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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Order pronounced on 21.09.2022*

+ BAIL APPLN. 1763/2022 & CRL.M.A. 11594/2022

SUMIT KUMAR Petitioner

Through: Mr. Ajay Verma, Advocate.

versus

STATE OF DELHI

..... Respondent

Through: Mr. N.S. Bajwa, APP for State.
WSI Athine, PS Lodhi Colony.**CORAM:****HON'BLE MR. JUSTICE TALWANT SINGH****Talwant Singh, J.:**

1. The petitioner has filed this bail application, being a Children-In-Conflict with Law (CCL), which arose from an order dated 20.04.2022 passed by learned ASJ in Sessions Case No. 362/2022 (FIR No. 29/2016, PS Lodhi Colony), which was registered under Section 302/392/411 IPC. Vide the said order, learned ASJ was pleased to dismiss the bail application of the present petitioner who has spent more than 5 years in judicial custody. Earlier, the petitioner was released on interim bail and he did not misuse the liberty of the interim bail.

2. The brief facts as mentioned in the bail application are that the FIR in question was registered on 03.02.2016 regarding death of a lady, aged about 67 years, whose daughter filed a complaint as she had found dead body of her mother lying on the floor of her house. The post-mortem report discloses the cause of death as 'smothering'. A neighbour had stated that on 31.01.2016 at about 3:00 PM, she had seen a youth with a black colour backpack talking with the deceased and on the next day, she came to know that her neighbour had died.



2.1 The present petitioner was arrested on 04.02.2016 on the basis of surveillance of the robbed mobile phone of the deceased, which was being used by CCL by inserting the SIM of his mother.

2.2 After interrogation, the story propounded by the prosecution is that on 31.01.2016 at about 3:00 PM, the CCL entered in the house of deceased on the pretext of being thirsty and when the deceased entered her own house, the CCL followed her and hit a steel pan on her head. When the victim tried to shout, he closed her mouth and nose with his hands and when she became motionless, he searched the wooden almirah and took mobile phone, iPad Mini and keys of the steel almirah and with the help of the key, he opened the almirah and robbed diamond, gold and silver jewellery articles, camera and cash.

2.3 After the incident, the CCL roamed at various places and after two days, he inserted a Vodafone SIM card in the mobile phone of the deceased. During further investigation, CCL identified and pointed out the place of occurrence and he also brought one steel pan (Pateela) from kitchen shelf and stated that he had hit the deceased with the said pan.

2.4 Post-mortem report was collected which shows that the cause of death was combined effect of smothering and strangulation. Regarding the steel pan, the opinion of the autopsy surgeon was that no marks of any external viable injury were present on the head of the deceased.

3. Charge sheet was filed under Section 302/392/411 IPC. Charges were framed against the CCL on 24.05.2018 and the trial proceeded. During trial, a neighbour of the deceased, namely, Ms. Purvi Sarkar had stated in the cross-examination that she had not seen any boy in front of the house of the deceased. She was confronted with her earlier statement recorded under



Section 161 Cr.P.C. and she denied having made any such statement.

3.1 The petitioner was on interim bail from from 15.05.2020 to 15.03.2021. The petitioner had not misused the interim liberty so granted and he resumed his education and had also utilised his vocational education and training to help his father during the Covid period.

3.2 The bail application moved by the present petitioner on 19.07.2021 was dismissed on 23.07.2021. The next application was moved on 01.02.2022 which was disposed of after more than 2 months and 20 days. The CCL has been alleged to be involved previously in another case FIR bearing No.591/15, PS Badarpur in which he was acquitted for the offence under Section 302 IPC.

4. The petitioner has prayed bail on the grounds that he has already spent 5 years and 5 months in jail; he is innocent and it will take a long time for trial to be concluded as only 4-5 witnesses have been examined so far out of 30 witnesses. It has been further submitted that the autopsy report has ruled out that the deceased was hit with steel Pateela as the forensic report says that no marks of any external visible injury/contusion were found on the head of the deceased.

4.1 The last seen witness, Ms. Purvi Sarkar has stated that she has not seen any boy in front of the house of the deceased. Wrong opinion has been formed by the learned Trial Court that CCL is a hardened criminal. The applicant was on interim bail for quite some time and he had utilised his skills to assist his father in his business. Most of the private witnesses have been examined. There is no possibility of CCL tampering with the evidence and influencing the witnesses. Bail is a rule whereas jail is an exception. There is no possibility of petitioner/CCL to flee from the process of law.



5. Notice was issued. The State has filed brief synopsis along with copies of judgements.

5.1 As per the said brief synopsis, it has been submitted that the bail application of the petitioner was dismissed by the Sessions Court as he had committed the offence with pre-meditated mind. The offence is gruesome and there was a previous involvement of the present petitioner in a matter where he was acquitted of an offence under Section 302 IPC. However, he was convicted under Section 364A IPC. The petitioner has been tried as an adult as he was aged about 17 years and 11 months and he had brush with the law earlier also.

5.2. The State has relied upon a judgement in the matter of '*Master Bholu v. State of Haryana and Anr*' CRR No.3838/2018 dated 30.06.2020 wherein it was held that when CCL is tried as an adult and hence, he cannot be granted any relief under Section 12 of the Juvenile Justice Act, 2015. Similarly, where the board and the Appellate Court had passed orders declining the concession of bail to the petitioner, the High Court found no reason to form a different opinion.

5.3 The next judgement cited by the State is *Abhishek Kumar Yadav v. State of UP and Anr.*' Criminal Revision 1221/2019 decided on 05.10.2020 by Allahabad High Court. In the said case, the petitioner was hardly 2 ½ months short of majority, so his case was distinguished from another minor, who was only 13 years and 9 months old on the date of the occurrence and moreover, he was a disabled child with 57% disability. In the present case, the petitioner was hardly one month short of attaining the majority on the date of the incident.

5.4 Reliance has been also placed on a judgement of the Hon'ble High



Court of Madhya Pradesh, Indore Bench in Criminal Revision No.853/2021, titled '*Sunil v. State of MP*' dated 25.06.2021. In the said case, the petitioner was aged about 15 years and the offence was of committing rape on a minor girl, who was aged about 10 years and 4 months. Although, the petitioner was tried as a juvenile in the said case but the Court declined to release him in the care and custody of his parents as the same would have defeated the ends of justice.

6. It has been argued on behalf of the learned counsel for the petitioner that although the decision was taken to try the present petitioner as an adult but since he was aged only 17 years and 11 months on the date of the incident, he is entitled to be dealt in terms of Section 12 of the Juvenile Justice Act, 2015. The same Section is quoted herein below:

“Bail to a person who is apparently a child alleged to be in conflict with law.

(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the persons release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the



police station, such officer shall cause the person to be kept only in an observation home 1[or a place of safety, as the case may be] in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail.

7. It is to be noted that in the matter of *'Harsh Bhavi v. State of Rajasthan 2018 (192) AIC 371*, it was held that where the accused was about to reach the age of majority and he was accused of kidnapping and murdering a child of 16 years of age and if the bail is granted to him, it will cause gross injustice to the child victim.

7.1 In *'Hashim v. State of UP 2018 (181) AIC 9'* it was held that juvenile offenders who have criminal tendencies and inclination to commit crime at the drop of hat should not be integrated to get shield of benevolent legislation. In the present case, even on earlier occasion, the petitioner was involved in a case under Section 302 and 364A IPC. However, at the end, he was acquitted of the offence under Section 302 IPC but he was convicted under Section 364 IPC.

7.2 Learned counsel for the petitioner has relied upon a judgement of the High Court of Patna in the matter of *'Lalu Kumar v. State of Bihar 2019 SCC Online PAT 1697'*. In the said matter, certain questions were framed by a learned Single Judge and the matter was referred to a Division Bench



which has inserted the said questions as detailed in para 178 of the said judgement, which is reproduced here under:

“We, thus, sum up the references by holding as under:-

Q. (i). Under which provision of law, a child, who has completed or is above the age of 16 years and is alleged to have committed a 'heinous offence' can maintain his application during the pendency of preliminary assessment by the Board under Section 15 of the Act of 2015?

A. For the reasons recorded hereinabove, a child, who has completed or is above the age of 16 years and is alleged to have committed a 'heinous offence' can maintain his application for release on bail under Section 12 of the Act of 2015 during the pendency of preliminary assessment by the Board under Section 15 of the Act of 2015.

Q. (ii). Under which provision of law, a child, who has completed or is above the age Patna High Court CR. APP (SJ) No.2117 of 2019 dt.01-10-2019 of 16 years and is alleged to have committed a 'heinous offence' can maintain his application for release on bail after the transfer of his case to the Children's Court for trial by the Board?

A. For the reasons recorded hereinabove, a child, who has completed or is above the age of 16 years and is alleged to have committed a 'heinous offence' can maintain his application for release on bail under Section 12 of the Act of 2015 after the transfer of his case to the Children's Court.

Q. (iii). Whether the powers conferred on the Board in the matter of bail to a person, who is apparently a child alleged to be in conflict with law are also available to the Children's Court?

A. In view of clear, unambiguous and specific stipulation in Section 8(2) of the Act of 2015, which provides that the powers conferred on the Board under the Act may also be exercised by the Patna High Court CR. APP (SJ) No.2117 of 2019 dt.01-10-2019 High Court and the Children's Court in the matter of grant of bail to a person, who is apparently a child and is alleged to have



committed a bailable or non-bailable offence, the powers conferred on the Board under the Act of 2015 are also available to the Children's Court and the High Court.

Q. (iv). Whether seriousness of the offence alleged is a ground for rejecting the bail in case of a child in conflict with law?

A. Seriousness of the offence alleged cannot be made a ground for rejecting bail under the Act of 2015.

Q. (v). Whether an appeal under Section 101(5) of the Act of 2015 or an application under Section 439 of the CrPC would be maintainable before the High Court by any person aggrieved by the order granting or rejecting bail by the Children's Court? A. Against an order granting or refusing bail passed by the Children's Court, no application for Patna High Court CR. APP (SJ) No.2117 of 2019 dt.01-10-2019 bail or cancellation of bail under Section 439(1) or 439(2) of the CrPC shall lie before the High Court and against such an order only an appeal under Section 101(5) of the Act of 2015 would be maintainable. The 'phrase' "in accordance with the procedure specified in the Code of Criminal Procedure" does not allude to application of the entire CrPC to the Act of 2015. The said reference to the CrPC in Section 101(5) of the Act of 2015 only means that the procedure, and not the substantive Sections, prescribed under Chapter XXIX shall apply to the appeal that could be filed under the said Section. To clarify further, the appeal, in terms of Section 101(5) has to be considered on the basis of material available on the record, i.e., material produced before the Board under Section 13 of the Act of 2015 and considerations arrived at in terms of Section 12 of the Act of 2015 for the purpose of grant of bail and not the considerations of grant of bail in terms of Sections 437, 438 and 439 of the CrPC. Patna High Court CR. APP (SJ) No.2117 of 2019 dt.01-10-2019 The reference in Section 101(5) to "procedure specified in the Code of Criminal Procedure" does not enlarge the scope of sub-sections to create a substantive right in terms of Section 439 of the CrPC in Section 101(5) of the Act of 2015. Q. (vi). What is the scope of Section 19(1)(i) of the Act of 2015 in connection with the trial of a child as an adult? Whether the provisions of Section 19 of the Act of 2015 are mandatory or the Children's Court has to compulsorily



follow the recommendations of the Board made under Section 15 read with Section 18(3) of the Act of 2015?

A. Upon a case of a child having been transferred to the Children's Court, a duty has been cast upon the Children's Court to further decide about the suitability of the child to be tried as an adult. The words used in Section 19(1)(i) and 19(1)(ii) of the Act of 2015 give two options to the Children's Court. First, to try the Patna High Court CR. APP (SJ) No.2117 of 2019 dt.01-10-2019 transferred child as an adult and second not to deal with child as an adult. The Children's Court is required to record its reason while arriving at a conclusion whether the child should be treated as child or an adult in view of Rule 13 (6) of the Rules. In case, the Children's Court decides to deal with child as a child it has to conduct an inquiry as a Board following the procedures for trial of a summons case in accordance with the provisions of Section 18 as would appear from the words used in Section 19(1)(i) of the Act of 2015. In case, it decides to try the child as an adult, it shall follow the procedure as prescribed by the CrPC for the purpose of trial by Sessions Court and pass appropriate orders after trial without prejudice to the provisions of Sections 19 and 21 of the Act of 2015 considering special 'needs of the child' the tenets of 'fair trial' and maintaining a 'child friendly' atmosphere as provided under Section 19(1)(i) of the Act of 2015.

Patna High Court CR. APP (SJ) No.2117 of 2019 dt.01-10-2019 The provisions of Section 19(1) of the Act of 2015 are mandatory. The Children's Court cannot dispense with the requirement of deciding as to whether there is need to try the transferred child as an adult or to deal with the transferred child as a child.

Q. (vii). What is the scope of application of the provisions of Cr.P.C. after the Board transfers the trial of the case to the Children's Court having jurisdiction to try such offences and the Children's Court decides that there is a need for trial of the child as an adult?

A. The procedure followed by the Children's Court for trial of a child as an adult would be of a warrant case and the proceedings in Chapter XVIII prescribed under Sections 225 to 237 of the CrPC, which deal with warrant cases by a Court of Sessions only would



be applicable while trying a child as an adult, subject to exceptions indicated under the Act of 2015.”

7.3 In my view, the above-mentioned answers to the questions framed by the learned Single Judge of Patna High Court are of no help to the present petitioner where he has been ordered to be tried as an adult and he is being so tried before the Sessions Court. In my view, the provisions of Cr.P.C. relating to regular bail under Section 439 Cr.P.C. are applicable to the said juvenile and the provisions of the Juvenile Justice Act, 2015 will not be applicable.

7.4. The CCL who has a criminal mind and he appears to be a hardened criminal, so he is not entitled to grant of bail at this stage when the evidence in the matter is being recorded. There is an apprehension that if he is released on bail, he may commit the same type of offence again and he may try to threaten or influence the witnesses in the present case. It is pertinent to note that he has committed the present offence when he was on bail in earlier case bearing FIR No.591/15 registered under Section 302 IPC, PS Badarpur.

7.5 The act of the present petitioner seems to be pre-planned and premeditated. He was apprehended on the basis of the technical surveillance of the phone of the deceased, which was being used by the present petitioner after inserting a SIM issued in the name of his own mother. At his instance, the jewellery and other articles belonging to the deceased were recovered and the same were duly identified by the close relatives of the deceased.

8. In view of the above, the conclusion is as under:

(i) The petitioner cannot take benefit of the benevolent provisions of Section 12 of the Juvenile Justice (Care and Protection of Children Act,



2015) because he was aged about 17 years and 11 months, just one month short of attaining majority on the date of the incident and he has been already ordered to be tried as an adult by the Juvenile Justice Board vide order dated 19.07.2016.

(ii) In my view, the provisions of Cr.P.C. are applicable while considering his bail as he is being tried as an adult and keeping in view the fact that he was already on bail in another case bearing FIR No.591/15, PS Badarpur in which charge was framed against him under Section 302/364A IPC read with Section 34 IPC but he was acquitted under Section 302 IPC and on the date of committal of the present offence, he was on bail in the said matter, so the possibility of the present petitioner committing another crime, if he is released on bail at this stage, is not ruled out.

(iii) The possibility of the petitioner threatening or coercing the prosecution witnesses is also not ruled out especially at this stage when the evidence of the material witnesses is being recorded.

9. Keeping the above facts and circumstances in view, I am not inclined to release the present petitioner on bail. The application is accordingly dismissed.

TALWANT SINGH, J

SEPTEMBER 21, 2022/pa

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