

via Video-conferencing

\$~21

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

Date of decision: 14th October, 2020

+ **BAIL APPL. 1507/2020**

SH. KRISHAN KUMAR

..... Applicant

Through : Ms. Rajdipa Behura and Ms.
Chandrani Prasad, Advocates.

versus

THE STATE OF NCT OF DELHI

..... Respondent

Through : Ms. Neelam Sharma, APP for the
State.
Ms. Liyi Marli Noshi, Advocate for
the Complainant

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI, J.

The applicant, aged about 40 years, who is an accused in case FIR No. 41/2018 dated 13.02.2018 registered under sections 376 IPC and section 4 of the POCSO Act at P.S. : Safdarjung Enclave, seeks interim bail.

2. Notice in this application was issued on 02.07.2020.

3. On the same date, in compliance of section 439(1-A) Cr.P.C. and Delhi High Court Practice Directions dated 24.09.2019, intimation was also sent through the Investigating Officer to the complainant/prosecutrix to remain present *via* video-conferencing at the hearing of the bail application.

4. Status reports dated 15.07.2020, 29.07.2020, 09.08.2020 and 09.09.2020 have been filed by the State.

5. Nominal roll dated 15.07.2020 and medical status report dated 15.07.2020 have been received from the Jail Superintendent.

6. Ms. Rajdipa Behura, learned counsel appearing for the applicant has canvassed the following principal grounds for interim bail :

- (a) that the applicant's family, which comprises his aged father, mother, wife and three minor children, belongs to the poor stratum of society, and finds itself on the verge of starvation since the applicant's father, who used to sell socks and handkerchiefs as a street vendor in Sarojini Nagar Market, New Delhi, has suffered severe financial losses due to the prevailing coronavirus pandemic and the consequent lockdown since his livelihood has been impacted;
- (b) that the applicant's father suffered an asthma attack on 14.05.2020, whereupon he was recommended complete bed-rest; but he suffered another attack on 21.05.2020, when he was advised hospitalisation. Counsel submits however that since the applicant's father was refused admission to a hospital due to the rush of coronavirus cases, he is now surviving at home on oxygen; and
- (c) that the applicant himself is suffering from acute pain in the spinal cord for the past more than 27 months, for which he is receiving only basic treatment from the jail hospital, which treatment is inadequate; and the applicant wishes to get himself treated at a private medical facility.

Copies of some medical records relating to the applicant and his father have been filed along with the petition and also additionally under cover of index dated 10.09.2020.

7. Ms. Neelam Sharma, learned APP has opposed grant of interim bail. She points-out that earlier applications for regular bail moved by the applicant have been dismissed by the learned Sessions Court on 21.05.2018 and 14.11.2018; and the last application seeking regular bail was withdrawn by the applicant on 30.05.2019 before a Co-ordinate Bench of this court. It is stated that an application seeking interim bail on the same ground as taken in the present application has also been dismissed by the learned Sessions Court on 24.06.2020.

8. Though in status report dated 15.07.2020 it is confirmed that the applicant's family comprises his father, mother, wife and three minor children, who all reside together at Khanpur Extension, New Delhi, it is recorded that upon verification of the medical records relating to the applicant's father, the doctor has said that no bed-rest was advised to the father; nor was the father found to be bed-ridden.

9. Alongwith status report dated 29.07.2020 the State has placed on record a copy of the complainant's statement dated 13.02.2018 recorded under section 164 Cr.P.C. Alongwith status report dated 09.09.2020, the State has also filed on record the complainant's MLC dated 13.02.2018.

10. Nominal roll dated 15.07.2020 records that as of that date the applicant has spent about 2 years and 5 months in judicial custody; that his jail conduct is 'satisfactory'; and that he is on bail in another criminal case under section 138 of the Negotiable Instruments Act. Medical status report dated 15.07.2020 received from jail records that the applicant has a

complaint of lower-back pain for the last about 2 years, for which he has been advised “*conservative treatment, physiotherapy and back muscle strengthening exercises*”; that he “*did not visit orthopaedic OPD since last 2 months*”; and that his general medical condition is “*stable and satisfactory*” and he is being provided prescribed medication from the jail dispensary.

11. The complainant was served with intimation under section 439(1-A) Cr.P.C. and Delhi High Court Practice Directions dated 24.09.2019 and is represented by Ms. Liyi Marli Noshi, learned counsel who has joined the video-conference hearing from Arunachal Pradesh. Ms. Noshi submits that the complainant has returned to her native place in Malkangiri, Odisha and is unable to travel to Delhi or join the video-conference hearing by reason of lack of resources and civil unrest in her native place.

12. A perusal of the complainant’s section 164 Cr.P.C. statement invokes revulsion. In the statement, the complainant narrates her plight after she was brought to Delhi by her maternal aunt when she was about 11 years of age on the excuse that she would educate her; which evidently was nowhere on the aunt’s mind. The maternal aunt in question is one Bobby Biswas, who is co-accused in the matter and is presently absconding.

13. It may only be said here, that the section 164 Cr.P.C. statement, though short, is extremely lucid, forthright and utterly shocking in what it discloses. Some of the portions of the statement, which capture the heinousness and depravity of the offence alleged *inter-alia* against the applicant are the following :

निकल रहा था या नहीं। फिर कभी कभी हफ्ते में दो-तीन बार लड़के आते थे उसके घर पे और उन लड़को के साथ मुझे से Sex करवाती थी उन लड़को से पैसे लेकर । उनकी एक Friend है Simmi वो नहीं Customers लेकर आती थी । उसके बाद मेरी मौसी मुझे Brokers Sangeeta और Sunita के पास भेजती थी मुनिरका मे । दिन में 3-3 , 4-4, 5-5, ऐसे करवाते थे ये Sex मुझसे अलग बंदो के साथ। जब मैं Proper तरीके से बड़ी हुई तब ये Broker के Through मुझे काफी Contract पे भेजती थी दिन में 7 या 8 काम होते थे मेरे। जब मैं उनको मना करती थी या रौंती थी या Friend बनाती थी तो ये मुझे Current लगाती थी एक

Current लगाया था बाँबी मौसी ने तब ये भी था और मेरे मौसा भी थे । तीनों मिलके मुझे मारते थे। जब भी मैं अपने घर जाने को कहती थी तो ये कहती थी कि तेरा भाई तुझे इसने मेरी Dance कि Video भी मेरे भाई को भेजी और उसको मेरे खिलाफ भड़काया कि लड़की दिल्ली में बहुत गलत काम करती है इसी डर कि वजह से मैं घर नहीं जा पाती थी मुझे ये किसी Birthday Party व शादी ब्याह में भी जाने नहीं देती थी । पैसे भी नहीं देती थी सब अपने पास रख लेती

14. In the context of the present applicant, what is notable is that though the complainant refers to several boys/men, who she says committed sexual assault on her, she names only a few. *One of the persons specifically named is the applicant.* The following portion of the section 164 Cr.P.C. statement may be seen in this behalf :

थी। बीच में 2-3 महीने के बीच में भी 2 Customers बुलाये थे अपने घर पे Krishan और Prem । इन्होंने भी मेरे साथ Sex किया और मेरी मौसी को पैसा देते थे मेरे मना करने पे मौसी और घर का नौकर मिलके मुझे बहुत मारते थे एक

15. While certain other names also appear in the section 164 Cr.P.C. statement, those appear to be the names of the ‘brokers’, to whom the maternal aunt used to send the complainant. The complainant also says in the statement that while she does not remember the names of many of the concerned persons, she names those she remembers.

16. It is noteworthy that in the statement recorded by the counsellor as part of the complainant's MLC conducted on 13.02.2018, the complainant mentions the applicant by name as a ‘customer’. It may be mentioned here that there is also reference in the MLC to the complainant having been administered a pill for medical termination of pregnancy some 1½ years before the date of the medical examination; as also to burns by “*electric current on back, feet*”; and also to insertion of a “*bottle with petrol in anus*” and of “*red pepper in anus/vagina*”.

17. Without delving any deeper into the evidentiary aspects of the matter, suffice it to say that after being brought to Delhi by her maternal aunt, who is presently absconding, it appears the complainant was put through a horrendous ordeal of depravity, perversion, deviance and vice at the hands of several persons, of whom she certainly remembers the applicant.

18. Investigation in the matter is stated to be complete; charge-sheet and supplementary charge-sheet have been filed in the matter; and charges have

been framed *inter-alia* against the applicant on 16.11.2018. Suffice it to say that the evidence and material on record clearly disclose the involvement of the applicant in the crime.

19. Other things apart, Ms. Noshi, learned counsel appearing on behalf of the complainant has vociferously opposed the grant of even interim bail, submitting that though the complainant is away in her native place in Malkangiri, Odisha, yet she has been threatened by co-accused Bobby Biswas, through the complainant's own brother. The court is informed that co-accused Bobby Biswas has *absconded after she was released on interim bail vidé* order dated 23.01.2019 by the learned Sessions Court on the ground that her child was ailing, and has subsequently been declared proclaimed offender.

20. Responding to the above submission on behalf of the complainant, Ms. Behura contends that for one, the applicant cannot be held responsible for the actions or omissions of co-accused Bobby Biswas or any other co-accused; and also that two other co-accused namely Seema Beniwal and Dinesh have already been enlarged on regular bail.

21. In the course of submissions, a question has also arisen as to the applicability of the 'presumption of guilt' to the applicant as contemplated in section 29 of the POCSO Act. While counsel for the applicant has argued that section 29 would have no application while considering a bail plea and can only be invoked during trial, this court has *vidé* judgment dated 22.09.2020 in Bail Application No. 1559/2020 titled ***Dharmander Singh @ Saheb vs. The State (Govt. of NCT, Delhi)*** already taken a view on this aspect, whereby in the opinion of this court, section 29 gets triggered once charges are framed against an accused; though not before that.

22. Be it noted that *Dharmander Singh* (supra) was a case of regular bail; and this court held that once section 29 applies to an accused the threshold of satisfaction required for a court to grant bail is raised; and a court would consider the evidence on record more favourably for the prosecution and evaluate, though without requiring proof of evidence, if the evidence available would sustain the weight of guilt. If the evidence adduced is admissible and *ex-facie* credible, that would weigh against granting bail.

23. In the opinion of this court, to give due effect to the intention of the Legislature in enacting section 29 in this special statute, namely the POCSO Act, intended to protect children from sexual offences, at the post-charge stage, the *rigours of section 29 would also apply to interim bail* and would tilt the balance against or in favour of the accused, depending on an overall consideration of many factors which *inter-alia* may include the following illustrative criteria, as indicated by this court in *Dharmander Singh* (supra) :

- a. the age of the minor victim : the younger the victim, the more heinous the offence alleged;
- b. the age of the accused : the older the accused, the more heinous the offence alleged;
- c. the comparative age of the victim and the accused : the more their age difference, the more the element of perversion in the offence alleged;
- d. the familial relationship, if any, between the victim and the accused : the closer such relationship, the more odious the offence alleged;
- e. whether the offence alleged involved threat, intimidation, violence and/or brutality;
- f. the conduct of the accused after the offence, as alleged;

- g. whether the offence was repeated against the victim; or whether the accused is a repeat offender under the POCSO Act or otherwise;
- h. whether the victim and the accused are so placed that the accused would have easy access to the victim, if enlarged on bail: the more the access, greater the reservation in granting bail;
- i. the comparative social standing of the victim and the accused : this would give an insight into whether the accused is in a dominating position to subvert the trial;
- j. whether the offence alleged was perpetrated when the victim and the accused were at an age of innocence : an innocent, though unholy, physical alliance may be looked at with less severity;
- k. whether it appears there was tacit approval-in-fact, though not consent-in-law, for the offence alleged;
- l. whether the offence alleged was committed alone or along with other persons, acting in a group or otherwise;
- m. other similar real-life considerations.

As held in *Dharmander Singh* (supra) the aforesaid criteria are neither exhaustive nor complete; and are intended only to assist in evaluating the egregiousness of the offence alleged.

24. In the opinion of this court, where allegations under the POCSO Act are involved, the issue of presumption of guilt engrafted in section 29 cannot be ignored and must also be addressed; and the grounds for interim bail *must be assessed giving due regard* to section 29 as it would apply to the grant of regular bail. Restricting itself to cases under the POCSO Act, this court is of the view that 'regular bail' and 'interim bail' are two species of the same

genus. The essential difference is that if admitted to regular bail, an accused retains his liberty throughout trial, unless the bail is cancelled; whereas interim bail is granted for a specified period of time, after which the accused must surrender back to custody. Interim bail is usually granted to enable an accused to attend to exigencies or emergencies or on other similar grounds. After all, the effect of regular bail and interim bail is the same, namely that an accused who is in custody gets back his liberty *by being handed-over to the custody of the surety*¹; and the difference is only the length of time for which he gets back his liberty. Once an accused is enlarged even on interim bail, and if he chooses to defy the conditions imposed, he may vitiate the judicial process in much the same way as he would, if he were on regular bail.

25. In the opinion of this court therefore, even though the applicant in this case is seeking only interim bail, this court must assess the plea *also* on the touchstone of the criteria for grant of regular bail in light of section 29 of the POCSO Act.

26. Applying the aforesaid criteria to the facts of the present case, the following factors weigh with the court:

- (a) *For one*, the applicant is a mature man, about 40 years of age, while the victim is stated to be about 16 years of age at the time of registration of the FIR. Since she is alleged to have been exploited for about 2-3 years prior to that, at the relevant time, the victim was an innocent child upon whom debauched

¹ (2012) 9 SCC 446 : *Ash Mohammad vs. Shiv Raj Singh & Anr.* : para 20

offences are alleged to have been committed *inter-alia* by the applicant. This is testimony to the depravity of the acts alleged;

- (b) *Next*, the applicant is stated to be a family man with three minor children of his own, and yet such offences are alleged to have been committed upon a girl who was about 25 years younger. This speaks to the perverseness of the acts alleged;
- (c) *Next*, although there is no direct allegation of any threat, intimidation, violence or brutality having been committed by the applicant himself, it is inconceivable that the young victim suffered the depraved acts with various men, including the applicant, willingly and without resistance and that there was no threat or intimidation. Since the victim specifically names the applicant, he cannot forsake blame for the coercion that must have been exercised upon the victim to get her to participate in the acts;
- (d) *Next*, it is evident that the victim identifies the applicant by name because he was a repeat-visitor, who committed the reprehensible acts several times upon the victim. The offence alleged against the applicant was therefore not a 'one-off' act and the applicant repeatedly violated the victim;
- (e) *Next*, the victim is stated to hail from an extremely poor background from Malkangiri, Odisha; and as per the allegations, was brought to Delhi by her aunt for purposes of educating her. Clearly therefore, the victim does not come from a socially well-placed family; while on the other hand, the

applicant, even if poor, is a resident of Delhi and would be in a relatively dominating position over the victim; and may attempt to subvert the process of law;

- (f) *Next*, the question of there having been even tacit approval for the acts alleged; or the acts being a result of any innocent physical alliance between the victim and the applicant, does not arise;
- (g) *Next*, it is also clear from the allegations that the applicant, alongwith other persons, some of whom the victim has named, all exploited the victim. Even if these men acted individually and not all together at the same time, the moral turpitude of the acts alleged is evident;
- (h) *Next*, all this is supported by the victim's statement recorded under section 164 Cr.P.C., which statement is *per-se* credible, having been recorded before a Magistrate;
- (i) *Also*, this court does not discern any redeeming or mitigating circumstances in favour of the applicant, *at least at this stage*.

27. That apart, even if the matter is looked at purely from the perspective of interim bail, as prayed only for a short period of time, no case is made-out for the following reasons :

- a. *Firstly*, that the father's medical ground cited for interim bail is not borne-out or verified by the status reports filed;
- b. *Secondly*, insofar as the applicant's own medical condition is concerned, from the status reports it appears to be a chronic back-problem which is under conservative treatment in the jail

medical facilities; and a brief period of interim bail would not help resolve this condition. It may be noted that as per medical status report dated 15.07.2020 the applicant “*did not visit orthopaedic OPD since last 2 months*” ;

- c. *Thirdly*, it would appear that granting interim bail for a short period of time would also not help the applicant in restoring the financial position of his family on a sustained basis. Besides, after revocation of the lockdown, it should now be possible for the family to make a livelihood, including by the applicant's father recommencing his street-vending business;
- d. *Also*, as discussed above, since charges have already been framed and section 29 of the POCSO Act applies to the applicant's bail plea, the statutory presumption of guilt gets triggered; and the balance tilts heavily against the applicant for grant of bail, including interim bail;
- e. *Besides*, the allegations against the accused, which appear to be *prima facie* supported by the evidence and material placed before the trial court with the charge-sheet, disclose a case of wanton depravity, in which the accused participated.

28. In a recent verdict, *vidé* order dated 15.10.2020 made in Criminal Appeal No. 686/2020 titled ***State of U.P. vs. Gayatri Prasad Prajapati***, a 3-Judge Bench of the Hon'ble Supreme Court has set-aside an order of interim bail granted by the Allahabad High Court to an accused on medical grounds, holding that there was no satisfaction recorded by the High Court that the treatment offered to the bail applicant by the prison administration was not adequate; or that the accused required any further treatment by any

particular medical institution for which it was necessary to release him on interim bail. Applying the same principle to the present case, this court is also not satisfied that the applicant has made-out any valid, credible medical or other ground for interim bail.

29. In view of the above discussion, this court is not persuaded to grant to the applicant interim bail.

30. Nothing in this order shall be construed as an expression on the merits of the evidence or the matter otherwise; and shall not preclude the applicant for filing for bail afresh, at the appropriate stage, in accordance with law.

31. Accordingly, the interim bail application is dismissed.

32. Pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J.

OCTOBER 14, 2020/j