

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

+ **BAIL APPLN. 477/2021**

Date of decision: 05th APRIL, 2021

IN THE MATTER OF:

KASHISH BATRA

..... Petitioner

Through Mr. Abhijat, Mr. Kunal Malhotra,
Mr. Arpit Kumar Singh and
Mr. Princee Aroraa, Advocates

versus

STATE

..... Respondent

Through Mr. Hirein Sharma, APP for the State.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The petitioner has filed the instant petition under Section 439 Cr.P.C. for seeking regular bail in FIR No.442/2020, dated 28.10.2020, registered at Police Station Tigri, Delhi, under Sections 370, 370(A), 372, 374, 376 and 342 IPC and Section 6 of the POCSO Act.

2. On 28.10.2020, a complaint was given by the prosecutrix stating that she is studying in 8th standard and is staying with her family at B-453, Sangam Vihar, New Delhi. It is stated that her father caught her chatting with a boy named Nadeem with whom she had fallen in love. It is stated that on 11.07.2020, her elder brother once again caught her talking/chatting on phone with Nadeem and he slapped her. The prosecutrix states that she left

her home and got into a battery rickshaw. She did not have her mobile phone. She did not had any money. She states that in that rickshaw she met one Imrana who inquired as to why the prosecutrix was crying. She states that Imrana told her that she works for an NGO and that she would help the prosecutrix. It is stated that Imrana took the prosecutrix to her home, gave her food and took her to KNF Hotel, Gurgaon where the petitioner was present. It is stated in the complaint that Imrana and the petitioner herein gave her something to drink and she became semiconscious and the petitioner raped her. It is stated that even though she was not fully conscious she could feel that she was being raped and could see the petitioner who had removed all his clothes. It is stated that Imrana kept the prosecutrix at the Hotel for three days and when she told Imrana that she wanted to go home, Imrana took her home but told her that she should not reveal that she has been raped. It is stated that when she went back home she refused to stay with her parents because she was frightened. It is stated that the prosecutrix came back with Imrana who sent her with one Rashid. It is stated that Rashid took the prosecutrix to Moti Nagar and raped her. It is stated that the prosecutrix ran away from Imrana and Rashid and went to Greater Noida where a man named Mukesh gave her his phone and she spoke to Nadeem, who asked her to come to Meerut. It is stated that when she went to Meerut, Nadeem refused to keep her with him. It is stated that Mukesh brought the prosecutrix back to Greater Noida and took her to his house where she spent 14 days with Mukesh. Her family was informed and her uncle took her back home. On the said statement, FIR under Sections 370, 370(A), 372, 374, 376

and 342 IPC and Section 6 of the POCSO Act was registered.

3. Statement of the victim was recorded under Section 164 Cr.P.C before the Magistrate wherein she reiterated her statement given in the complaint. Investigation was conducted. During investigation, Imrana, Kashish Batra (the petitioner herein) and Rashid were arrested. The petitioner was arrested on 23.11.2020. It is stated that during the investigation the prosecutrix along with her mother were taken to FNF Co Living, U Block, DLF III Gurgaon, where it is alleged that the petitioner raped the victim. The investigation revealed that the petitioner was living as a paying guest in a company called FNF Co Living, where the victim was raped. The Manager of FNF Co Living revealed that on the request of the mother of the petitioner he allowed him to run a kitchen in his Paying Guest accommodation at the ground floor. The petitioner started visiting his Paying Guest premises since June, 2020 and he used to stay there at night as he had to start the kitchen in the said premises.

4. It is stated that the CDR records and location report of the petitioner and Imrana were obtained to ascertain as to whether the petitioner was staying at the place where the offence was committed. It was found that the petitioner was in and around the vicinity of the place of occurrence where the first incident of rape was alleged to have been committed by the petitioner.

5. It is pertinent to mention here that the victim was given counselling by the Child Welfare Committee. The Child Welfare Committee has given a report on 16.10.2020 wherein it is stated as under:

"HISTORY:-

On perusal of the support person as well as interaction with child it is noted that the child has divulged new facts which invokes POCSO Act, and human trafficking. The child has shared that she was talking to a boy named Nadeem through Tik-tok. On 10th July her family found out about her affair and beated her. On 11th she left/ was thrown out of the house. She was on her way to Sangam Vihar where she met a lady named Imrana Khan. Imrana took her to Gurgaon in KNF Hotel, there she spent three days. Thereafter Imrana started pressurizing her to sleep with men and joined business of flesh trade with her. The owner of the Hotel even offered 2 lakh rupees. Thereafter on refusal from Heena, Imrana sent her to her cousin brother, Rasheed at Moti Nagar where Rasheed committed sexual assault on her. Thereafter she ran away to Meerut in a cab to meet Nadeem. At Meerut Nadeem refused to keep her so she stayed with Mukesh and his family and threatened to death which forced her to leave the family and hence this DD No. 40A dated 25.07.2020, PS Tigri got registered and child was brought before the bench.

Support person Ms. Swati Jha from BBA submitted the report via mail same is perused and taken on record. Child is interacted child again revealed that she was sexually abused by 2 persons named Batra in the Hotel KNF Gurgaon and Rashid and one lady Imrana is also involved in this case. Support person also requested to conduct a sport visit.

In this case previously directions are given to SHO, in case with DD No.40-a Dated: 25.07.2020 PS Tigri is directed to act in the light of new facts of sexual

assault and Human Trafficking stated by the child and take action as per law. Submit status report on NDOH. But no compliance has been submitted till now. (Vide order dated 08.09.2020) Bench has viewed it seriously. Support person Ms. Swati Jha from BBA submitted the report via mail same is perused and taken on record. Child is interacted child shared that she was sexually abused by two persons named Batra in the Hotel KNF in Gurgaon and Rashid and one lady Imrana is also involved in this case. Support person is also requested to conduct a spot visit.

Child is present, child is interacted. child shared that she wants to go with her mother and mother is also willing to take the custody of the child considering all facts and circumstances and in the best interest of child, child is being restored to her mother. ID proof of Mother is taken on record and Form No.19 and 20 are executed and same accepted."

6. The petitioner filed an application for bail and the learned Additional Session Judge-05,(POCSO),South Delhi, Saket Courts, by an order dated 08.12.2020 dismissed the bail application. A second bail application was filed by the petitioner and by an order dated 30.01.2021, the said application was also dismissed.

7. The petitioner has now approached this Court by filing the present bail application under Section 439 Cr.P.C. for grant of regular bail.

8. Mr. Abhijat, learned counsel appearing for the petitioner would contend that the petitioner is in custody since 23.11.2020. He would state that the supplementary Charge-sheet has been filed. He would also state that

the petitioner has roots in the society and that there is no apprehension that the petitioner will flee from justice if he is released on bail. He would also state that the petitioner cannot tamper with any evidence since the prosecutrix is under the care and custody of the Child Welfare Committee. It is stated that the petitioner is now not being called for any kind of investigation and hence there is no need for the petitioner to be kept in jail. The learned counsel for the petitioner would state that continued custody will become punitive in nature and that is contrary to the law laid down by the Supreme Court. He would state that there has been inordinate delay in the filing of the FIR. He also stated that there are several discrepancies in the story of the complainant. Learned counsel for the petitioner also state that the petitioner was arrested on 23.11.2020. The charge-sheet was filed on 21.01.2021, that is after 59 days of the arrest and the Supplementary Charge-sheet has been filed just now. He would state that the petitioner was entitled for default bail. The learned counsel for the petitioner relies on the judgment dated 15.03.2021 passed by the Supreme Court in Fakhrey Alam v. The State of Uttar Pradesh, (CRL.A.319/2021), to contend that there can be only one charge-sheet and subsequent charge-sheets cannot enlarge the time and therefore the accused is entitled to default bail under Section 167 Cr.P.C. Learned counsel for the petitioner also places reliance on the following judgments:

a) Judgment of this Court **BAIL APPLN. 1559/2020** titled as Dharmender Singh v. State (NCT of Delhi).

b) Judgment of the High Court of Bombay in **CRIMINAL BAIL BAIL APPLN.477/2021**

APPLICATION No.2632/2019 titled as Anirudha Radheshyam Yadav v. The State of Maharashtra.

- c) Judgment of this Court in H.B. Chaturvedi v. C.B.I., MANU/DE/1521
- d) Anil Mahajan v. Commissioner of Customs and Anr., 2000(2)JCC(Delhi 302)
- e) Rajinder Singh Sethia v. State, 32 (1987) DLT 164
- f) Sukh Ram v. State through CBI 64, (1996) DLT 633
- g) Sudhir Nathani v. Central Bureau of Investigation, MANU/DE/0999
- h) Sanjay Chandra & Ors. V. Central Bureau of Investigation, CRL.A.2178/2011
- i) Suresh Kalmadi v. CBI, MANU/DE/1625/2015
- j) Anurag Vardhan v. CBI, MANU/DE/0551/2003.

Mr. Abhijat places reliance on the following paragraphs of the judgment of this Court in H.B. Chaturvedi v. C.B.I., MANU/DE/1521 which relied on the judgment of Anil Mahajan v. Commissioner of Customs and Anr., 2000(2)JCC(Delhi 302) which observes as under:

“(c) The object of bail is to secure the attendance of the accused at the trial. The principal rule to guide release on bail should be to secure the presence of the applicant to take judgment and serve sentence in the event of the Court punishing him with imprisonment.

(d) Bail is not to be withheld as a punishment. Even assuming that the accused is prima facie guilty of a grave offence, bail cannot be refused in an indirect process of punishing the accused person before he is convicted.

(e) Judges have to consider applications for bail keeping passions and prejudices out of their decisions.

(f) In which case bail should be granted and in which case it should be refused is a matter of discretion subject only to the restrictions contained in Section 437(1) of the Criminal Procedure Code. But the said discretion should be exercised judiciously.

(g) The powers of the Court of Session or the High Court to grant bail under Section 439(1) of Criminal Procedure Code are very wide and unrestricted. The restrictions mentioned in Section 437(1) do not apply to the special powers of the High Court or the Court of Session to grant bail under Section 439(1). Unlike under Section 437(1), there is no ban imposed under Section 439(1) against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. However while considering an application for bail under Section 439(1), the High Court or the Court of Sessions will have to exercise its judicial discretion also bearing in mind, among other things, the rationale behind the ban imposed under Section 437(1) against granting bail to persons accused of offences punishable with death or imprisonment for life.

(h) There is no hard and fast rule and no inflexible principle governing the exercise of such discretion by the Courts. There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or refusing bail. The answer to the question whether to grant bail or not depends upon a variety of circumstances, the cumulative effect of which must enter

into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.

9. Mr. Abhijat, learned counsel for the petitioner, states that there are several contradictions in the statement of the prosecutrix. He states that the petitioner be released on bail.

10. On the other hand, Mr. Hirein Sharma, learned APP would state that the judgment of Supreme Court in Fakhrey Alam(supra) is distinguishable with the facts of this case. He would state that in the said case the first charge-sheet was filed under Sections 420, 467, 468, 471, 120-B IPC and Sections 3, 25 and 30 of the Arms Act. Thereafter a second charge-sheet was filed under the UAPA Act beyond the period of 180 days. It is stated that in the fact of that case the Supreme Court held that there can be only one charge-sheet and granted bail to the appellant therein because the charge-sheet under the UAPA Act was filed beyond a period of 180 days. He would state that in the present case, charge-sheet was filed on 21.01.2021 and only the supplementary charge-sheet for the very same offences has been filed at a later point of time and therefore default bail cannot be granted to the petitioner herein. He would state that the prosecutrix was being forced into flesh trade and the petitioner is accused of committing a heinous offence. He would state that there is likelihood of the petitioner putting pressure on the prosecutrix and tampering with evidence.

11. Heard Mr. Abhijat, learned counsel for the petitioner and Mr. Hirein Sharma, learned APP for the State.

12. As rightly pointed out by Mr. Hirein Sharam, learned APP, the case of Fakhrey Alam (supra) does not apply to the facts of this case inasmuch as in the abovementioned case a second charge-sheet under the UAPA Act was filed beyond 180 days. In that case the appellant was arrested on 03.06.2017. The first charge-sheet was filed on 04.09.2017 under Sections 420, 467, 468, 471, 120-B IPC and Sections 3, 25 and 30 of the Arms Act. Thereafter a second charge-sheet was filed under the UAPA Act on 05.10.2017 which was beyond 180 days period. In those circumstances the Supreme Court held that there can be only one charge-sheet and therefore the petitioner therein was entitled to default bail. In the present case the charge-sheet was filed on 21.01.2021. The investigation was completed and the ingredients of Section 167(1)(a), 167(2) read with Section 173(1)(a) Cr.P.C has been met with and therefore the petitioner is not entitled to default bail.

13. The parameters of granting bail have been laid down by the Supreme Court in a number of cases. In Ram Govind Upadhyay v. Sudarshan Singh, (2002) 3 SCC 598 the Supreme Court has given the following considerations :

“..... (a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there

being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”

14. The seriousness of the offence of rape and its impact on the victim has been stated by the Supreme Court in Lillu v. State of Haryana, (2013) 14 SCC 643. The Supreme Court has observed as under:

“12. In State of Punjab v. Ramdev Singh [(2004) 1 SCC 421 : 2004 SCC (Cri) 307 : AIR 2004 SC 1290] this court dealt with the issue and held that rape is violative of the victim's fundamental right under Article 21 of the Constitution. So, the courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanising act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not

only causes physical injuries, but leaves behind a scar on the most cherished position of a woman i.e. her dignity, honour, reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society. It is a crime against basic human rights and also violates the most cherished fundamental right guaranteed under Article 21 of the Constitution.” (emphasis supplied)

15. In State of Rajasthan v. Om Prakash, (2002) 5 SCC 745 the Supreme Court observed as under:

“19. Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of sexual pleasure. There cannot be anything more obscene than this. It is a crime against humanity. Many such cases are not even brought to light because of the social stigma attached thereto. According to some surveys, there has been a steep rise in child rape cases. Children need special care and protection. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are the country's future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other modes of sexual abuse. These factors point towards a different approach required to be adopted.....”

(emphasis supplied)

16. The delay in filing the FIR cannot be said to be fatal to this case at this juncture while considering the application for bail. The prosecutrix is

only 16 years of age. She was given counselling. The report given by the Child Welfare Committee reveals that the accused were trying to put the prosecutrix into flesh trade and that she managed to escape. The call detail records of the accused Imrana and the petitioner corroborate the locations. As correctly observed by the Additional Session Judge, there is no reason forthcoming as to why the prosecutrix would falsely implicate the petitioner. There are sufficient materials in the charge-sheet against the petitioner. The petitioner is accused of committing a heinous offence of rape on a child. The possibility of the petitioner putting pressure on the prosecutrix at this stage, if released on bail, cannot be ruled out. In view of the above this Court is not inclined to grant bail to the petitioner.

17. However, the Trial Court is directed to hear the arguments on framing of charge and if charges are framed, examine all the public witnesses including the prosecutrix as expeditiously as possible and preferably within one year.

18. Accordingly, the application is dismissed with the abovementioned observations.

SUBRAMONIUM PRASAD, J.

APRIL 05, 2021

Rahul