

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

Date of decision: 5th OCTOBER, 2021

IN THE MATTER OF:

+ **BAIL APPLN.2380/2021**

PRADUMAN

..... Petitioner

Through: Mr. Pradeep Rana, Mr. Jujhar Singh
and Mr. Nitin Bansal, Advocate.

versus

THE STATE (GOVT. OF NCT OF DELHI) & ANR. Respondent

Through: Ms. Meenakshi Chauhan, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The present bail application is filed under Section 439 of Code of Criminal Procedure in FIR No. 802 of 2020 filed at PS Nihal Vihar for offences under 376, 313, 328, 506 IPC read with Section 6 POCSO Act filed on 04.08.2020.
2. The facts as per the FIR are that the complainant filed a complaint stating that she is 16 years of age, a student of 12th Standard and lives along with her parents and two elder brothers. She stated that in January 2020 the Petitioner stalked her while she would go to school and he had expressed his intention to make friends with her but she resisted.
3. The FIR states that during the national lockdown stoked by COVID-19, on 20.06.2020 she went to borrow a school book from her friend and when was returning she was stopped by the Petitioner who held

her hand and asked her why she was showing an attitude towards him. It is stated that the Petitioner forcefully took her to the ground floor of his house and gave a cold drink and chips to her after which she became unconscious and fainted and when she woke up it is stated found herself on the bed of the Petitioner with her private parts paining and the bed wet. It is stated that she broke down and told the Petitioner that he had wronged her for nothing to which the Petitioner retorted that you have a big attitude and now I have broken it. It is stated further that the complainant due to fear of reprisal from her family did not disclose this happening to them.

4. The FIR states that from 30.07.2020 the complainant was having continuous spells of vomiting and she was taken the doctor where despite medication the vomiting didn't stop and on her revisiting the doctor on 03.08.2020 and ultrasound of the complainant was done and it was discovered that she was Pregnant by 7-8 weeks. After registration of the FIR, the accused was arrested. Statement of the prosecutrix under Section 164 CrPC has been recorded before the learned Metropolitan Magistrate, Tis Hazari Courts.

5. In the statement under Section 164 CrPC statement the prosecutrix stated that she was being followed by the Petitioner, he would try and talk to her but she would not show interest. The Section 164 CrPC statement further stated on returning from her friend's house she was stopped by the Petitioner and was given laced cold drink after taking her to his house which rendered her unconscious after which the Petitioner raped her. She stated that she was dejected and confronted him thereafter asking him why he did this. She further stated that due to shame and fear she did not tell her family what had transpired with her. She stated that she had gotten pregnant and was

admitted to Bhagwan Mahavir Hospital and Medical Termination of Pregnancy was done on 7.8.2020 after informing the Police, filing an FIR and completing the legal formalities and obtaining consent of her parents/brothers.

6. During the course of investigation, it was stated by the complainant to the sub-Inspector that she does not want to be involved in the case or continue the case against her friend a.k.a Petitioner herein. Section 161 CrPC statements of the complainant's family members were recorded. The Chargesheet shows that the complainant's date of birth as per her school records in 25.08.2003 i.e. 17 years at the time. It also states that from the investigation done there is ample evidence, testimony, MLC of the victim and proof of her minority at the time the incident occurred.

7. Investigation is complete and the charge sheet stands filed. The Petitioner approached this Court for granting regular bail. After hearing some arguments, this Court vide order dated 23.11.2020 allowed the Petitioner to withdraw his bail application with liberty to apply for bail at an appropriate stage.

8. The Petitioner approached the Special Court, (FSTC) (POCSO) applying for Bail. The Court denied to enlarge the Petitioner on bail vide order dated 01.07.2021. The Court recorded the Complainant's stance of not wishing to go forward with the present case. The Trial Court dismissed the application in view of the seriousness of the crime. The petitioner has approached this Court by filing this bail application.

9. Mr. Pradeep Rana, learned counsel appearing for the Petitioner submitted that the Petitioner has been falsely implicated in the present FIR. He submitted that the Petitioner and the Complainant were in the

same school i.e. Government Boys Senior Secondary School, the Petitioner in 12th Standard (Evening Session) and Complainant in 11th Standard (Morning Session) and developed a friendship. He submitted that the difference of age between both complainant and petitioner is of 3 years, 18 and 21 respectively.

10. Learned counsel for Petitioner submitted that a bare reading of the FIR would show that the Complainant has been coerced by her family members to file the present FIR. He submitted that the family motivated by the support of an NGO has instituted the present FIR because the family objected to the consenting friendship of the Complainant and the Petitioner. In support of this argument he submitted that Section 164 CrPC statement and bail order of the Special Court denying bail, both these record that Complainant does not want to pursue the case as it was a thing that happened in the past and wants to go ahead with her education. He submitted that there was a delay of 50 days in filing of the FIR.

11. Learned counsel for Petitioner submitted that the investigation agency has not been able to ascertain the actual age of the complainant and no birth certificate of the complainant has till date been placed on record. He submitted that no ossification test or other test has been conducted on the complainant to conclusively determine her age. He submits that mere school records indicating the date of birth is not enough evidence based on which a charge under the harsh sections of POCSO can be slapped against the Petitioner.

12. Mr. Rana, learned counsel submitted that the Petitioner is a 21 year-old pursuing his education via open learning mode from Delhi University and has deep roots in the society. He submits that Petitioner has been in

jail for a year now and deserves to be enlarged on bail. He submitted the Petitioner's permanent address is H. No.158, Unouti, Uttar Pradesh which is his ancestral home. He places reliance on another bail order of this Court in Dharmander Singh v. State, (2020) SCC Online Del 1267, where bail was granted to an accused under POCSO charges, this Court exhorted guidelines that need to be followed in deciding bail where charges of POCSO have been alleged.

13. Per Contra, Ms. Meenakshi Chauhan, learned APP opposed the bail application. She submitted that the Complainant was a 16 year old girl and the boy was an 20 years old. She submitted that the charges involved were very serious in nature. She contended that the charges involved were of rape, administering adulterated substance under the IPC and aggravated sexual assault under the POCSO Act and that all these charges entail a minimum punishment of 10 years and can extend life, 'life' would mean the remainder of the natural life of the Petitioner.

14. The learned APP submitted that the Complainant had been impregnated by the assault made by the Petitioner and she had to medically extricate her fetus which has caused her much mental trauma. She submitted that even if the Petitioner and Complainant were friends and in an relationship, it would still attract the sixth clause under Section 375 IPC which states that having sexual intercourse with the consent of a girl below the age of 18 would still constitute rape and would be punishable with the same punishment as if the offence was done without the consent of the victim. She contended that the delay in the FIR is explained in the FIR i.e. the complainant felt ashamed to report this as she felt it would tarnish the name of her family.

15. Heard Mr. Pradeep Rana, learned counsel for the Petitioner and Ms.Meenakshi Chauhan, learned APP for the State and perused the material on record.

16. Material on record reveals that on 03.08.2020, the prosecutrix was examined in Bhagwan Mahavir Hospital in which the history which was given by the prosecutrix was that she had her periods overdue and the Gynaecology Department has referred the her after finding that the prosecutrix was pregnant. In the MLC, it is stated by the prosecutrix that she went to her friend's house for a party. The date of the party has not been given. It is stated that in the party, they drank beer and the other family members and friends were also present. It is stated that since they had lot of drinks, she fell unconscious and when she woke up, she found herself in bed and the bed sheet was wet and the prosecutrix was paining.

17. The FIR was registered the next date i.e. 04.08.2020 wherein the prosecutrix had named that the petitioner herein used to stalk her and wanted to do friendship with her which she denied. It is alleged in the FIR that between 11.06.2020 to 20.06.2020, she went to her friend's house to borrow her books while on her way back, the petitioner met her, stopped her and caught hold of her and forcibly took her to the ground floor of his house, made her consume drinks and she became unconscious. When she regained consciousness, she found that she was lying down and the bed sheet was wet and her body was paining. When she confronted the petitioner, he told her that since she was not adhering to his request of friendship and he committed rape.

18. On the very same date i.e. 04.08.2020, in the statement under Section 164 CrPC, she has categorically stated that she did not know the

person who committed rape on her. She stated that she used to visit her friend, the person i.e. the petitioner herein that his name, she does not know, caught hold of her and took her to his house. She states that she did not sound because there was nobody in the street. It is stated by her in the statement under Section 164 CrPC that the petitioner forced her to consume a cold drink and then she did not remember what happened. When she regained consciousness at 4/4:30 in the evening, she found that the bed sheet was wet and lower portion of her body was paining. She states that the boy who committed rape on her came on that point of time and he told her that he could not control himself and beg for forgiveness.

19. This Court has also perused the photographs which has been produced wherein the petitioner and the prosecutrix found are to be shown in very close proximity and it is apparent that they were in a relationship with each other.

20. A perusal of the abovementioned facts show that the prosecutrix has given three different statements. In the MLC which was conducted prior to the FIR she does not name the petitioner. The MLC was conducted because prosecutrix who was below the age of 18 years was found to be pregnant. The FIR was registered on the next day when she named the petitioner. The statement of the prosecutrix under Section 164 CrPC was recorded wherein she does not name the petitioner.

21. During the proceedings of bail, the prosecutrix has stated that she has no objection to the grant of bail. The prosecutrix and the petitioner are more or less of the same age and as stated, the photographs which have been filed clearly show that the prosecutrix and the petitioner were in a relationship. When the prosecutrix who was complaining of vomiting and

who was taken to the hospital and in the hospital it was revealed that she was pregnant and the MLC and it gives to the corroboration to the fact that the prosecutrix was not subjected to any forcible rape. This Court cannot overlook the fact that the petitioner is now only 21 having a complete life ahead of him. This Court also cannot overrule their friendship as both of them were students of the same school.

22. Consensual sex has been in legal grey area because the consent given by minor cannot be said to be a valid consent in the eyes of law. The short question which arises is as to whether the petitioner should be granted bail or not. Whereas, what has become a trite and unfortunate practice is that the Police are filing POCSO cases at the behest of the family of a girl who object to her friendship and romantic involvement with a young boy. The rigor of the law is therefore being misapplied and subsequently misused. The age of the petitioner and the prosecutrix, the photograph which categorically pointed towards a relationship between the two and the discrepancies in the statements given at the time of the recordings of the MLC, the FIR and the statement under Section 164 CrPC are all mitigating factors which tilt the balance towards the grant of bail to the accused.

23. In Anant Janardhan Sunatkari v. State of Maharashtra, (2021) SCC Online Bom.136, the Bombay High Court dealt with a 19 year old who had been convicted of Rape of a 15 year old, the accused therein was released on bail and the High Court observed as follows :

“11. I have perused the impugned judgment; evidence of victim, mother of victim and of PW-6 (Classmate of the victim) as well the evidence of Medical Officer.

12. I am conscious of the fact that the passing of POCSO has been significant and progressive step in securing children's rights and furthering the cause of protecting children against sexual abuse. The letter and spirit of the law, which defines a child as anyone less than 18 years of age, is to protect children from sexual abuse.

13. I am also conscious of the fact that consensual sex between minors has been in a legal grey area because the consent given by minor is not considered to be a valid consent in eyes of law.

14. In the case at hand, facts are distinctive in the sense, victim is first cousin sister of the appellant. At the relevant time, she was 15 year old and appellant was 19 year old. Both were students and living in one house. A fact cannot be overlooked that the victim had resiled from her statement and further disowned the contents of portion marked B of her statement recorded under Section 164. Even her mother was unfriendly to prosecution. Opinions of doctor that victim was subjected to sexual assault was subject to FSL report. The FSL report was not obtained till the conclusion of the trial. Victim said, her statement to the police and narrative in statement under Section 164 was at the instance of Class teacher. Therefore, in the proceedings, wherein suspension of sentence is sought, this Court cannot ignore the 'evidence of victim' and 'her mother'. At the same time, the age of the victim and of appellant their relations also cannot be overlooked. Though the prosecution vehemently argued and relied on Section 29 and 30, which provides for presumption of culpable, mental state as to certain offences, in my considered opinion, this submission and argument of the prosecution is to be gone into, when appeal is to heard finally."

24. In Jayantibhai Babulbhai Alani v. State of Gujarat, (2018) SCC Online Guj. 1223, the Gujarat High Court dealt with the case of a young adult charged with Sections 363, 366, 376 IPC and Section 3 & 4 of the POCSO Act, the High Court granted bail to the accused therein after observing the following-

“6. This is an unusual case of boy and girl having affair. As the prosecutrix was minor, the applicant is sent behind prison because of the complaint lodged by the father of the prosecutrix. Undoubtedly, a minor girl is to be protected under law as there are number of instances of sexual abuses of minor girls and therefore, there is a special legislation of POCSO in the year 2012 and amendment in sections 375 and 376 of the IPC in 2014. The judiciary takes a very serious note of sexual offences against women and specially against minor girls. Upon reading of the statement of the prosecutrix, they both eloped. Further, the trial Court rejected bail application mainly on the ground that the girl is minor and her consent is immaterial.

7. In the present case, the prosecutrix is 17 years 11 months old and the accused is 18 years old. It appears from the record and the statement of the prosecutrix dated 07.04.2018 that the prosecutrix was in love with the applicant and left the home of her own and moved with the applicant at various places. These are the mitigating factors and therefore, present application deserves consideration.” (emphasis supplied)

25. This Court in Dharmender Singh v. State (Govt. of NCT) (*supra.*), has very definitely laid down parameters that are to be followed when considering bail of a person accused under the POCSO Act, it has held as follows-

*“77. Though the heinousness of the offence alleged will beget the length of sentence after trial, in order to give due weightage to the intent and purpose of the Legislature in engrafting section 29 in this special statute to protect children from sexual offences, while deciding a bail plea at the post-charge stage, in addition to the nature and quality of the evidence before it, the court would also factor in certain real life considerations, illustrated below, which would **tilt the balance against or in favour of the accused**:*

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 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.

78. The above factors are some cardinal considerations, though far from exhaustive, that would guide the court in assessing the egregiousness of the offence alleged; and in deciding which way the balance would tilt. At the end of the day however, considering the myriad facets and nuances of real-life situations, it is impossible to cast in stone all considerations for grant or refusal of bail in light of section 29. The grant or denial of bail will remain, as always, in the subjective satisfaction of a court; except that in view of section 29, when a bail plea is being considered after charges have been framed, the above additional factors should be considered.”

(emphasis supplied)

26. It appears, in the facts and circumstances of this case, as if the present FIR has been lodged at the insistence of the family of the victim/complainant who were perhaps embarrassed on finding that the complainant had become pregnant and if this was known in the neighborhood there would be a social backlash that the family would encounter and, in order to avoid the social embarrassment and to get the pregnancy medically terminated this FIR has been filed giving it the color of sexual exploitation and bringing it in the ambit of the POCSO Act which envisages the abolition of child abuse.

27. It can be seen that the petitioner and the complainant are friends and love between both of them cannot be ruled out as an option. The FIR has been lodged after the discovery that the prosecutrix is pregnant and

statement under Section 164 Cr.P.C recorded thereafter. As stated there are discrepancies between the statement of the doctor, the FIR and the statement under Section 164 CrPC. Looking at the respective ages of the petitioner and the complainant both were romantically attracted towards each other and their relationship was consensual. The photographs annexed in the petition show that the petitioner and the complainant were romantically involved with each other, which is a common phenomena in adolescence/young adults. It is also clear to the Court that the pregnancy of the complainant was terminated after lodging of the FIR. The complainant has gone on record in her 164 Cr.P.C statement as well as before the learned Trial Court that she would not like to pursue this case and wants to move on with her life and study ahead and would also not want her friend to suffer in jail. The petitioner being a young man of 21 years of age and having a full life ahead cannot be deprived of his liberties. The petitioner has been in jail for over 12 months and is being subjected to be in the company of hardened criminals. This would do more harm than good to a common man of 21 years of age. In the facts and circumstances of the case, this Court thinks that the petitioner's case should be considered adequately.

28. This Court on 12.08.2021 directed the petitioner to find out as to where the petitioner would reside if he is granted bail and that such place should be far away from where the prosecutrix resides so that the evidence is not tampered with.

29. Mr. Pradeep Rana, learned counsel for the petitioner states that the petitioner would stay at H. No. 158, Unouti, Hardoi, Uttar Pradesh - 241404. The said house belongs to the father of the petitioner who stays

with his family. The address stands verified by the prosecution. In the facts and circumstances of the case, this Court is inclined to grant bail to the petitioner on the following conditions:-

- a) The Petitioner shall furnish a personal bond in the sum of ₹50,000/- with two sureties of the like amount, one of them should be a relative of the petitioner, to the satisfaction of the Trial Court/Duty Magistrate.
- b) The Petitioner shall not leave the District of Hardoi without other than appearing in Court. He is directed to attend all the proceedings.
- c) The Petitioner shall report to the local Police Station every Tuesday and Friday at 10:30 AM and should be released after completing the formalities within half an hour.
- d) The Petitioner is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
- e) The petitioner has given his address in the memo of parties as H. No. 158, Unouti, Hardoi, Uttar Pradesh -241404. The Petitioner is directed to continue to reside at the same address. In case there is any change in the address, the Petitioner is directed to intimate the same to the IO.
- f) The Petitioner shall not, directly or indirectly, tamper with evidence or try to influence the witnesses.
- g) Violation of any of these conditions will result in the cancellation of the bail given to the Petitioner.

26. It is made clear that the observations made in this Order are only for the purpose of grant of bail and cannot be taken into consideration during the

trial.

27. Accordingly, the bail application is disposed of along with the pending application(s), if any.

SUBRAMONIUM PRASAD, J

OCTOBER 05, 2021

Rahul