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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ BAIL APPLN. 2637/2019
KAPIL BHATIA

..... Petitioner

Through: Mr. Vikas Pahwa, Sr. Adv. with
Mr. Rajiv Mohan, Mr. Abhimanyu
Kampani, Ms. Priyanka Singh, Ms.
Nishtha Singh and Mr. Arhan Masud,
Advs.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Amit Chadha, APP for State with
Insp. Jagdish Rai, PS – Karol Bagh,
SI Mukesh Tomer, PS- Karol Bagh,
W/SI Suman
Complainant – Ms. Ruchi Johnson in
person

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

ORDER

% **30.01.2020**

1. The present petition is preferred under Section 439 of the Code of Criminal Procedure, 1973 ("Cr.P.C") seeking grant of regular bail in FIR No. 273/2018 registered at Police Station – Karol Bagh for the offences punishable under Sections 354/376/377 IPC, Sections 6/21 of Protection of Children from Sexual Offence Act, 2012 and Sections 75/79 of Juvenile Justice (Care and Protection of Children) Act, 2000.

2. Learned counsel appearing on behalf of the prosecutrix submits that she made allegations against the petitioner that she was working at the residence of the petitioner i.e. at House No. 8A/104, Karol Bagh, New

Delhi. She was only allowed to talk to her parents once in 3 years. She had not received any salary in these three years. She was not allowed to go outside the house. She used to do entire household work from 6 AM to 11 PM. She stayed, slept and had food in the house. She was physically assaulted by petitioner, who was 40 years of age. Petitioner used to have sexual intercourse and physically assault her. Petitioner used to go the room of prosecutrix and forcefully make her do inappropriate sexual acts on a daily basis, She further stated that one other girl was working with her, namely, 'A', the petitioner used to do the same with her also and sometimes, he did this with both of them together. She revealed everything to petitioner's wife but she did not do anything. She further alleged that she was not allowed to visit outside. Petitioner used to do his massage from her without clothes. He used to take her to his shop and rape her there too also.

3. Learned APP submits that though the petitioner has already undergone one and a half year in judicial custody, however, that cannot be the ground to release him on bail.

4. However, the Hon'ble Supreme Court in case of *Satish Jaggi vs. State of Chhatisgarh and Ors.*, MANU/SC/7396/2007 held that at the stage of granting of bail, the Court can only go into the question of the prima facie case established for granting bail, it cannot go into the question of credibility and reliability of the witnesses put up by the prosecution. The question of credibility and reliability of prosecution witnesses can only be tested during the trial.

5. Learned APP submits that allegations in the present case, are serious and crime is heinous, therefore, the present petition deserves to be

dismissed.

6. On the other hand, Mr. Vikas Pahwa, learned Senior Advocate appearing on behalf of the petitioner submits that as per the version of prosecutrix on 12.06.2018 information was received by Sub-Divisional Magistrate, Karol Bagh ("SDM") regarding engagement of child labour at House No.8A/104, WEA Karol Bagh, Delhi i.e. residential premises of Petitioner pursuant to which, a raid was conducted at the said premises and the Prosecutrix, who was working as a domestic servant, was rescued. As per the record, Prosecutrix was taken to the Office of SDM wherein her statement was recorded whereby she inter alia alleged that (i) she is aged seventeen (17) years and had been working at the residence of the Petitioner as a domestic servant since past three (3) years. (ii) She was neither allowed to speak to her family members nor given any remuneration during such time. Further, she was never allowed to go outside the residence (iii) Petitioner committed rape on her person during such time at the residential premises as well as at his business place, which also included oral sex. Further, he showed her pornographic content on his mobile phone. (iv) She informed about the said incidents to his family members i.e. wife, mother and father of Petitioner but they did not take any action.

7. Learned senior counsel submits that thereafter, prosecutrix was taken for medical examination to Lady Hardinge Medical College/Smt. S.K.Hospital, New Delhi wherein she declined to give her consent for internal examination. Thereafter, on the basis of allegation mentioned above, Police Station Karol Bagh registered FIR No.273 dated 12.06.2018 under Sections 354, 376, 377 of the Indian Penal Code, 1860 ("IPC"), under

Sections 6, 21 of Protection of Children from Sexual Offences Act, 2012 ("POCSO Act") and under Sections 75, 79 of Juvenile Justice (Care and Protection of Children) Act, 2000 ("J.J.Act") against the Petitioner as well as his wife and parents.

8. Pursuant to the registration of the FIR, the Petitioner was arrested by Police Station Karol Bagh on the same day. On 15.06.2018, the statement of Prosecutrix under Section 164 Cr.P.C was recorded wherein she reiterated the narrative as mentioned above. On 18.07.2018, Ld. Trial Court rejected the Petitioner's bail application observing that investigation is at the initial stage and ossification test report of Prosecutrix is awaited, since the Investigating Agency could not obtain any age proof documents.

9. However, the investigating officer of PS Karol Bagh filed the Final Report on 20.08.2018 before Ld. Additional Sessions Judge-05 (Central), Tis Hazari Courts, New Delhi ("the Ld. Trial Court"). Said Court considered the Final Report on 27.08.2018 and was pleased to take cognizance of the offences mentioned therein i.e. Sections 354, 376, 377 IPC, under Sections 6, 21 of POCSO Act and under Sections 75, 79 J.J.Act against the Petitioner, along with summoning his wife, mother and father who were summoned for offences under Sections 6, 21 POCSO Act and under Sections 75, 79 J.J.Act. Insofar as the investigation is concerned, few facts are important: -

(i) The Investigating Agency could not obtain age proof documents of the Prosecutrix. Therefore, ossification test was conducted in order to determine her age. It was concluded that, as on the date of examination i.e. 03.08.2018, her age was found to be more than twenty (20)

years and less than twenty one (21) years, contradicting her earlier claim. The relevant section of the Ossification Test Report is cited below as:

"Considering together the physical, dental and radiological findings of **** @ **** / her age is estimated to be more than twenty (20) and less than twenty one (21) years "

ii. At the hearing of Petitioner's first bail application dated 18.07.2018, it was pointed out to the Investigating Agency that the Prosecutrix possessed a mobile phone bearing number 8826519817. During the investigation, the claim of the Petitioner was found to be true and such mobile number was found to be that of Prosecutrix.

10. He further submits that on 18.12.2018, Ld. Trial Court framed formal charges under Sections 354/354A/354B/344/376(2)(n) IPC, under Sections 6/12 POCSO Act and under Sections 75/79 J.J.Act against the Petitioner herein. Thereafter, the matter was put up for recording of prosecution evidence.

11. Learned counsel further submits that from 15.01.2019 to 04.06.2019, the Prosecutrix was examined, cross-examined and discharged. However, evidence offered by Prosecutrix, when read as a whole, is full of material improvements, discrepancies and make it highly improbable that incidents, as alleged, ever took place. As per allegation of prosecutrix she was allowed neither to speak to anyone nor allowed to go outside the residential premises. Whereas, she was also working as a domestic servant in the house of tenants of Petitioner and thus, was having every opportunity to narrate her

ordeal. She was in fact in regular touch with her previous employer namely, Sh. Laxman Singh and her relative namely Smt. Manju. It was Petitioner's wife who used to get her mobile number recharged. She was in touch with her parents. She received gifts from one person namely Madan, who was her neighbour. With regard to the allegation that prosecutrix was never paid any remuneration, it is submitted that father of petitioner used to deposit prosecutrix's salary in the account of her father.

12. Learned counsel further pointed out that material improvements and facts, which Prosecutrix did not state in her Section 164 Cr.P.C. statement but introduced for the first time in her examination-in-chief before Ld. Trial Court. It is stated that she used to work from 6 AM to 11 PM. Petitioner used to forcefully establish physical relations with the prosecutrix and forced her to indulge in oral sexual acts. The Prosecutrix never got any payment and was only allowed to speak to her family members after two years. Prosecutrix used to be kept locked in the house and not permitted to go out and that one day she told a neighbor as to what the Petitioner and her family members used to do with her who told her to inform the police but she stated that she was afraid. Prosecutrix informed her earlier employer about her plight. Petitioner used to take the Prosecutrix at his business place and used to touch her body by taking her into a separate room.

13. Learned Senior Counsel has pointed that a bare perusal of the evidence of Prosecution would reveal that it suffers from serious infirmities, improbabilities and inconsistencies. Prosecutrix has materially improved her statement before the Ld. Trial Court and thus, the statement of the Prosecutrix lacks credibility and believability.

14. He submits, the settled law is that conviction can be based on the sole testimony of the Prosecutrix and corroboration is not required, though the same is necessitated as a matter of prudence. But, the onus is on the Court to satisfy itself that the evidence does not suffer from infirmities and that account of the Prosecutrix is trustworthy and reliable. However, if the Court finds otherwise, that is, the Prosecutrix is an unreliable witness, then corroboration is necessary and accused will not be convicted on her uncorroborated testimony.

15. As stated in the present petition that the Prosecutrix has turned out to be an extremely unreliable witness, wherein, the Ld. Trial Court would definitely seek ample corroboration of her narrative. It is pertinent to note that no medical or physical evidence is available. Furthermore, there is no documentary evidence nor does there exist the circumstance which the prosecution can claim that petitioner may, in the event of release on bail, be in a position to tamper or in any manner hamper the due process of law.

16. It is not in dispute that so far only two prosecution witnesses have been examined including the Prosecutrix. However, yet to examine 17 more witnesses and all of them are in nature of formal witnesses for which the custody of petitioner is not required.

17. In '*State of Maharashtra Vs. Nainmal Punjaji Shah, (1969) 3 SCC 904*' it has been held that in matters of allegations of tampering with evidence or absconding, there must be 'absolute certainty' before an accused can be incarcerated on that ground. The course of investigation has been and shall remain immune from any apprehension of influence at the hands of Petitioner.

18. There is no allegation that petitioner has made any attempt to suborn witnesses or in any other manner pollute or obstruct the judicial process

19. Keeping in view the facts recorded above, however, without commenting on the merits of the case, I am of the view that the present case is fit for bail.

20. Accordingly, the petitioner/applicant shall be released on bail on his furnishing personal bond in the sum of ₹25,000/- with two sureties of the like amount to the satisfaction of the Trial Court.

21. The petition is allowed and disposed of.

22. Copy of this order be transmitted to the Jail Superintendent and the Trial Court concerned for necessary compliance.

23. Order *dasti* under the signatures of Court Master.

SURESH KUMAR KAIT, J

JANUARY 30, 2020/PB