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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 21st December 2022

+ BAIL APPLN. 3618/2022
BIJENDER MEHTO

..... Petitioner

Through: Mr. Vikas Kumar with Mr. Rajneesh
Bhashar, Advocates.

versus

GNCT OF DELHI & ORS.

..... Respondents

Through: Mr. Shoiab Haider, APP for the State.
Ms. Sampanna Pani, Advocate for the
prosecutrix/victim appearing *pro-*
bono.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

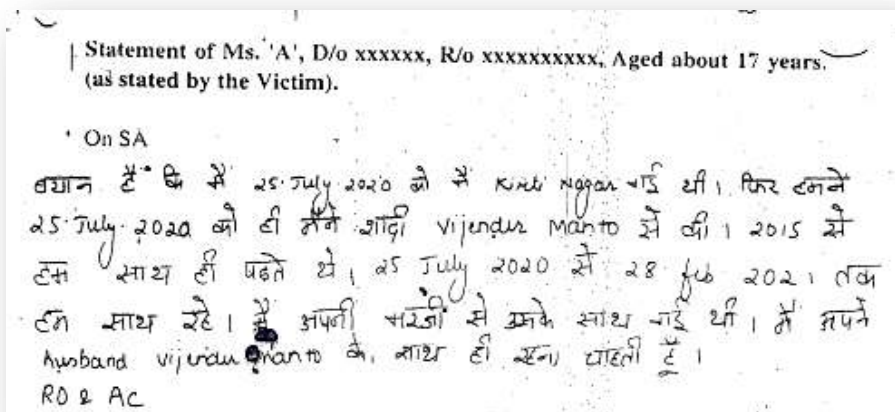
J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition under section 439 read with section 482 of the Code of Civil Procedure 1973 ('Cr.P.C.'), the petitioner seeks regular bail in case FIR No.381/2020 dated 28.07.2020 registered under sections 363/366/376 of the Indian Penal Code 1860 ('IPC') and section 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act') at P.S: Geeta Colony, arising from which he is presently undertrial in SC No.250/2021 before the learned Additional Sessions Judge (POCSO) East District, Karkardooma Courts, Delhi.

2. The petitioner has been in judicial custody since 01.03.2021.
3. Notice on this petition was issued on 05.12.2022. Status report dated 15.12.2022 has been filed in the matter.

4. Mr. Vikas Kumar, learned counsel for the petitioner submits that :
- 4.1. The genesis of the matter is a consensual relationship between the petitioner and 'X' (name anonymised) who have known each other for many years, since they were in school together. The petitioner's date of birth is 18.02.2002 as per school records; whereas the date of birth of 'X' is 12.11.2003 as per school records;
- 4.2. The petitioner's date of birth has been accepted in proceedings arising from another FIR No.71/2019 registered at P.S: Geeta Colony, in which the petitioner was tried as a juvenile by the learned Principal Magistrate, Juvenile Justice Board; who, *vide* order dated 20.07.2019 declared the petitioner as a 'child in conflict with law'. The date of birth of 'X' has been verified from her school records, as per status report filed in the present matter.
- 4.3. The offence that is subject matter of the present FIR is alleged to have been committed between 25.07.2020 and 18.02.2021. It was on 25.07.2020 that 'X's mother reported her missing. As per the allegations in the FIR, when she went missing, 'X' was around 17 years of age. At that time the petitioner was about 18 years of age.
- 4.4. On 16.10.2021 charges were framed against the petitioner under section 376(2) IPC and section 6 POCSO Act. The matter is pending trial, and is at the stage of recording prosecution evidence.
- 4.5. In her statement dated 03.03.2021 recorded under section 164 Cr.P.C. 'X' has said the following :



4.6. In her court deposition recorded on 04.04.2022, 'X' who is now 'major', has deposed on oath as follows :

"On Oath

I got married with Bijender Mehto on 10.04.2019 near Ambala, Haryana. Bijender took me there from Laxmi Nagar. I called accused Bijender after calling him at Laxmi Nagar. I reached Laxmi Nagar by Auto. I did not inform anyone in my family regarding the same. I left my home at about 7.00 p.m. After marriage, I used to reside in Haryana in a room, however, I do not remember the place. It is overnight journey to reach at Haryana from Delhi. I used to live with the accused in the same city where I got married. My mother lodged complaint. Police brought me and Bijender to Delhi. My mother and bade papa also came there with the police. Police took me to Dilshad Garden. Police also took me to SDN hospital. I returned back from Haryana on 25.04.2019. When I left the house with the Bijender Mehto, I was studying in class 9th. At that time I was studying in 9th class. I told to the police that I went with Bijender Mehto at my own will. My statement was recorded my (sic) Judge Aunty. Police had taken me to the Court for recording my statement.

I went with Bijender Mehto four times i.e. in 2019 and on 25.07.2020. On 25.07.2020, Bijender Mehto took me with him from Laxmi Nagar to Mayapuri, Delhi near railway station. I reached Laxmi Nagar by auto. Thereafter, I came back in the year 28.02.2021. I used to reside in Jhuggi in Mayapuri along with

Bijender Mehto. Police brought us from there. Police took me to the SDN hospital, Shahdara. My statement was not recorded before Judge Sahab in 2021. I have a child through Bijender Mehto. I gave birth to a child on 02.06.2021. I again went to SDN hospital with the IO of this case.

Further examination in chief is deferred for post lunch."

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" I lived with Bijender Mahto (sic) in Jawahar Delhi Camp, Mayapuri. I did not inform to anyone in my family when I went with Bijender Mahto (sic) on 25.07.2020. I was taken from Nirmal Chaya to hospital for my delivery on 02.06.2021. My child is residing with me. On 01.05.2019, I had an abortion on asking of my mother. I became pregnant by Bijender Mahto (sic).

At this stage, accused is shown through VC link to victim on monitor/screen.

On seeing, victim stated that he is my husband namely BijenderMehto (Accused correctly identified).

XXXXXX by Sh. Ashok Tiwari, Ld. LAC for accused.

I came from Bihar to Delhi alongwith my parents on 01.03.2019. It is correct that before admission in the school, I used to study at home. I am the eldest child of my parents. My parents are not having any document in support of my date of birth. As per my parents, my date of birth is 31.05.2005. I took the admission in the school in Bihar in the year 2015 in 5th standard. It is correct that my year of birth is 2000. I cannot tell my exact date of birth in 2000.

After coming from Nirmal Chaya, I am residing in parental house of the accused alongwith my child. The expenses of my child is being borne by father of accused. I am happy with the family of the accused. I want to continue to live with the family of my husband. It is also correct that I want that alleged case against my husband be dropped/stopped.

(emphasis supplied; Bold in original)

4.7. X's mother has supported the prosecution's case in her deposition.

- 4.8. It is the admitted case that 'X' has borne a child with the petitioner, who was born on 02.06.2021; and that 'X' alongwith her child are presently living with the *petitioner's* parents. This fact is also admitted by 'X's mother in her court deposition on 25.05.2022.
5. In the circumstances, it is argued on behalf of the petitioner that this is a case of 'juvenile romance', where the petitioner and 'X' also engaged in a physical relationship, all of which happened with the complete and unreserved approval of 'X', without any element of deception, coercion or pressure. It is submitted that 'X', who is now 'major', in fact regards the petitioner as her husband and wants to live with him, which is why she is presently residing with the petitioner's parents. It is also argued that considering that the petitioner has been in custody for over 22 months, he deserves to be enlarged on regular bail.
6. On the other hand, Mr. Shoaib Haider, learned APP appearing for the State has opposed grant of bail on the ground that serious offences under section 376(2) IPC and section 6 of POCSO Act are alleged; and enlarging the petitioner on bail would prejudice the prosecution.
7. Be that as it may, and without delving into the merits of the matter, in the opinion of this court, what is relevant at this stage are the following aspects :
- 7.1. There is no gainsaying the fact that at the time between 25.07.2020 and 18.07.2021, when the offences under section 376(2) IPC and section 6 POCSO Act are alleged to have been committed, 'X' was 'minor'. However going by her date of birth of 12.11.2003, she was at the cusp of majority, being about 17 years, 08 months old.

- 7.2. In her statement recorded under section 164 Cr.P.C. as also in her court deposition, 'X' has consistently maintained that she had accompanied the petitioner by her own free volition; and that she got married to him; and had lived with him and also got impregnated by him.
- 7.3. 'X' admits that she has had a child with the petitioner and that she took that pregnancy to term and gave birth to that child, all of which appears to have been done willingly. At least *prima-facie*, the foregoing factual scenario admits of only one inference, viz. that there was a consensual physical relationship between the two.
8. It would be in the fitness of things to record at this point, that considering the sensitive nature of the matter and the fact that 'X' was present in court in-person, the hearing of the matter was conducted *in-camera*. The court interacted with 'X' at length; and it was found that 'X' completely and wholeheartedly endorses and affirms whatever has come to be recorded in the course of investigation and trial, as summarised above.
9. However, since charge-sheet has been filed and charges have been framed, section 29 POCSO Act would get triggered, raising the threshold of satisfaction required for grant of bail. On this point, this court refers to its own view taken in ***Dharmander Singh @ Saheb vs. The State (Govt. of NCT, Delhi)***¹ where the following indicative criteria were set-down by the court while considering the matter of bail at the post-charge stage :

¹ 2020 SCC Online Del 1267

“68. In view of the above discussion and after considering the opinion of the Supreme Court and the views taken by the other High Courts, this court is persuaded to hold that the presumption of guilt engrafted in section 29 gets triggered and applies only once trial begins, that is after charges are framed against the accused but not before that. The significance of the opening words of section 29 “where a person is prosecuted” is that until charges are framed, the person is not being prosecuted but is being investigated or is in the process of being charged. Accordingly, if a bail plea is considered at any stage prior to framing of charges, section 29 has no application since upto that stage an accused is not being prosecuted.

* * * * *

“70. Now coming to a scenario where a bail plea is being considered at a stage after charges have been framed, in keeping with the observations of the Supreme Court in Rajballav Prasad (supra), the presumption of guilt contained in section 29 would get triggered and will have to be “taken into consideration”.

“71. However, the dilemma would remain as to how the presumption of guilt contained in section 29 is to be applied even after charges have been framed, when the accused has not been given the opportunity to rebut such presumption. When section 29 engrafts the presumption of guilt against the accused, it also affords an opportunity to the accused to rebut the presumption by proving to the contrary. It cannot possibly be that the court should invoke half the provision of section 29 while ignoring the other half, much less to the detriment of the accused. But even after charges are framed, the accused does not get the opportunity to rebut the presumption or to prove the contrary by leading defence evidence, until prosecution evidence is concluded. It would be anathema to fundamental criminal jurisprudence to ask the accused to disclose his defence; or, worse still, to adduce evidence in his defence even before the prosecution has marshalled its evidence. Again therefore, even for a stage after charges have been framed, section 29 cannot be applied in absolute terms to a bail plea without doing violence to

the 'due process' and 'fair trial' tenets read into Article 21 of our Constitution.

* * * * *

“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 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

“75. If the court finds that the evidence adduced by the prosecution is admissible and ex facie credible, and proving it during trial is more a matter of legal formality, it may decide not to grant bail. If, on the other hand, the court finds that the evidence before it, is either inadmissible or, is such that even if proved, it will not bring home guilt upon the accused, it would grant bail.

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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;*

.....

e. whether the offence alleged involved threat, intimidation, violence and/or brutality;

.....

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;

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;

.....”

(emphasis in original)

10. In the opinion of this court, when tested on the criteria set-out above, the circumstances of the present case would favour grant of bail to the petitioner.
11. In fact, in what would make this case *sui-generis*, upon being queried by the court, ‘X’ has even offered to stand ‘surety’ for the petitioner if he is admitted to bail, since it would appear that ‘X’ would perhaps be the only *local* surety available to the petitioner, who otherwise hails from Bihar.
12. Accordingly, the petition is allowed; and the petitioner is admitted to regular bail during the pendency of the trial, subject to the following conditions :

- 12.1.The petitioner shall furnish a personal bond in the sum of Rs.10,000/- (Rs. Ten Thousand Only) with 02 *local* sureties in the like amount, to the satisfaction of the learned trial court. As observed above, learned counsel for the petitioner submits that the complainant/prosecutrix is herself willing to stand surety for the petitioner. This submission is noted, without however making it a condition for grant of bail;
- 12.2.The petitioner shall furnish to the Investigating Officer/S.H.O., P.S.: Geeta Colony, Delhi a cell-phone number on which he may be contacted at any time; and shall ensure that the number is kept active and switched-on at all times;
- 12.3.Since the petitioner is stated to be a native of Berui, Saran, Bihar and may travel there, it is directed that the petitioner shall furnish to the I.O. a local address within Delhi as also his permanent address in Bihar, where he may be found, if the need so arises;
- 12.4.If the petitioner has a passport, he shall surrender the same to the learned trial court and shall not travel out of the country without prior permission of the trial court;
- 12.5.The petitioner shall not offer any inducement, threat or promise to any of the prosecution witnesses or other persons acquainted with the facts of case;
- 12.6.The petitioner shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial.
13. Nothing in this order shall be construed as an expression of opinion on the merits of the pending trial.

14. A copy of this order be sent to the concerned Jail Superintendent *forthwith*.
15. The petition stands disposed-of.
16. Pending applications, if any, also stand disposed-of.
17. The court records that Ms. Sampanna Pani, has appeared *pro-bono* for the prosecutrix/complainant in this case.

ANUP JAIRAM BHAMBHANI, J

DECEMBER 21, 2022

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