

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CRIMINAL MISCELLANEOUS JURISDICTION
APPELLATE SIDE**

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE BISWAROOP CHOWDHURY**

CRM (DB) 433 of 2023

**Bishnu Kirtoniya @ Kirtonia
Vs.
The State of West Bengal.**

Appearance:

For the Petitioner	: Mr. Jaydeep Kanta bhowmik, Adv. Mr. Dipankar Deb, Adv. Mr. Sayantan Bhowmik, Adv. Ms. Rikta Sarkar, Adv.
For the State	: Mr. Aditi Shankar Chakraborty, Ld. APP Mr. Ujjal Luksom, Adv. Mr. Sagnik Sankar Sikdar, Adv.
Judgment On	: 11.08.2023

Biswaroop Chowdhury, J.:

This is an application under Section 439 of the Code of Criminal Procedure filed by the petitioner who is in custody from 07/10/2022 in

connection with Mekhliganj P.S. Case No – 333 of 2022 dated 06.10.2022 under Sections 363/365/34 of the Indian Penal Code read with Section 6 of the Protection of Children from Sexual Offences Act 2012.

It is the contention of the petitioner that there is no iota of evidence to corroborate impugned claim of the defacto complainant. It is further contended that he is in custody for a protracted period as an under trial prisoner and without any contribution from his end and in this case charge sheet has been filed and there is no possibility of immediate conclusion of the case. It is also contended that the alleged Victim Girl had romantic relationship but the father of the said Victim Girl was against the said relationship.

Learned Advocate appearing for the state objects the grant of bail. Heard Learned Advocate for the petitioner and Learned Advocate appearing for the state perused the petition filed and materials in the case diary.

Upon perusing the materials in the case diary it appears that the case was instituted against the petitioner under Section 363 and 365 of the Indian Penal Code on the complaint of the father of the Victim Girl. Subsequently Section 4/6 of POCSO Act 2012 was added. Upon further perusal of the statement made under Section 164 CrPC by the Victim Girl it will appear that there was love affairs between the petitioner and the victim girl and the victim girl left with the petitioner, and resided with him for a period of 3 months. It will further appear that the defacto complainant, father of the victim girl knew about the love affairs but did not consent the marriage of the victim girl with

the petitioner as the victim girl was a minor. Although the victim girl stated about physical relationship with the petitioner but she refused to undergo medical test. Thus from the materials in the case diary it will appear that the act of the petitioner of residing with the victim girl is not all on a sudden but as a result of love affairs between the petitioner and the victim girl for last six months prior to lodging complaint and it was within the knowledge of the parents of the victim girl. As the matter involves romantic relationship not similar to other cases of POCSO it should be measured slightly on a different scale on the basis of a judicial decision which is discussed below.

In the case of ***Vijayalakshmi VS State being CrI.O.P. No. 232 of 2021 and CrI MP No. 109 of 2021*** the Hon'ble Madras High Court observed as follows:

“12. ‘As rightly recognized by the Learned Single Judge of this Court in Sabari’s Case (cited supra), incidences where teenagers and young adults fall victim to offences under the POCSO Act being slapped against them without understanding the implication of the severity of the enactment is an issue that brings much concern to the conscience of this Court. A reading of the Statement of Objects and Reasons of the POCSO Act would show that the Act was brought into force to protect children from offences of sexual assault, sexual harassment and pornography, pursuant to Article 15 of the Constitution of India, 1950 and the Convention on the Rights of the Child. However, a large array of

cases filed under the POCSO ACT seems to be those arising on the basis of complaints registered by the families of adolescents and teenagers who are involved in romantic relationships with each other. The scheme of the Act clearly shows that it did not intend to bring within its scope or ambit, cases of the nature where adolescents or teenagers involved in romantic relationships are concerned.”

The Hon’ble Court further observed as follows:

18. ‘In the present case, the 2nd Petitioner who was in a relationship with the 2nd Respondent who is also in his early twenties, has clearly stated that she was the one who insisted that the 2nd Respondent take her away from her home and marry her, due to the pressure exerted by her parents. The 2nd Respondent, who was placed in a very precarious situation decided to concede to the demand of the 2nd Petitioner. Thereafter, they eloped from their respective homes, got married and consummated the marriage. Incidents of this nature keep occurring regularly even now in villages and towns and occasionally in cities. After the parents or family lodge a complaint, the police register FIRs for offences of kidnapping and various offences under the POCSO Act. Several criminal cases booked under the POCSO Act fall under this category. As a consequence of such a FIR being registered, invariably the boy gets arrested and thereafter, his youthful life comes to a grinding halt. The provisions of the POCSO Act, as it stands today, will surely make the acts of the boy an offence due to its stringent nature. An adolescent boy caught in a

situation like this will surely have no defense if the criminal case is taken to its logical end. Punishing an adolescent boy who enters into a relationship with a minor girl by treating him as an offender, was never the objective of the POCSO Act. An adolescent boy and girl who are in the grips of their hormones and biological changes and whose decision-making ability is yet to fully develop, should essentially receive the support and guidance of their parents and the society at large. These incidents should never be perceived from an adult's point of view and such an understanding will in fact lead to lack of empathy. An adolescent boy who is sent to prison in a case of this nature will be persecuted throughout his life. It is high time that the legislature takes into consideration cases of this nature involving adolescents involved in relationships and swiftly bring in necessary amendments under the Act. The legislature has to keep pace with the changing societal needs and bring about necessary changes in law and more particularly in a stringent law such as the POCSO Act.

Upon perusal of the materials in the case diary although it would not be proper to make observation on the merits of the case but it should be decided as to whether petitioner should be enlarged on bail. In order to decide as to whether petitioner should be enlarged on bail it is necessary to consider some judicial pronouncement.

In the Case of Captain ***Jagjit Singh reported in AIR – 1962 SC. P-253.***
The Hon'ble Supreme Court observed that there are no hard and fast rules

regarding grant or refusal of bail, each case being necessary to be considered on its own merits. The matters always call for judicious exercise of discretion by the Court. Where the offence is of a serious nature the Court has to decide the questions of grant of bail light of such considerations as the nature and seriousness of the offence character of the evidence, circumstances which are peculiar to the accused a reasonable possibility of presence of the accused not being secured at the trial and reasonable apprehension of witnesses being tampered with the larger interest of the public or such similar other consideration.

In the case of ***Gudikanti reported in AIR-1978 S.C. P-429***, the Hon'ble Supreme Court has laid down the guidelines in the matter of granting or refusing bail. It is observed that deprivation of freedom by refusal of bail is not for punitive purposes but for the bifocal interest of justice. The nature of charge is a vital factor and the nature of evidence is also pertinent. The severity of the punishment to which the accused may be liable if convicted also bears upon the issue. Another relevant factor is whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being. The Court has also to consider the likelihood of the applicant interfering with the witnesses for the prosecution or otherwise polluting the process of justice. It is rational to inquire into the antecedents of the man who is applying for bail to find out whether he has a bad record particularly a record which suggests that he is likely to commit serious offences while on bail. In the case of *State V Balchand reported in AIR-1977 S.C. 2447*

it was observed by the Hon'ble Supreme Court that the basic rule is to grant bail except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like.

In ***Sanjay Chandra V CBI (2012) 1 SCC (Cri) 26: (2012) 1 SCC 40***, the Supreme Court has considered the right of liberty of any citizen including an accused of a non-bailable offence vis-à-vis his right to bail. It has been held that the provisions of CrPC confer discretionary jurisdiction on criminal Courts to grant bail to the accused pending trial or in appeal against convictions: since the jurisdictions are discretionary, it has to be exercised with great care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. The approach adopted by the trial court and affirmed by the High Court, is a denial of the whole basis of the Indian system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual. Bail is the rule and committal to jail an exception. Refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution. When there is a delay in trial, bail should be granted to the accused.

In the case of ***State of Kerala V Raneef (2011) 1 SCC. P-784*** the Hon'ble Supreme Court observed that in deciding bail applications an

important factor which certainly be taken into consideration by the Court is the delay in concluding the Trial.

Upon considering the judicial decisions discussed above it will appear that law laid down in different judicial pronouncements that bail is the rule and jail is the exception holds good even today unless there is provision under special law creating bar in the grant of bail. Thus following the principle that bail is the rule and jail is the exception will confer discretion to the Court to refuse bail when the offence is such that punishment provided is so severe and the materials against the accused are so strong and the antecedent of the accused is such that grant of bail will lead to abscondence of the accused or tampering with evidence or repeating such offence or such release creates panic in the mind of the witnesses to depose against the accused. The fact of the case should be such that even imposing of stringent condition would not be a deterrent to abscond or tamper with the witness, the Court may exercise discretion to refuse bail.

In the instant case although the petitioner is in custody for ten months without trial which is a ground for bail but the fact that 31/08/2023 is fixed by the Trial Court for consideration of charge this application of bail instead of being adjourned is rejected at this stage. As Victim Girl is a vital witness in POCSO case and completion of evidence of victim girl is a ground for consideration of bail of the accused the petitioner is at liberty to make

application for bail before the Learned Trial Judge after completion of evidence of the Victim Girl which should be considered in accordance with law.

This application stands disposed.

Urgent Photostat certified copies of the judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

(Biswaroop Chowdhury, J.)

Harish Tandon, J.

I am in agreement with the ultimate decision taken by my Brother in the draft judgment that the petition for bail is liable to be rejected but I intend to project my views in commensurate with the ultimate decision. A little prelude the protection of children from Sexual Offences (POCSO) Act, is required to be recapitulated before a journey is embarked on the factual matrix of the instant case. The aforesaid Act was aimed to effectively address the sexual abuse and sexual exploitation of the children with a less ambiguous and more stringent legal provisions as the legislators thought that the then existing provisions are inadequate and does not address the issues in this regard in the more effective manner. The Act does not imbibe within itself a protection of children a sexual assault by penetrated sexual assault but expanded its operation to any kind of a sexual harassment including the pornography with the establishment of a Special Court for trial of those offences.

The provisions contained in the said Act inculcated a sense of a gender neutrality with the primary object of the protection in the best interest and welfare of the child in every stages to ensure healthy physical, mental, intellectual and social development of children. The child is defined in the said Act without any ambiguity in the mind that any person below the age of 18 years is regarded as a child within the contour of the said Act and the paramount importance relating to the best natural and the well being of the

child appears to be a elixir of the said Act. At the advent of the said Act the quantum of punishment was much debated upon and by virtue of a subsequent amendment those have been enhanced and/or amended keeping in mind the sexual crime against the children to be heinous eroding the concept of compassion or empathy in favour of a perpetrator of such offence.

My Brother in his draft judgment have highlighted the teenagers effect after attaining puberty and a tendency to establish a physical relationship which is rampant in a society. It does not appeal to me in the sense that though there is a teenage infatuation towards the opposite sex in every girl of a teen age yet, the same cannot be regarded as a consensual physical relationship in a more developing society. The attraction with the opposite sex at teenage is basically to interact and enjoy the company of the opposite sex but establishment of the physical relationship at such age not only disturbs the biological development but having impact on the mental capacity to understand the consequences thereof and, therefore, should never be regarded as a consensual relationship as she has not reached the age of consent. Even Section 375 of Indian Penal Code does not recognises the consent of a child below the age of 18 years and the moment the law has been enacted to protect the children from such sexual assault or a sexual harassment in any form the law has to be interpreted in such manner.

In my opinion robust awareness programme must be undertaken at different levels amongst the adolescent to make him aware of the consequences

of such physical relationship so as to implement the law in tune with the object and purpose for which it is enacted.

The foremost duty of the Court while interpreting a statute is to keep in view the object and reasons of the Act and not to borrow any extraneous factors based upon a personal perspective as it would frustrate the very intendment sublime its promulgation and effective implementation. The concept of romantic relationship between age of 16 to 18 can never be stretched to a girl of 14 years otherwise the purpose of the defining a child in the said Act would be rendered meaningless.

In the instant case the girl is of 14 years of age and the accused is 24 years of age and it cannot be believed that the accused is not matured nor understand the consequences while establishing a physical relationship with such girl. In view of the above I concur with the ultimate decision of my Brother that the instant bail application deserves dismissal which in fact has been done.

(Harish Tandon, J.)