IN THE HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

(THROUGH VIRTUAL MODE)

Reserved on:20.11.2020
Pronounced on: 11.12.2020

Bail App No.139/2020,
CrlM Nos. 1444/2020
& 1445/2020

Badri Nath ... Petitioner(s)

Through: - Mr. Pranav Kohli, Advocate.

Vs.

Union Territory of J&K th. Police Station Bari Brahamana

....Respondents

Through: - Mr. Aijaz Lone Dy.AG

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1 Through the medium of instant petition, the petitioner is seeking regular bail in FIR No. 40/2020 for offences under Sections 354-A/452/506 IPC and under Section 8 of POCSO Act registered with Police Station, Bari Brahamana.

2 The facts leading to filing of this petition are that on 25.02.2020, the police of Police Station Bari Brahmana received an order dated 22.02.2020 from the Child Welfare Committee, Samba wherein it was

alleged that on 19.02.2020, the victim girl approached a Member of the Child Welfare Committee, Samba from Child line, Jammu and informed her that she was molested by her neighbourer and requested for immediate redressal of her grievance. On the basis of this, the concerned Member of the said Committee constituted a team to contact the child so as to listen to her grievance/complaint. On 22.02.2020, the mother of the victim girl along with the victim appeared before the Child Welfare Committee and she made a statement before the Committee. As per the story narrated by the victim girl to the aforesaid Committee, on 18.02.2020 at about 9 pm, the petitioner herein/ accused, who happens to be the neighbourer of the victim, came to her house and started talking vulgar and irrelevant things to her, while her mother was lying admitted in the hospital and her younger brother was sleeping. The victim further narrated to the aforesaid Committee that the petitioner/accused rubbed his hand on her mouth, pulled her hand, asked her to sit in his lap, touched her private parts and asked her to accompany him to the roof for making love. The victim went on to narrate that she locked herself in a room and from there, she called the son of the petitioner/accused who came over there and she narrated the whole story to him, but she was abused and threatened by the son of the accused. The victim further narrated that since her mother was hospitalised and his father is serving in the Army at Chennai, she got frightened.

3 Upon receiving the order from the aforesaid Committee, the police registered the subject FIR and started investigation of the case.

The statement of the victim under Section164 Cr.PC was recorded and after investigation of the case, offences under Sections 354-A/452/506 IPC and 8 of POCSO Act were found established against the petitioner/accused and he was arrested.

4 It appears that on account of outbreak of Covid-19 infection, the petitioner was granted interim bail for a period of one month by the learned trial Court in terms of its order dated 30.03.2020 and the same was extended from time to time up to 09.07.2020. On 08.07.2020, the petitioner moved an application for seeking extension of interim bail, but vide its order dated 10.07.2020, the same was declined by the trial Court and he was directed to surrender before the Jail authorities, whereafter the petitioner is stated to have surrendered and is in custody since then. It further appears that the petitioner after filing of charge sheet before the trial Court on 18.07.2020, again moved an application for grant of bail before the trial Court, but the same was dismissed by the trial Court vide its order dated 29.07.2020.

5 The petitioner has sought bail on the grounds that the learned trial Court was not justified in rejecting his bail application when he was already on interim bail and there was nothing on record before the trial Court to show that he had misused the concession of bail; that the petitioner is not involved in a case which entails severe punishment as the offence for which he has been booked carries a maximum punishment up to 7 years and, as such, he is entitled to grant of bail, particularly because the investigation of the case is complete and the

challan has been presented before the trial Court; that the petitioner would not flee from justice and he would abide by all the terms and conditions that may be imposed by this Court in case he is admitted to bail.

6 The respondent has resisted the bail application by filing objections thereto. In its objections, the respondent has reiterated the allegations made in the charge sheet against the petitioner. It has been contended that the petitioner is involved in a serious offence which he has committed against a child, as such, he does not deserve the concession of bail. It has been further contended that the order of the trial Court rejecting the bail application of the petitioner is based on cogent and sound reasoning, as such, the petitioner is not entitled to bail and that the petitioner has filed successive bail applications without any change of circumstances and, as such, the present application is not maintainable.

7 Before coming to the other aspects of the case, it is necessary to deal with the contention of the prosecution that the instant bail application is not maintainable because the earlier bail application of the petitioner, after filing of the charge sheet, stands rejected by the trial Court and, as such, there is no change of circumstances.

8 The question that arises for consideration is whether or not successive bail application will lie before this Court. The law on this issue is very clear that if an earlier application was rejected by an inferior court, the superior court can always entertain the successive

bail application. In this behalf, I am supported by the ratio laid down by the Supreme Court in the case titled **Gurcharan Singh & Ors vs. State (Delhi Administration), AIR 1978 SC 179** which has been followed by the Bombay High Court in the case of **Devi Das Raghu Nath Naik v. State,(1987 Crimes Volume 3 page 363).** Thus, the rejection of a bail application by Sessions Court does not operate as a bar for the High Court in entertaining a similar application under Section 439 Cr. P. C on the same facts and for the same offence.

9 Having held that the instant bail application is maintainable, let us now proceed to deal with the merits of this application. Before proceeding to analyse the rival submissions, it is necessary to restate the settled legal position about the matters to be considered for deciding the application for bail. These are as under:

(i) Whether there is any *prima facie* or reasonable ground to believe that the accused has committed offence;
(ii) Nature and gravity of the charge;
(iii) Severity of punishment in the event of conviction;
(iv) Danger of the accused absconding or fleeing after release on bail;
(v) character, behaviour, means, position and standing of the accused;
(vi) likelihood of the offence being repeated;
(vii) reasonable apprehension of the witnesses being tampered with and
(viii) danger of justice being thwarted by grant of bail.

10 When it comes to offences punishable under a special enactment, such as, POCSO Act, something more is required to be kept in mind in

view of the special provisions contained in the said enactment. Section 31 of the said Act makes the provisions of the Code of Criminal Procedure applicable to the proceedings before a Special Court and it provides that the provisions of the aforesaid Code including the provisions as to bail and bonds shall apply to the proceedings before a Special Court. It further provides that the Special Court shall be deemed to be a Court of Sessions. Thus, it is clear that the provisions of Cr.P.C including the provisions as to grant of bail are applicable to the proceedings in respect of offences under the POSCO Act. The present application is, therefore, required to be dealt with by this Court in accordance with the provisions contained in Section 439 Cr.P.C. The other provisions of the POCSO Act, which are also required to be kept in mind, are Sections 29 and 30, which read as under:

> *"29. Presumption as to certain offences - Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."*
>
> *30. Presumption of culpable mental state.-(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental stage but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*
>
> *(2) For the purposes of this Section, a fact is said to be proved only when the Special Court believes it to exist beyond*

reasonable doubt and not merely when its existence is established by a preponderance of probability".

11 Section 29 quoted above raises a presumption of commission of an offence under Sections 3,5,7 and 9 of the POCSO Act against a person who is prosecuted for commission of the said offence, unless contrary is proved. Similarly, Section 30 quoted above raises a presumption with regard to existence of culpable mental state against an accused in prosecution of any offence under the Act which requires a culpable mental state on the part of the accused. Again, the accused in such a case has been given a right to prove the fact that he had no such mental state.

12 The learned trial Court, while rejecting the bail application of the petitioner, has vide its order dated 10.07.2020 relied upon the provisions contained in Section 29 of the POCSO Act to observe that the culpability of offences under the said Act has a presumption attached to it.

13 The leaned counsel for the petitioner has vehemently argued that the presumption under Section 29 of the aforesaid Act would come into play only when the trial of offences commences against the accused and not during the proceedings prior to framing of charges. According to the leaned counsel, prior to commencement of trial, an accused has no chance to prove the contrary and, as such, the observation of the learned trial Court that even at this stage, presumption under Section 29 of the Act would come into play, is not in accordance with law. To

canvass his point, learned counsel has relied upon the judgment of the Delhi High Court in the case of **Dharmander Singh vs. State (Government of NCT of Delhi), reported in 2020 SCC Online Del 1267**. In the said case, the Court, while dealing with an application for grant of bail in a case involving, *inter alia,* the offences under Sections 6/21 of the POCSO Act, when the trial of the case was undergoing, framed five questions for considerations which are quoted herein below:

> *"i. Since Section 29 says "where a person **is prosecuted**" for committing an offence inter alia under Sections 3, 5, 7 and 9, the special court "shall presume" an accused to be guilty, when can a person be said to be prosecuted ?*
>
> *ii. Since Section 29 says "unless the contrary **is proved**", when does a person get the chance to disprove his presumptive guilt ?*
>
> *iii. When and at what stage does the 'presumption of guilt' as engrafted in Section 29 get triggered? and*
>
> *iv. Does the presumption apply only at the stage of trial or does it also apply when a bail plea is being considered ?*
>
> *v. Does the applicability or rigor of Section 29 depend on whether a bail plea is being considered before or after charges have been framed ?"*

14 The Court, after discussing the law on the subject, concluded as under:

> *"68. In view of the above discussion and after considering the opinion of the Supreme Court and the views taken by the other High Courts, this court is persuaded to hold that the*

presumption of guilt engrafted in Section 29 gets triggered and applies only once trial begins, that is after charges are framed against the accused but not before that. The significance of the opening words of Section 29 "where a person is prosecuted" is that until charges are framed, the person is not being prosecuted but is being investigated or is in the process of being charged. Accordingly, if a bail plea is considered at any stage prior to framing of charges, Section 29 has no application since upto that stage an accused is not being prosecuted.

69. Therefore, if a bail plea is being considered before charges have been framed, Section 29 has no application ; and the grant or refusal of bail is to be decided on the usual and ordinary settled principles.

74 As always, when faced with such dilemma, the Court must apply the golden principle of balancing rights.

In the opinion of this court therefore, at the stage of considering a bail plea after charges have been framed, the impact of Section 29 would only be to raise the threshold of satisfaction required before a court grants bail. What this means is that the court would consider the evidence placed by the prosecution along with the charge-sheet, provided it is admissible in law, more favorably for the prosecution and evaluate, though without requiring proof of evidence, whether the evidence so placed is credible or whether it ex-facie appears that the evidence will not sustain the weight of guilt.

75. If the court finds that the evidence adduced by the prosecution is admissible and ex facie credible, and proving it during trial is more a matter of legal formality, it may decide not to grant bail. If, on the other hand, the court finds

that the evidence before it, is either inadmissible or, is such that even if proved, it will not bring home guilt upon the accused, it would grant bail.

76. In a given case, the accused may, of his own volition, be willing to disclose his defence even while arguing for bail, to prevail upon the court; in which case, the task of the court would become easier. If however, the accused decides not to disclose his evidence at that stage, he would suffer the consequences of the presumption of guilt engrafted in Section 29".

15 On the basis of aforesaid observations of the High Court of Delhi in Dharmander Singh's case (supra), it has been contended by learned counsel for the petitioner that presumption under Section 29 of the POCSO Act would not come into play in the instant case as the charges are yet to be framed. Thus, according to the learned counsel, it cannot be stated that the petitioner is guilty of the offences for which he has been booked and that presumption of innocence till proved guilty would remain available to the petitioner even in the present case.

16 There can be no quarrel with the proposition that the presumption under Section 29 of the Act would come into play only if foundational facts, that would lead to raising of the aforesaid presumption, are not established. However, the question arises, if the material on record supporting the allegations in the charge sheet, *prima facie* establishes the foundational facts, whether or not the statutory presumption under Section 29 of the POCSO Act would come into operation even at the pre-trial stage when the bail application of an

accused is under consideration. As per the opinion expressed by the learned Single Judge of Delhi High Court in Dharmander Singh's case (supra), presumption under Section 29 of the aforesaid Act would not come into operation if the bail application is considered at the pre-trial stage.

17 To test the merits of this observation, it is necessary to have an in-depth analysis of the words and expressions used in Section 29 of the said Act. It provides that when a person is prosecuted for commission/abetting or attempting the commission of an offence under the said Act, the Court shall presume that such person has committed or abetted or attempted to commit the offence. The expression used in the provision is "prosecuted". As has been noted by the learned Single Judge of Delhi High Court in Dharmander Singh's case (supra), the term 'prosecution' as defined in Oxford Advanced Learner's Dictionary means the process of trying to prove in Court that somebody is guilty of a crime; the process of being officially charged with a crime in Court.

18 In Black's Law Dictionary, the term 'prosecution' has been defined as under:

> *"prosecution. 1. The commencement and carrying out of any action or scheme <the prosecution of a long, bloody war>.2. A criminal proceeding in which an accused person is tried <the conspiracy trial involved the prosecution of seven defendants>. --Also termed criminal prosecution."*

19 The Supreme Court has, in the case of **Thomas Dana vs The State of Punjab, AIR 1959 SC 375,** while explaining the meaning of expression 'prosecute' in the context of Article 20(2) of the Constitution, observed as under:

> *"To " prosecute", in the special sense of law, means, according to Webster's Dictionary," (a) to seek to obtain, enforce, or the like, by legal process; as, to prosecute a right or a claim in a court of law. (b) to pursue (a person) by legal proceedings for redress or punishment; to proceed against judicially; espy., to accuse of some crime or breach of law, or to pursue for redress or punishment of a crime or violation of law, in due legal form before a legal tribunal; as, to prosecute a man for trespass, or for a riot." According to Wharton's Law Lexicon, 14th edn., p. 810, " prosecution " means " a proceeding either by way of indictment or information,, in the criminal courts, in order to put an offender upon his trial. In all criminal prosecutions the King is nominally the prosecutor." This very question was discussed by this Court in the case of Maqbool Hussain v. The State of Bombay (1), with of reference to the context in which the word " prosecution " occurred in Art. 20. In the course of the judgment, the following observations, which apply with full force to the present case, were made:-*
>
> *"..... and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure."*

20 From a careful perusal of the definition of the word "prosecute" given in various Law Dictionaries and the connotation given to the said expression by the Supreme Court in the Thomas Dana's case (supra), it can safely be stated that the prosecution of an accused begins with the presentation of challan before a Court. Therefore, I respectfully beg to

differ with the opinion expressed by the learned Single Judge of the Delhi High Court in Dharmander Singh's case (supra), that the prosecution commences with the commencement of trial of a case.

21 The Legislature has used the word 'prosecuted' in Section 29 of the POCSO Act. If the Legislature intended to bring the presumption contained in Section 29 of the POCSO Act into operation at the commencement of trial of the case, it would have certainly used the word 'tried' instead of word "prosecuted", as has been done in the case of Section 54 of the NDPS Act, which creates presumption in trial of certain offences under the said Act. For reference, relevant excerpts of Section 54 of NDPS Act are quoted below:

> *"54.Presumption from possession of illicit articles.—In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of:—*
>
> *(a).....*
>
> *(b) .....*
>
> *(c) .....*
>
> *(d) ....."*

22 In Dharmander Singh's case (supra), the learned Single Judge of Delhi High Court has, after reading the principles of reasonable, just or fair procedure into the provision contained in Section 29 of the POCSO Act, come to the conclusion that before trial of a case begins, an accused has no chance to put up his defence and to prove the contrary. The learned Judge has opined that the word 'prosecution' has to be

interpreted as 'trial' so as to make the latter part of provision of Section 29 of POCSO Act meaningful. I am afraid such an interpretation cannot be given to the Section 29 of the Act because the Legislature has clearly used the expression 'prosecuted' and not 'tried' in the said provision. So far as the principles of reasonable, just and fair procedure are concerned, the same can be taken care of even at the time of considering the bail application at pre-trial stage by analysing the material that is collected by the investigating agency during the course of investigation for ascertaining whether or not the foundational facts that would give rise to the presumption in terms of Section 29 of the Act are, *prima facie,* in existence.

23 In the bail proceedings, even at pre-trial stage, it would open to an accused to highlight the circumstances/material or lack of it to show that foundational facts are not established and in this manner, the right available to an accused under the later part of the provision contained in Section 29 of the POCSO Act would get safeguarded.

24 For the foregoing reasons, I am of the considered opinion that at the time of considering the bail application of an accused, who has been booked for the offences under Sections 3,5,7 &9 of the POCSO Act, the presumption under Section 29 of the said Act would come into play even at the pre-trial stage. The accused, of course, would have a right to bring to the notice of the Court the material or lack of it to show that the foundational facts giving rise to the presumption are *prima facie* not established in the case.

25 The Supreme Court in the case of **State of Bihar vs. Rajballav (2017) 2 SCC 178** has held that the presumption of innocence of an accused is not applicable to the cases where there is contrary statutory presumption of his guilt such as when prosecuted under Sections 3,5,7 & 9 of the Act. To hold that presumption of innocence is available even to an accused booked for offences under POCSO Act, would be against the aforesaid ratio laid down by the Supreme Court.

26 With the aforesaid legal position in mind, let us now proceed to consider the instant case on its merits.

27 The first ground taken by learned counsel for the petitioner is that the petitioner was on interim bail from 30.03.2020 to 10.07.2020 and it was not open to the trial Court to dismiss the bail application of the petitioner without there being any ground for cancellation of bail. I am afraid, the contention of learned counsel for the petitioner in this regard is mis-conceived. It is not a case where the petitioner was granted bail and thereafter his bail was cancelled. If that would have been the case, the petitioner would have been well within his right to contend that the grounds for cancellation of the bail in the instant case are not made out. In the instant case, the petitioner was granted interim bail for a particular period in view of the outbreak of Covid-19 infection. Once that period expired, his bail was considered on merits and the same came to be dismissed by the trial Court. The principles governing the cancellation of bail, therefore, would not apply to the instant case.

28 Next, it has been contended by learned counsel for the petitioner that the accused is alleged to have committed offence under Section 354-A IPC and Section 8 of the POCSO Act which are not heinous in nature. According to the learned counsel, offence under Section 354-A IPC is bailable, whereas the offence under Section 8 of the said Act carries a maximum punishment of five years. He has contended that in view of the law laid down by the Supreme Court in **Avnish Kumar vs. State of Bihar, (2014) 8 SCC 237,** it is not open to the investigating agency to detain a person casually and mechanically where offence is punishable with imprisonment for a term which may be less than seven years.

29 It is true that the offence for which the petitioner has been booked carries punishment less than seven years, but that is only one of the considerations for grant of bail. The other considerations like nature of offence, the position of the accused with reference to the victim and the witnesses and the public interest are some of the other considerations which are also required to be taken into account while considering the bail plea of an accused.

30 In the instant case, there is material on record to *prima facie* show the involvement of the petitioner in the alleged crime and in view of Section 29 of the POCSO Act and the material collected by the investigating agency during the investigation of the case, the presumption of innocence is no longer available to the petitioner. Having said so, the gravity of the offences is required to be considered

in the backdrop of age of the accused and that of the victim as also their position vis-à-vis each other.

31 The petitioner is aged about 57 years, whereas the victim is only 12 years of age. The petitioner is the neighbourer of the victim who would treat her as her uncle. There was fiduciary relationship between the petitioner and the victim, who would repose trust and confidence in him being her neighbourer. By indulging in abhorrent behaviour with the child victim, the petitioner has shaken this trust and confidence and brought bad name to the relationship of a child with her neighbourer who is as good as her father. It is not an ordinary offence where an accused has tried to molest a major woman having no acquaintance with her. It is a case where the petitioner has committed sexual assault upon a girl child who is about 1/5th of his age. The gap in age of the petitioner and the victim makes his alleged act more heinous and it shows an element of perversion in the offence alleged. The position of the petitioner qua the victim makes the offence more heinous.

32 Apart from the above, there are other factors which have come to light during the present proceedings. The father of victim is posted somewhere in Chennai and he remains out of his house being employed in Armed Forces. The mother of the victim, who was undergoing treatment at the time when the alleged occurrence took place, has in the meanwhile passed away and the victim child presently resides with her maternal uncle. All these facts have come to light when a notice was issued to the victim in pursuance whereof, Ms. Vidhi Dubey Member,

Child welfare Committee, Samba appeared before this Court through video link. She has submitted that the victim is under a state of shock and after the death of her mother, she is wholly dependent upon her maternal uncle.

33 Having regard to the fact that the petitioner happens to be the next door neighbourer of the victim whose mother has already died and whose father is posted outside the UT of Jammu and Kashmir, exertion of pressure upon the victim by the petitioner so as to coerce her not to depose against him before the trial Court cannot be ruled out. Therefore, granting bail to the petitioner at this stage, at least till the statement of the victim is recorded before the trial Court, would thwart the course of justice.

34 For all the foregoing reasons, I do not find it a fit case where petitioner can be enlarged on bail at this stage. The application is, therefore, dismissed.

35 Before parting, I would like to note here that had this Court not issued notice to the victim and the Member of the Child Welfare Committee, Samba, certain facts like the death of mother of victim and the present mental state of the victim would not have come to light. These facts have been found to be of great relevance for consideration of the instant bail application.

36 While Section 439 (1-A) incorporated in the Cr.P.C vide Amendment Act No. 22 of 2018 makes the presence of the informant or

any other person authorised by him obligatory at the time of hearing of application for bail to a person accused of offences under Section 376(3) or 376 AB or Section 376DA or Section 376DB of IPC, but the offences under POCSO Act are not included in the said provision. Thus, notice to informant in an application for grant of bail to an accused involved in offences mentioned in Section 439 (1-A) Cr.P.C is obligatory, but the law does not provide for issuance of notice to the victim of an offence under POCSO Act at the time of consideration of bail application of the accused which, I think, is needed keeping in view the nature and gravity of offences under the POCSO Act.

37 The Ministry of Women and Child Development, Government of India has, in exercise of powers under Section 39 of POCSO Act, 2012, issued Model Guidelines. Guideline 2.2(ii) is relevant to the context, which is reproduced as under:

> "*2.2*
> *(i)……*
>
> *(ii).* ***Children have the right to information about the case in which they are involved,*** *including information on the progress and outcome of that case, unless the lawyer considers that it would be contrary to the welfare and best interests of the child. It would be best if the lawyer coordinates with other persons or agencies concerned with the child's welfare, such as the support person, so that this information is conveyed in the most effective manner. Victims should receive the most appropriate information on the proceedings from all their representatives, and the assistance of a support person appointed under Rule 4(7) most often constitutes the best*

practice in ensuring that full information is conveyed to the victim.

***Such information would include**:*

(a) Charges brought against the accused or, if none, the stay of the proceedings against him;

(b) The progress and results of the investigation;

(c) The progress of the case;

(d) The status of the accused, including his/her bail, temporary release, parole or pardon, escape, absconding from justice or death;

(e) The available evidence;

(f) The child's role in the proceedings;

(g) The child's right to express their views and concerns in relation to the proceedings;

(h) The scheduling of the case;

(i) All decisions, or, at least, those decisions affecting their interests;

(j) Their right to challenge or appeal decisions and the modalities of such appeal;

(k) The status of convicted offenders and the enforcement of their sentence, including their possible release, transfer, escape or death.

(iii)……

(iv)……

(v)……

(vi)……
(v)……

(vi)……

(vii)……

38 From a perusal of aforesaid guidelines, it is clear that the victims are entitled to receive most appropriate information of the proceedings

which would include the status of the accused including his/her bail, temporary release, parole or pardon, escape, absconding from justice or death.

39 In order to give a mandatory colour to the aforesaid guidelines, it is necessary to issue a Circular to all the Special Courts constituted under the POCSO Act within the Union Territories of Jammu and Kashmir and Ladakh, directing them to ensure that the victim/Child Welfare Committee is informed about the proceedings in bail petitions of the persons accused of having committed offences under the aforesaid Act by issuing prior notice to them. The Registrar Judicial is directed to place this judgment before Hon'ble the Chief Justice (Acting) with a request to consider the matter regarding issuance of a Circular in the above terms.

Disposed of along with connected applications.

(SANJAY DHAR)
JUDGE

Jammu
11 .12.2020
"Sanjeev, PS"

Whether the order is speaking: ***Yes***
Whether the order is reportable ***Yes***

SANJEEV KUMAR UPPAL
2020.12.15 13:08
I attest to the accuracy and
integrity of this document