charge under Section 376 (2) IPC read with Section 6 POCSO Act on 13.11.2014 but, taking note primarily of the fact that he had been in custody since 13.06.2014, admitted him to bail by same order subject to conditions as to personal bonds and surety bond adding that “*he shall not try to contact the victim in any manner*”.

13. It is conceded on behalf of the petitioner that the evidence in the case arising out of first FIR so far recorded includes the deposition of the prosecutrix which broadly reiterates the fact that she was a child aged about 13 years on the relevant date when she was subjected by the petitioner to penetrative sexual assault it constituting, in general law, an offence under Section 376 IPC and, under the special law, an offence under Section 6 of POCSO Act.

14. As per the case of the prosecution, arising out of the second FIR, the petitioner, assisted by two-three other young persons, had accosted the prosecutrix in the public street, at about 7 a.m. on 20.10.2016, blocking her way to school. She was forcibly put in a motor vehicle (auto-rickshaw) after being blind-folded by the petitioner and taken to a room at the third floor of property no. L-230, Laxman Puri, Nabi Karim, where she was sodomised and raped (thrice) by the petitioner and thereafter brought back and released at a place near her house sometime around 1.20 p.m.

15. The petitioner seeks to argue that the evidence being led in the second case is not worthy of reliance. The counsel for the petitioner was cautioned that it may not be desirable to subject the evidence to such scrutiny as is demanded midway the process. He nonetheless submitted that his arguments *vis-à-vis* the credibility be considered. The same are being taken up solely for the purpose of deciding the application at hand.

16. The petitioner argues that at the time of her medical examination in Lady Harding Medical College on 20.10.2016, attempt was made by the petitioner to project the second incident as a case of

gang rape and one also involving sodomy, the petitioner in her statements not having supported the case of gang rape, the possibility of she having been sodomised requiring to be ruled out since there is no corroboration from medical opinion. This submission does not impress this Court in the context of issues which are under consideration here. Suffice it to state that, even in the MLC, the prosecutrix had clarified that she was not sure if she had been assaulted by three persons or only by one indulging in the act multiple times, though in her statement under Section 164 Cr.P.C. she was more clear pointing the finger at the petitioner alone. The medical officer does not seem to have medically examined the prosecutrix from the angle of sodomy. It appears that the allegations made in such regard were not brought to the notice of the medical officer at that stage. Be that as it may, the conclusions on this score will have to be reached by the trial court upon appreciation of the evidence in its entirety. It is not desirable to pick holes on the basis of selective reading of the evidence. It may be added that even in the MLC there is some indication of assault, it having left certain tell-tale signs (abrasions).

17. The prosecutrix was allegedly kidnapped on 20.10.2016 from near her school and taken to a premises, both places located within the local jurisdiction of same police station. On being asked, the learned senior counsel conceded that the ATM from where money is shown to have been drawn is located at a distance not very far. He himself gauged the distance to be one that can be covered hardly in a few minutes on a motor vehicle. It does not seem to be the case of the

prosecutrix that the petitioner was present with her throughout the period of her wrongful confinement. In fact, as pointed out in the order dated 14.09.2018 of the court of sessions, her evidence is yet to be concluded. Possible absence, for a short duration, from the premises where the prosecutrix was confined for purposes of drawal of money from an ATM, located not very far, may not necessarily mean that the entire case is to be disbelieved. The plea of *alibi* will have to be properly presented before the trial court and a decision solicited on such plea and evidence.

18. It does appear that the prosecutrix has shown some reluctance to testify against the petitioner. But then, stray sentences in her deposition are not to be treated as reflective of her complete version or the entire truth. The court cannot shut its eye to the fact that the version of the prosecutrix has been that at the time of she being kidnapped on 20.10.2016, she was first challenged about her testimony in the court (in the previous case) on 13.08.2015, she being under threats to change the said statement or else she with her brothers would be killed. Such threats, it may be noted, have statedly continued even after the second case was registered, this being shown by the complaint dated 16.07.2018 lodged by the father of the prosecutrix vide DD No. 35A PS Nabi Karim on which the police is taking steps to register yet another FIR. As pointed out by the prosecution, threatening a person to give false evidence itself is an offence under Section 195-A IPC, one which is cognizable.

19. The learned senior counsel for the petitioner relied on *Ramdas & Ors. vs. State of Maharashtra (2007) 2 SCC 170* to argue that in

order to bring home the guilt, the court must be convinced about the truthfulness of the prosecutrix and further that there should exist no circumstances which cast doubt on her veracity, it being expected that the testimony presented is “*absolutely unblemished*” and “*of sterling quality*”. These principles are important to be borne in mind at the time of final adjudication. The cases are still midway the process of trial.

20. This Court does not find merit in the contention of the learned senior counsel that both the cases are *per se* unbelievable because the prosecutrix herself had run away with the petitioner. Sufficient grounds have been found to frame charges and cases are pending trial. The argument also ignores the basic fact that while the petitioner is a person aged 28-30 years, the petitioner is a child born on 15.01.2001, hardly of the age of 13 years and 15 years respectively, at the time of two consecutive episodes wherein she was subjected to penetrative sexual assaults. In cases of such nature, the consent of the victim child is inconsequential. Rather, under the POCSO Act, presumption of the petitioner having committed the offence is raised in terms of Section 29 of POCSO Act.

21. The learned senior counsel for the petitioner referred to decision of a learned single judge of this Court reported as *Onkar Gulati vs. State & Anr. 1997 SCC Online Del 79* to submit that this court should not exercise the power under Section 439 (2) Cr.P.C. to cancel the bail of the petitioner in the first case. Reliance was particularly placed on following paras of the said decision:

“6. It is a well-established principle of law that it is easier to grant bail in a non-bailable case. However, once a bail is granted it cannot be cancelled merely on a request from the side of the complainant unless and until the complainant shows that the same is being misused and it is no longer conducive in the interest of justice to allow him any further to remain on bail. Once a man has been set at liberty through an order of a Court he cannot be deprived of the same unless the complainant makes out a case for cancellation of the same. There is a consensus amongst different High Courts and the Hon'ble Supreme Court on this point that a bail once granted can be cancelled only in those discerning few cases where it is shown that a person to whom the concession of bail has been granted is mis-using the same by subverting the course of justice i.e. efforts are being made to suborn the witnesses, threats are being extended to the witnesses and they are being intimidated not to appear against the accused persons and in case they do so they will have to bear dire consequences. The bail can also be cancelled in case the accused on bail fails to appear before the Court at the time of the trial and thus there is an abuse of the process of the Court”.

(emphasis supplied)

22. In *Onkar Gulati* (supra), reference is made to certain observations of the Supreme Court in cases reported as *Dolat Ram & Ors. Vs. State of Haryana*, (1995) 1 SCC 349, and *State (Delhi Administration) vs. Sanjay Gandhi* AIR 1978 SC 961. In *Dolat Ram* (Supra) the supreme Court had held thus:-

“4.Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted, have to be considered and dealt with on different basis very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion

or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the Court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial....”

(emphasis supplied)

23. In *Sanjay Gandhi* (Supra), the court observed thus:-

“13.Rejection of bail when bail is applied for is one thing, cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. The fact that prosecution witnesses have turned hostile cannot be itself justify the inference that the accused has won them over....”

(emphasis supplied)

24. There is no dispute as to the fact that the offences with which the petitioner is charged in both the cases are non-bailable. There is also no doubt that the offence under Section 6 of POCSO Act, which is attracted in both cases, if proved, can be visited with rigorous imprisonment for a term which may extend to imprisonment for life with fine. Section 437 inhibits the court, other than the High Court or Court of Session, to release a person accused of commission of non-

bailable offence on bail, if there appear reasonable grounds for believing that he has been guilty of offence punishable with offence of death or imprisonment for life. Noticeably, Section 437 (3) Cr.P.C. empowers the criminal court releasing a person on bail in certain offences to impose such conditions as ensure that the accused abides by certain discipline in the matter of his future conduct, not only by not engaging in any criminal activity, but also by not undertaking any misadventure so as to tamper with the evidence against him. Sub-section (3) of Section 437 Cr.P.C. reads thus:-

“When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), [the Court shall impose the conditions,—

- (a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,*
- (b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and*
- (c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence,*
and may also impose, in the interests of justice, such other conditions as it considers necessary.”

(emphasis supplied)

25. Section 438 Cr.P.C. is often invoked for relief that is generally known as “anticipatory bail”, such jurisdiction having been conferred by the law on the High Court and on the Court of Sessions. While entertaining an application for such relief in cases involving non-bailable offences, the court is expected to take into consideration certain factors including the nature and gravity of the accusations, antecedents of the applicant, possibility of he fleeing from justice and the probability of the accusations made being *malafide* [section 438 (1) Cr.P.C.]. Even while granting anticipatory bail, the empowered court is expected to include suitable conditions and, for this, it would be advantageous to refer to Section 438 (2) Cr.P.C. which reads thus:-

“ (2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including—

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the court;

(iv) such other condition as may be imposed under sub-section (3) of Section 437 as if the bail were granted under that section”.

(emphasis supplied)

26. The High Court and the Court of Sessions have been vested with “special powers” in the matter of bail, even in cases involving

gravest of possible crimes (including capital offences), by Section 439 Cr.P.C. which reads thus:-

“439. Special powers of High Court or Court of Session regarding bail.— (1) A High Court or Court of Session may direct—

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice:

Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under sub- section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860), give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.

(1-A) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860).]

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody”.

(emphasis supplied)

27. Noticeably, while granting release on bail in exercise of power under Section 439 Cr.P.C., the court is expected to consider if conditions similar to those in Section 437 (3) Cr.P.C. are required to be imposed. At the same time, it is well settled that even while exercising the wide power under Section 439 Cr.P.C., the court cannot be oblivious to the nature and gravity of the accusations, the antecedents of the applicant, the possibility of he fleeing from justice or tampering with evidence. It may be observed that even if such conditions were not expressly so included in the bail order, they are inherent in every order releasing an accused on bail, he being expected to bear in mind the discipline under which he shall not only refrain from undertaking any criminal activity but also not try to tamper with or influence any witness for the prosecution against him. It is trite that threatening a witness with the objective of deterring him from testifying in court is one of the modes of influencing a witness or tampering with the evidence.

28. In *Aslam Babalal Desai vs. State of Maharashtra* (1992) 4 SCC 272, the Supreme Court while examining the jurisdiction conferred by Section 439 Cr.P.C. for cancellation of bail referring to earlier decision reported as *Raghubir Singh and Ors. vs. State of Bihar* (1986) 4 SCC 481, summarized the principles thus:-

“11. “...the grounds for cancellation under Sections 437(5) and 439(2) are identical, namely, bail granted under

Section 437(1) or (2) or Section 439(1) can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to.”

(emphasis supplied)

29. In *Mansoor vs. State of UP* (2009) 14 SCC 286,, the approach of the court to meet the challenge of threat to fair trial on account of intimidation of witnesses was indicated thus:

*“15. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned. In this context, the following observations of this Court in *Shahzad Hasan Khan v. Ishtiaq Hasan Khan* [(1987) 2 SCC 684 : 1987 SCC (Cri) 415] are quite apposite: (SCC p. 691, para 6)*

“6. ... Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the

victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution.”

(emphasis supplied)

30. Again, in *Neeru Yadav. Vs. state of UP (2014) 16 SCC 508*, the Supreme Court has guided thus:-

“16. The issue that is presented before us is whether this Court can annul the order passed by the High Court and curtail the liberty of the second respondent? We are not oblivious of the fact that liberty is a priceless treasure for a human being. It is founded on the bedrock of the constitutional right and accentuated further on the human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilised society. It is a cardinal value on which the civilisation rests. It cannot be allowed to be paralysed and immobilised. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to the rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. Society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible.

Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law”.

(emphasis supplied)

31. The above principles have been reiterated in *State of Bihar vs. Rajballav Prasad* (2017) 2 SCC 178, it being held that the prime consideration before the court always is to protect fair trial and ensure that justice is done.

32. The court cannot stand as a mute spectator while an individual accused of a heinous offence like that of rape, particularly of a child, indulges in the same offence even while the trial is pending, by ravishing her once again in a brutal manner. The failure on the part of the court to act in such fact-situation would be abdication of responsibility. No doubt, the petitioner is entitled to fair trial. Undoubtedly, the issue of bail or its denial, involve questions of personal liberty. But the victim of a crime is also entitled to certain rights, the most important of her rights being that she is insulated from intimidation. The overall societal interest has to prevail over the right of the accused to personal liberty.

33. This court is of the opinion that the order dated 13.11.2014 releasing the petitioner on bail in the first case was passed without proper consideration of the facts and circumstances attendant upon the accusations. It smacks of a casual approach which cannot be countenanced. There was no consideration of the gravity of the

offences involved. The presiding judge while considering the application for bail, forgot that by the same order he had framed charge under Section 6 of POCSO Act which attracted imprisonment for life as a possible punishment. He forgot that he was dealing with special crime under POCSO Act where a presumption was running against the accused. Mere fact that the petitioner had been in custody for a certain period could not have been treated as sufficient to release him on bail.

34. But then, the above observations have been recorded only for future guidance of the criminal courts. They are not made for the purposes of cancellation of bail. It is the subsequent events which have justified the proposal to cancel the bail. The second case of October 2016 vintage, also involves offence under Section 6 POCSO Act. The circumstances unfolded during investigation have shown that the objective, *prima facie*, was to deter the prosecutrix into silence, she having been expressly threatened and asked to change her statement in the first case or else she and her kith and kin would be liquidated. It appears, *prima facie*, that kidnapping followed by another rape and sodomy was more to punish her for her deposition in the court in the first case. There cannot be a more brazen case of breach of the discipline on the part of accused who had been released on bail in the first case.

35. The court of sessions while releasing him on bail on 13.11.2014 had specifically told the petitioner that he was not to try to contact the victim in any manner. The second case on which the trial is being held on sufficient grounds being found to frame charges shows that the said

condition has been openly flouted. Needless to add, the conduct reflected in the subsequent complaint dated 16.07.2018 made by the father of the prosecutrix reinforces the view that it is wholly unsafe for the petitioner to be allowed to be at large during the pendency of the two cases.

36. For the foregoing reasons, on the above-mentioned facts and in the circumstances, this Court is satisfied that the petitioner ought not be released on bail in sessions case no. 29031/2016 arising out of FIR no. 224/2016 of police station Nabi Karim. Further, a case is made out for this court to exercise its responsibility and jurisdiction under Section 439 (2) Cr.P.C. read with Section 482 Cr.P.C., to cancel the order dated 13.11.2014, whereby the petitioner was released on bail in sessions case no 67/214 arising out of FIR No. 218/2014 of police station Nabi Karim. Ordered accordingly.

37. The prayer for release on bail in the first mentioned case (FIR No. 224/2016) is, thus, declined. The order dated 13.11.2014 releasing the petitioner on bail in FIR No.218/2014 of police station Nabi Karim, is cancelled.

38. It has been brought to the notice of this Court, during hearing in this matter, that both the above-mentioned cases are pending trial before two different courts. This is deemed not desirable inasmuch as both the cases have a bearing on each other. The sessions judge of Central District is directed to pass an appropriate orders to bring both the cases before the same court.

39. The observations made in this order have been necessitated on account of arguments raised on behalf of the petitioner touching upon

evaluation of the evidence that is being led in the two criminal cases. Such observations, however, have been recorded only for dealing with the issue of bail in the second case and in the context of show cause notice for cancellation of bail in the first one. They shall not be treated as binding at the final adjudication in the two cases. The trial court will be expected to render its final decision in the two cases uninfluenced by such observations.

40. The petition is disposed of in above terms.

R.K.GAUBA, J.

FEBRUARY 28, 2019

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