

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
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CRM-M-44728-2023 (O&M)

Date of decision: 14.09.2023

Harish Kumar

...Petitioner(s)

Vs.

State of Haryana & Another

...Respondent(s)

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

Present: - Mr. Saransh Sabharwal, Advocate
for the petitioner.

NIDHI GUPTA, J.

Present petition under Section 439 Cr.P.C. is filed seeking grant of regular bail to the petitioner in case FIR No.98 dated 29.03.2023 (Annexure P2) under Section 365 IPC (Sections 120-B, 363, 365, 366, 366-A, 376(2)(n) IPC and Sections 6, 17 and 21 of POCSO Act, 2012 added later on) registered at Police Station Kalka, District Panchkula, Haryana.

2. FIR in the present case was registered on the basis of complaint moved by Bala Rani/mother of the victim. As per the facts set out in the complaint, it has been stated that the complainant has two children. On 27.03.2023 at about 3.30 PM her elder daughter K--/victim told her that she is going to the house of her friend Nishtha but till 28.03.2023 she has not returned home. The complainant inquired about her whereabouts from her friend and nearby relatives but could not find her. The complainant suspected that her daughter has been enticed by Raj son of Harish as earlier also on 21.02.2023 Raj had enticed her daughter however she had returned on 22.02.2023. On 16.03.2023 accused Raj surrendered before the learned Magistrate Kalka and got bail. On 26.03.2023 her daughter told her that accused Raj has committed wrong act with her many times and he has threatened her that he will make her video viral. Accused Raj is an influential person and has links with political

members. On 23.03.2023 accused Raj assaulted her husband/father of the victim with a knife and in this regard, a complaint has been filed in the police station but no action has been taken against him. The complainant has all reasons to believe that her minor daughter has been kidnapped by accused Raj. The complainant sought legal action against the culprit. On the basis of aforesaid complaint, the present case FIR No.98 dated 29.03.2023 under section 365 of IPC was registered at Police Station Kalka.

3. During investigation, on 20.04.2023 uncle Arun Dhiman produced the victim in the police station. Thereafter, the statement of victim under section 164 Cr.P.C. was recorded by the learned Magistrate. In view of the facts emerged during investigation against the accused Raj and his father/the present petitioner, the offences under sections 6, 17, 21 of POCSO Act and Sections 363, 366-A, 376(2-N), 120-B of IPC were added. On 22.04.2023, accused Raj @ Raj Kumar son of Harish Kumar was arrested. Accused Harish Kumar (present petitioner) has been arrested on 25.04.2023.

4. Learned counsel for the petitioner inter alia submits that date of alleged incident is 27.03.2023, however, FIR has been registered after a delay of almost 2 days on 29.03.2023. Learned counsel further submits that the main allegation contained in the present FIR is that the petitioner's son namely Raj, has kidnapped the daughter of the complainant. Learned counsel contends that earlier also, FIR No.57 dated 21.02.2023 under Section 365 IPC was registered at Police Station Kalka, Panchkula (Annexure P1), on the basis of statement of father of the victim, on the same set of allegations that the son of the petitioner namely Raj had enticed away the daughter of the complainant. It is submitted that now the present FIR no. 98 dated 29.3.2023 had also been registered under Section 365 IPC with the same allegation that the son of the petitioner has kidnapped daughter of the complainant however, this time on the statement of the mother of the victim. It is submitted that accordingly, the allegations made in both the above said FIRs are identical; and that the petitioner has not been named in either of the FIRs.

5. It is stated that moreover, the victim has been produced before the police authorities by her family members for recording of her statement.

6. It is submitted that the victim in her statement under Section 164 Cr.P.C. dated 21.04.2023 (Annexure P3) has categorically stated that she was in a consensual relationship with son of the petitioner namely Raj for the last two-and-a-half years; and that they had eloped together in February, 2023. It is submitted that the petitioner has been roped into the case only on the ground that the victim in her statement under Section 164 Cr.P.C. has stated that the petitioner had given Rs.50,000/- to his son Raj to enable both of them to go to Nepal. It is stated that it is only thereafter that offences under Sections 6, 17 and 21 of POCSO Act, 2012 and Sections 363, 366-A, 376(2)(n) and 120-B IPC have been incorporated in the present FIR on 21.04.2023.

7. It is submitted that however, the prosecutrix has also clearly stated in her statement that she was waiting to turn 18 years of age so that she could marry Raj. Learned counsel contends that therefore, no offence is made out as admittedly, date of birth of the victim is 22.01.2006. Therefore, on the Date of incident i.e. 27.03.2023 age of the victim was 17 years. It is submitted that as per the judgment of Madras High Court rendered in the case of **"Sabari Vs. Inspector of Police & Others"** 2019 SCC OnLine Mad 18850: Law Finder Doc Id # 1443121 it has been held that "40. *Therefore, on a profound consideration of the ground realities, the definition of 'Child' under Section 2(d) of the POCSO Act can be redefined as 16 instead of 18. Any consensual sex after the age of 16 or bodily contact or allied acts can be excluded from the rigorous provisions of the POCSO Act and such sexual assault, if it is so defined can be tried under more liberal provision, which can be introduced in the Act itself and in order to distinguish the cases of teen age relationship after 16 years, from the cases of sexual assault on children below 16 years....."*

8. It is further submitted that thereafter, Raj was arrested on 22.04.2023 and the petitioner was arrested on 25.04.2023. It is stated

that charges were framed on 23.08.2023 and case is now fixed for prosecution evidence on 12.10.2023. Learned counsel submits that if this Court is pleased to release the petitioner on bail, the petitioner undertakes not to tamper with evidence or influence the witnesses.

9. Notice of motion.

10. Mr. Jaswinder Singh Arora, DAG Punjab accepts notice on behalf of respondents and files custody certificate dated 13.09.2023 which is taken on record. As per custody certificate, the petitioner is in custody for 4 months and 18 days pending trial. Learned State Counsel opposes the grant of bail to the petitioner and submits that serious allegations have been made against the petitioner.

11. I have heard learned counsel for the parties.

12. Without commenting on the merits of the matter, however, keeping in view the totality of the facts and circumstances of the case, including the fact that perusal of the custody certificate reveals that there is no other case against the petitioner; and admittedly, petitioner was not named in the FIR; and that conclusion of the trial will take considerable time as prosecution evidence is yet to commence, accordingly, the present petition is **allowed**. The petitioner Harish Kumar s/o Ram Lakhan is ordered to be released on regular bail on his furnishing bailbonds/surety bonds to the satisfaction of the CJM/Duty Magistrate concerned. However, it is made clear that nothing stated above shall be deemed as an expression of opinion on the merits of the case.

13. Pending application(s) if any also stand(s) disposed of.

14.09.2023

Sunena

(Nidhi Gupta)

Judge

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No