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

% *Date of Decision: 21.12.2020*

+ **BAIL APPLN. 1727/2020**

NEHA

..... Petitioner

Through: Mr. Mukesh Kalia, Advocate

versus

THE STATE (N.C.T OF DELHI)

..... Respondent

Through: Ms. Meenakshi Dahiya, APP

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. Present Application has been filed by the Applicant under Section 439 read with Section 482 Cr.PC for grant of interim bail for two months in FIR No. 186/2017 under Sections 342/363/366A/368/370/370A/372/34/109 IPC and Sections 3/5/7 ITP Act and Section 17 of POCSO Act, PS Kamla Market.

2. Applicant is in judicial custody since 23.07.2017. Interim Bail is sought on the ground that the Applicant delivered a baby boy on 21.06.2017 and was soon thereafter taken into custody. Since she was a single mother and there was nobody to take care of one month old child, the child was brought along with her to Jail. At present, the child is over 3 years of age and on account of COVID-19 virus, is susceptible/vulnerable to the infection.

3. Mr. Mukesh Kalia learned counsel for the Applicant has argued that the Applicant should be released on interim bail on compassionate and humanitarian grounds as there is a high risk to the life of the child and the present occupancy of jail exceeds the optimum capacity. During the pendency of the present Application, Mr. Mukesh Kalia had also pointed out that the child was suffering from some medical ailments. On account of this, a medical report was called from the Medical Officer of the concerned Jail.

4. Status Report has been filed in which it is stated that the prosecutrix is a native of Nepal and after her parents died in an earthquake she was being looked after by the Gram Vikas Samiti of the Village. She was brought to Delhi by one native of Nepal for getting her a job but instead she was sold to a lady namely Sita who took her to *Kotha* No. 56 GB Road and sold the prosecutrix to the Applicant herein who forced her into sexual relationships with customers after administering intoxicating injections. On 21.07.2017 however, the prosecutrix managed to escape and an FIR was registered against the Applicant. It is further stated that in the statement under Section 164 Cr.PC, the prosecutrix corroborated her previous statement. The case is pending trial and 7 out of 16 witnesses have been examined including the Chief and Cross-examination of the prosecutrix, wherein she has corroborated her previous statement.

5. The Application was adjourned from time to time for the Investigating Officer to produce the Complainant in accordance with the provisions of Criminal Law (Amendment) Act, 2018 as well as the judgement of the Division Bench of this Court in W.P. (C) 5011/2017 titled ***Reena Jha & Anr. v Union of India & Ors.*** and of the Coordinate Bench in CrI.M.C.1474/2020 titled ***Miss G (Minor) Thr. Her. vs. State of NCT of***

Delhi & Anr. as well as the Practice Directions issued on 24.09.2019. From time to time Status Reports have been filed by the State in which it was brought out that the prosecutrix has returned to her native place in Nepal and it would take time to trace her whereabouts on account of the Pandemic COVID-19. Finally, an Additional Status Report dated 17.09.2020 was filed by the State, stating therein that the whereabouts of the prosecutrix were ascertained from the NGO which is a Rescue Foundation and it was informed that the prosecutrix is married and settled in Nepal and in case so required, the Vice President of the Rescue Foundation will appear before the Court to confirm the said fact. Repeated efforts to serve her have been unsuccessful.

6. Ms. Dahiya learned APP for the State has vehemently opposed the grant of Interim Bail on two grounds. Firstly, it is contended that the allegations against the Applicant are serious and the prosecutrix in her Examination-in-Chief has corroborated the allegations and has withstood the Cross-examination. She draws the attention of the Court to certain specific questions in this Examination-in-Chief to point out that the Applicant has indulged in a very serious and heinous crime. Secondly, it is submitted that the medical status of the child has been ascertained after duly examining the child. The Applicant did complain that the child was suffering from a high leucocyte count but after being referred to Deen Dayal Upadhyay Hospital and thereafter to Lok Nayak Hospital, it was found that there was no evidence of leukaemia. She further submits that the child is under constant review and follow up care of the medical officer for the cough, cold and is being treated accordingly. She also submits that there is a separate creche for the child and the health of the children is constantly monitored by visiting

Paediatricians. The child was also examined by the Doctor on 27.09.2020 for Anal Pruritus and the Doctor has prescribed oral medicines.

7. Mr. Mukesh Kalia *per contra* submits that the child of the Applicant is suffering from multiple medical issues which is clearly evident from a reading of the Medical Report. In fact, the report shows that perhaps there is no clarity on the aspect whether the child is suffering from Leukaemia or Anaemia and the fact that the child does have repeated abdominal pain and has been diagnosed with Anal Pruritus, requires the child to be removed from the environment of the Jail so that the Applicant can have the child examined in Private Hospitals for correct diagnosis and treatment.

8. I have heard the learned counsel for the Applicant and the learned APP for the State.

9. By the Criminal Law (Amendment) Act, 2018, Section 439 Cr.PC was amended and it was made mandatory for the informant or any other person authorised by the informant to be present at the time of hearing of a Bail Application filed by the Accused. Delhi High Court issued Practice Directions on 24.09.2019 to ensure compliance of the Amendment which are as under:

“In order to ensure better and effective compliance of the above provisions, Hon’ble the Chief Justice has been pleased to direct as under:-

(a) 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, the High Court or the Court of Session shall 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; and

*(b) The Courts shall ensure that the Investigating Officer has, in writing as per **Annexure A**, communicated to the informant or any person authorized by her that her presence is 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. **Annexure A** shall be filed by the I.O. along with the Reply / Status Report to such bail application and the Courts shall make all endeavour to ensure presence of the informant or any person authorized by her.”*

10. Vide order dated 27.01.2020, the Division Bench in **Reena Jha**’s case (supra) observed that the Practice Directions would *mutatis mutandis* apply to offences under the POCSO Act as well. Relevant para is as follows:-

*“4. ...Accordingly, we direct that the provisions of Practice Directions dated 24.09.2019 shall *mutatis mutandis* also apply to offences under POCSO Act.*

11. In **Miss G (Minor)**’s case (supra) (Crl.M.C.1474/2020), a coordinate Bench of this Court has recently issued certain directions to ensure effective implementation of the 2018 Amendment with regard to issuance of notice to the complainant/informant/victim. While observing that non-issuance of notice is not merely a procedural lapse but contrary to the legislative mandate, the Court has carved certain exceptions, which are as follows:-

“j) In every bail order, service of notice or reasons for non-service or non-hearing of the complainant/victim/informant shall be specifically recorded before proceeding to pass orders.

k) If the complainant/victim/informant does not appear despite service of notice, bail can be considered by the Court, in accordance with law.”

12. The Status Report filed by the State would have to be examined in the light of these directions and the 2018 Amendment. It is stated in the Report that a letter was sent to the NGO which is a Rescue Foundation and had helped the prosecutrix in registering the FIR on 31.08.2020, to convey the whereabouts of the prosecutrix and in addition telephonic conversation was also made with the officials of the NGO on two occasions. The IO was informed that as per the information available with them, the prosecutrix is married, settled and residing at her in-law's house in Nepal. Repeated efforts to contact her have been unsuccessful more particularly on account of the Pandemic and the place of residence of the prosecutrix being outside the country. In my view sufficient efforts have been made by the State to secure the presence of the Prosecutrix. Since the ground for seeking interim bail relates to health of a 3 year old child, the application has been heard in the absence of the Prosecutrix.

13. I have carefully examined the Medical Report with respect to the 3 year old child of the Applicant. A holistic reading indicates that the child is suffering from repeated abdominal pain and has also been diagnosed with Anal Pruritus for which oral medicines have been prescribed. As to whether the child has Leukaemia or Anaemia is uncertain from a reading of the Medical Report, as there is no clear diagnosis on this aspect. But it appears that the child does have medical complications as he has been suffering from fever, cough, cold, loose motions and abdominal pain, very frequently.

14. Having heard the learned counsel for the Applicant and analysed the Medical Report, in my view the Applicant is entitled to Interim Bail. The Applicant is accordingly admitted to Interim Bail for a period of six weeks from the date of her release from the Jail, subject to verification of her

address by the Investigating Officer and also subject to her furnishing a Personal Bond in the sum of Rs. 20,000/- with a local surety of an equivalent amount to the satisfaction of the Duty Magistrate/Jail Superintendent.

15. Bail is granted subject to the following conditions:

- a. Applicant shall not leave the jurisdiction of NCT of Delhi without prior intimation to the concerned SHO/IO.
- b. Applicant shall not contact the prosecutrix or her family members or induce any threat directly or indirectly to the prosecutrix or any other prosecution witness.
- c. Applicant shall provide her Mobile Number to the concerned SHO/IO and keep it operational at all times and she shall also 'drop-a-pin' on the google Map so that the SHO/IO can verify the presence and location. The Applicant shall communicate with the concerned SHO/IO telephonically every Monday and Thursday between 10 and 10.30 a.m.
- d. The Applicant shall surrender on the expiry of the Interim Bail before the concerned Jail Superintendent.

16. Application is disposed of in the above terms.

17. Copy of the order shall be sent to the concerned Jail Superintendent for information and necessary action.

(JYOTI SINGH)
JUDGE

DECEMBER 21, 2020 // rd