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IN THE HIGH COURT OF DELHI AT NEW DELHI*Date of Decision: 28th April, 2022*

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BAIL APPLN. 457/2022**MOHIT KUMAR**

..... Petitioner

Through: Mr. Kanhaiya Singhal,
Mr. Rishabh Jain, Mr. Chetan
Bharadwaj, Mr. Priyal Garg,
Ms. Anisha Singhal, Advocates.

Versus

STATE NCT OF DELHI

..... Respondent

Through: Ms. Meenakshi Dahiya, APP
for the State with SI Ankesh
Meena, PS- Hauz Qazi.
Mr. Amit Kumar with
Ms. Shilpi Verma and Mr.
Deepak Sharma and the
complainant in person.

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CORAM:**HON'BLE MR. JUSTICE PRATEEK JALAN****ORDER**

1. By way of this application under Section 439 of the Code of Criminal Procedure, 1973 ["CrPC"], the applicant [hereinafter referred to as "P"] seeks regular bail in connection with FIR No. 254/2021, dated 15.09.2021, registered at Police Station Hauz Qazi, under Section 354A of the Indian Penal Code, 1860 ["IPC"] and Section 10



of the Protection of Children from Sexual Offences Act, 2012 [“POCSO Act”].

Facts

2. FIR No. 254/2021 was registered at Police Station Hauz Qazi on 15.09.2021 on the complaint of the applicant’s wife [hereinafter referred to as “G”]. The FIR originally mentioned offences under Section 354A of the IPC and Section 10 of the POCSO Act. P was arrested on 16.09.2021. Following G’s statements under Sections 161 and 164 of the CrPC, Section 376 of the IPC and Section 6 of the POCSO Act were added. After investigation, the charge sheet was filed, and charges under Sections 354A, 376 and 506 of the IPC and Sections 6 and 10 of the POCSO Act have been framed against P on 24.11.2021.

3. The allegations in the FIR are as follows:

- a. G was married to P on 14.12.2016. They had a daughter [hereinafter referred to as “M”] on 11.11.2017.
- b. Although the attitude of P and his parents towards G changed after marriage and they used to beat and abuse G verbally, she tolerated it for the sake of her domestic life.
- c. After some days, being fed up with the situation, G separated her kitchen. P lived with his parents on the first floor of the matrimonial home, whereas G lived with her daughter M on the ground floor of the same property.
- d. On 07.07.2021, P took M upstairs as usual at around 8:30 PM and left her downstairs at around midnight.



- e. On the next day, when G was giving M a bath, M reported an incident of the previous day, which amounted to an allegation that P had removed her undergarments and touched her in the perineal region on the previous day. The perineal region of M was also a little swollen.
 - f. G raised the matter with P the next day, who denied the allegation and started fighting with her, following which G reported the matter to the police.
 - g. The police having failed to act, G gave a written complaint at the Police Station on 26.07.2021. The police called P and released him after counselling him.
 - h. There was no change in P's behaviour and G apprehended that he would indulge in such acts again. G therefore kept a watch on M but P insisted on taking her to the first floor, where he lived (alongwith his parents). On G protesting against P taking M upstairs, P threatened her with eviction from the residence and that her household goods would be thrown outside the house. The FIR records that inquiries were made with both G and M, and M corroborated the version of G.
4. M was medically examined at LNJP Hospital on 15.09.2021 and counselled by the counsellor of the Delhi Commission for Women ["DCW"]. M's statement under Section 164 of the CrPC was sought to be recorded by the Metropolitan Magistrate ["Magistrate"] on 16.09.2021, who observed that the victim refused to answer any question and was sulking, by reason whereof the statement of the



victim could not be recorded. It is stated in the charge sheet that an attempt was made to record the statement of M under Section 164 of the CrPC again, which was declined by G.

5. The statement of G was also recorded under Section 164 of the CrPC on 21.09.2021. In the said statement, G stated that she had matrimonial disputes with P. G made allegations of verbal and physical abuse against P and his parents. She recounted an incident of 14.02.2021, following which she was thrown out of the house alongwith her daughter, and she started living on the ground floor of the same property. As far as the incident of 07.07.2021 was concerned, G's statement under Section 164 of the CrPC, as mentioned in the charge sheet, recorded an allegation of P inserting his middle finger in M's private parts, in addition to the allegations recorded in the FIR.

6. A supplementary statement of G was recorded on 10.11.2021 under Section 161 of the CrPC, wherein she stated that on 08.07.2021, while she was bathing M, in addition to reporting that P had touched her in the perineal area, M complained of pain. G applied cream in the affected area, but upon the pain persisting, M revealed that the pain had started when P had fingered her. G explained that she had not disclosed this in her earlier statement under Section 164 of the CrPC because she was unable to comprehend it. She claimed that this had been revealed by M to the Magistrate while recording the statement under Section 164 of the CrPC.



7. In view of certain inconsistencies in her statements, G was also interrogated by the Investigating Officer on 10.11.2021, when she reiterated this position.

8. P made an application for bail before the Sessions Court, which was rejected on 12.01.2022. He contended that the complaint had been registered due to a matrimonial dispute between him and G, and that the prosecution had failed to explain the delay in registration of the FIR. It was also submitted before the Sessions Court that the examining doctor did not find any internal or external injury during the medical examination of M. The Sessions Court, however, found the allegations to be extremely serious, and charges under Sections 354A/376/506 of the IPC and Sections 6/10 of the POCSO Act having been framed against P, bail was declined.

9. Notice in the present application was issued on 07.02.2022, when it was recorded as follows:

“2. Learned counsel for the petitioner states that the petitioner is the father of the victim and he is being implicated in the present case for committing an offence punishable under Sections 354A/376/506 IPC and Sections 6/10 of the POCSO Act on his own daughter and that too on the complaint of the wife of the petitioner with whom there is a matrimonial dispute. He states that the child has not said anything in her statement under Section 164 Cr.P.C and the mother has come up and given her statement under Section 164 Cr.P.C. He states that a perusal of the FIR and the material which has been filed in this Court shows that it is only an attempt by the wife of the petitioner to arm-twist him. He states that the petitioner is in custody since 16.09.2021 and, therefore, bail be granted to the petitioner.”



10. I heard learned counsel for the parties and reserved judgment on 23.03.2022. However, in the course of preparation of the judgment, I found that the FIR referred to a complaint dated 26.07.2021, made by G to the police authorities, which was not on record. Consequently, the matter was listed on 12.04.2022, when Ms. Meenakshi Dahiya, learned Additional Public Prosecutor for the State, was requested to produce the said complaint and documents relating to the action taken pursuant thereto. Ms. Dahiya has filed a copy of a complaint dated 24.07.2021, and other documents enumerated below. The matter was next listed on 20.04.2022, and learned counsel for the parties were given an opportunity to address the Court on the said documents. G was also present in Court on the said date, and was represented by Mr. Deepak Sharma, learned counsel.

11. The documents placed on record by Ms. Dahiya include the following:

- a. A written complaint addressed by G to the Station House Officer [“SHO”] of the concerned police station stated to be received on 24.07.2021 at 8:53 PM, which states as follows:
 - (i) G visited the police station on 24.07.2021 and stated that her daughter M, aged 3 years 7 months, was taken to the first floor of the property eight days ago, in accordance with daily practice.
 - (ii) P indulged in inappropriate conversation with M. The content of the inappropriate conversation has



been reported and is similar to the report in the FIR.

- (iii) For this reason, G has stopped sending M with P.
- (iv) G telephoned P for spending money on 20.07.2021, when he said he would give her money after one or two days. However, upon being reminded, he placed the condition that M must be permitted to go upstairs, which led to a fight between the two and a physical scuffle also ensued. P threatened G with calling the police and evicting her from the house, at which point she came to the police station to record her complaint. G apprehended that P would commit some wrong acts with M. She would like to live separately with M to avoid any such act in future.
- b. A general diary entry recorded on 25.07.2021 at 3:55 PM which reveals that a PCR call was received with the complaint that the father of a young girl touches her private parts and teaches her inappropriate conversation.
- c. Two handwritten statements have also been placed on record, one signed by G and one signed by P. Although the statement signed by P bears the date 24.07.2021, it appears *prima facie* from a reading of the statement that the statement was actually recorded on 25.07.2021. The first statement, which is signed by G, is addressed to the SHO. It states that G got married to P in 2016 and has a



daughter aged 3 years 6 months. Her parents-in-law live separately on the first floor of the property. G's husband, i.e. P, and her parents-in-law used to cast insinuations upon her and M, and use inappropriate language. G states that she has filed a case for maintenance in Court against them. She states that her husband and parents-in-law have been troubling her for some time and she has made a call to the PCR on the same date, following which she was visited by a counselor of the DCW. It is stated that G's husband and parents-in-law have now said that they would not trouble her and will not cast insinuations upon her and her daughter and will accept the verdict of the Court. She states that she is now going home with her husband and her daughter and that she has made this statement of her own volition in the presence of her father, Shiv Kumar, and the counselor. It is stated that she takes back the call which she had made and that she will call again in the event she is troubled further. It is thereafter stated that, with regard to the allegation she had made about molestation of her daughter by her father, i.e. P, she has enquired with her daughter about the same and no such complaint exists. In the future, if her husband and parents-in-law insult her or her daughter in any way, she would complain about them at that stage.

- d. The statement of P has also been recorded that he is taking his wife and daughter with him. He and his parents



will not use any insulting words towards his wife and daughter, and he will look after them properly. In the event he does not comply with these assurances, then legal action be taken against him.

- e. An inquiry report, prepared by Head Constable Rajkumar Singh, has also been attached. It refers to four diary entries concerning complaints made by G against P, dated 24.07.2021, 30.07.2021, 07.08.2021 and 11.08.2021, with regard to P touching the private parts of M. It is stated that the complainant has a dispute with her husband for the last five months, that the husband gives inadequate amount for household expenses, makes allegations against her and troubles her. The report further states that, during the course of inquiry, it was found that, on 25.07.2021, a call was made by G, following which a report was prepared by the officer. The complainant had given her written statement to the effect that her husband had not committed any act of molestation with her daughter. It was therefore recommended that the complaint be closed. The inquiry report has been endorsed by the SHO, recording that there is an acute dispute between the husband and wife and that it was revealed in the course of counseling that *“nothing had happened, as alleged in the complaint with the girl child”*. It was, therefore, requested that the complaint be closed.



Submissions

12. I have heard Mr. Kanhaiya Singhal, learned counsel for P, Ms. Dahiya for the State, and Mr. Amit Kumar and Mr. Sharma for the prosecutrix.

13. Mr. Singhal submitted that the present case is an entirely fabricated case at the instance of G. He placed on record complaints lodged by P against G since the year 2017. P has also filed proceedings for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act, 1955 against G on 20.08.2021. P also placed on record communications between him and G to demonstrate that G has been pressing him for divorce. He also referred to communications between G and another person, in an attempt to submit that G had intimate relationships with other persons. The transcripts of various conversations, Facebook posts, and videos have also been placed on record.

14. Mr. Singhal submitted that, in respect of the incident on 07.07.2021, which, according to G, was told to her by M on 08.07.2021, the FIR was registered only on 15.09.2021. The FIR was initially registered under Section 354A of the IPC and Section 10 of the POCSO Act. No medical examination of the alleged victim was conducted until after the registration of the FIR. Even at that stage, the medical examination did not reveal any external or internal injury. He submitted that even at this belated stage, no allegation of insertion of P's finger in M's private parts was made, which has come forth only in the supplementary statement dated 10.11.2021, following which the



remaining charges, including Section 376 of the IPC and Section 6 of the POCSO Act, were added.

15. Mr. Singhal also referred to the additional documents filed by Ms. Dahiya, discussed in paragraph 11 hereinabove, to submit that they reveal gross inconsistencies in the case made out by G, including as to the date and timing of the incident. He also pointed out that G had withdrawn the allegations and specifically stated that the allegations earlier made were incorrect.

16. Mr. Singhal stated upon instructions that, in the event P is released on bail, he will not reside in the matrimonial home where G and M are resident, but at K/18/8, Gangotri Vihar, West Genda Gali No. 33, Bhajanpura.

17. Mr. Singhal placed certain judgments before this Court wherein bail has been granted in respect of offences under the POCSO Act. In *Anu P. Kumar vs. State of Kerala, Represented by Public Prosecutor*¹, the Kerala High Court was concerned with an allegation levelled against a father by his 15 year old daughter. Anticipatory bail was granted, taking into account delay of 19 months in lodging of the FIR and matrimonial disputes between the victims' parents. In *Joy V.S. vs. State of Kerala, Represented by Public Prosecutor*², bail was granted to an accused of an offence under Sections 7, 8, 9(p), 10 and 11(iii) and 12 of the POCSO Act. The Kerala High Court noted that, in such cases, mere delay in reporting the matter to the police is not fatal to the prosecution's case. However, where it was coupled with other

¹ (2019) SCC Online Ker 22995

² (2019) SCC Online Ker 783



circumstances [in that case, the accused had, in the *interregnum*, sent a legal notice to the mother of the alleged victim claiming professional fees on account of psychological therapy to the alleged victim], the Court found a suspicion to be raised against the prosecution's case. Anticipatory bail was therefore granted. In *Swarup Mohan vs. State of Kerala*³ also, anticipatory bail was granted to an accused despite charges under the POCSO Act in respect of offences committed upon his son, keeping in mind the strained relationship between the parents of the said victim and the long delay in filing of the FIR.

18. Ms. Dahiya, on the other hand, submitted that the delay in registration of the FIR is explained in the complaint lodged by G, which states that she had first made a complaint on 26.07.2021. Ms. Dahiya submitted that, in view of the seriousness of the allegation against P in respect of acts committed against his own daughter, who was only 3 years 11 months of age, he is not entitled to bail. She attributed the lack of any internal or external injury being revealed in the medical examination of M to the fact that the medical examination was, in fact, conducted more than two months after the incident took place.

19. Mr. Kumar initially adopted the submissions advanced by Ms. Dahiya and did not seek to make any further submissions. Mr. Sharma, however, after the filing of the additional documents by Ms. Dahiya, submitted that the statement dated 24/25.07.2021 was made by G under pressure and "wrong legal advice".

³ (2018) SCC Online Ker 21314



Analysis

20. A Coordinate Bench of this Court, in *Dharmander Singh vs. State*⁴, has reiterated the principles relating to grant of bail, in particular with reference to the POCSO Act. As far as the general principles regarding grant of bail are concerned, this Court has cited the decisions of the Supreme Court in *Gurcharan Singh vs. State (Delhi Administration)*⁵ and *Mahipal vs. Rajesh Kumar*⁶.

21. In *Dharmander Singh*⁷, the Court considered the particular provisions of the POCSO Act, particularly Section 29 thereof, and came to the conclusion that the presumption against the accused thereunder is attracted only after framing of charges. Where an application for bail is being considered after framing of charges, the presumption under Section 29 would have to be taken into consideration, with the effect of raising the threshold of the satisfaction required before bail is granted. In the present case, as charges have been framed, the provisions of Section 29 of the POCSO Act are applicable and these principles have to be applied.

22. In *Dharmander Singh*,⁸ this Court has identified certain factors to be considered in this context:

“74. As always, when faced with such dilemma, the court must apply the golden principle of balancing rights. In the opinion of this court therefore, at the stage of considering a bail plea after charges have been framed, the impact of section 29 would only be to raise the threshold of

⁴ 2020 SCC Online Del 1267

⁵ (1978) 1 SCC 118

⁶ (2020) 2 SCC 118

⁷ Supra (note 4)

⁸ Supra (note 4)



satisfaction required before a court grants bail. What this means is that the court would consider the evidence placed by the prosecution along with the charge-sheet, **provided it is admissible in law, more favorably for the prosecution** and evaluate, though without requiring proof of evidence, whether the evidence so placed is credible or whether it ex facie appears that the evidence will not sustain the weight of guilt.

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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.”

23. It is evident from the status report dated 23.02.2022 filed by Ms. Dahiya that the investigation has been completed and the charge sheet has already been filed. Despite the gravity of the allegations levelled against P in the present case, and the higher threshold of satisfaction required under Section 29 of the POCSO Act, I am of the view that P is entitled to be released on bail. I am mindful of the fact that the allegations concern an offence committed by P against his



own daughter who was only 3 years 11 months of age. However, the contents of the charge sheet itself reveal that G became aware of the incident on 08.07.2021, but did not insist upon registration of the FIR until 15.09.2021. The allegation of insertion of P's finger in M's private parts, which is the foundational basis for the offences under Section 376 of the IPC, and Section 6 of the POCSO Act, also did not find place in the FIR originally filed. Although more than two months had lapsed since the alleged incident, M was not taken for a medical examination until after the registration of the FIR, which is *prima facie* not consistent with the narrative that M had complained of swelling and pain in the perineal region on 08.07.2021 itself. The medical examination, when conducted, did not reveal any external or internal injury. When the statement of M was recorded under Section 164 of the CrPC, she did not make any statement, and G has not permitted any further attempt to be made in this regard.

24. Although reference has been made in G's statement to a written complaint filed by her on 26.07.2021, the documents produced by Ms. Dahiya reveal that the complaint was actually made on 24.07.2021. That complaint refers to an incident of eight days prior, i.e. 16.07.2021, and makes no mention of the incident of 07.07.2021, on the basis of which the present FIR was registered. Even with regard to the said complaint, the statement given by G the next day, i.e. 25.07.2021, indicates that no such incident had occurred. The inquiry report dated 15.08.2021 is in respect of four diary entries, including the diary entry dated 24.07.2021. Head Constable Rajkumar Singh



recorded G's written statement that P had not molested their daughter. The SHO has endorsed this submission.

25. After the date of the alleged incident, P had filed divorce proceedings against G on 20.08.2021, and the FIR came to be registered by G soon thereafter, on 15.09.2021. The fact of matrimonial disputes between the parties for a relatively long period is undisputed, and G has also referred to disputes with P regarding maintenance money for household expenses. Despite the existence of such matrimonial disputes, G continued to reside in the same property, albeit on a different floor. In fact, even after the alleged incident took place, G continued to permit P to have unsupervised access to the minor child, which she seeks to explain by reference to threats of dispossession from the family property and eviction.

26. While none of these may be conclusive factors at the stage of trial, at this stage, the Court has to keep all these elements in mind while deciding whether the continued incarceration of P is warranted. With reference to the factors listed in paragraph 77 of *Dharmander Singh*⁹, suffice it to say that the Court has expressly noticed in paragraph 78 that these considerations are not exhaustive and "*the myriad facets and nuances of real-life situations*" would have to be considered.

27. There is nothing in the status report to suggest that P is a flight risk or that he is likely to tamper with the evidence in any way.

⁹ Supra (note 4)



28. It may be mentioned that although various allegations have been raised in the present application by P with regard to the character of G, I do not consider those allegations relevant for the present purposes.

29. For the reasons aforesaid, P is admitted to bail in FIR No. 254/2021 dated 15.09.2021, registered in Police Station Hauz Qazi, subject to the following conditions:

- a. P will submit a personal bond in the sum of ₹50,000/- [Rupees Fifty Thousand Only] with two sureties in the like amount, at least one of whom must be a blood relative, to the satisfaction of the Trial Court.
- b. P is bound down to the statement made by Mr. Singhal on his behalf that he will not reside at the place where G and M are resident. Mr. Singhal has stated that he will reside at K/18/8, Gangotri Vihar, West Genda Gali No. 33, Bhajanpura. In the event of any change in his place of residence, he will give advance information thereof to the Investigating Officer [“IO”] and the Trial Court.
- c. P will attend the Trial Court on each and every date of hearing, unless exempted by the Trial Court for exception reasons.
- d. If P has a passport, he is directed to surrender it to the Trial Court.
- e. P will give his mobile number to the IO and ensure that he remains reachable on the said mobile number at all times.



- f. P will not contact G in any manner and will also not contact any of the prosecution witnesses.
- g. P will not tamper with any evidence or indulge in any unlawful act or omission or prejudice the proceedings pending in the Trial Court.

30. It is made clear that these observations are only for the purpose of disposal of the present bail application, and will not prejudice the parties in the trial.

31. The bail application stands disposed of with these directions.

32. A copy of this order be communicated to the concerned Jail Superintendent electronically for information.

April 28, 2022
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PRATEEK JALAN, J.



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