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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: 12.07.2023

+ **BAIL APPLN. 489/2023 & CRL.M.A. 12824/2023**

SHUBHAM PAL

..... Petitioner

Through: Mr. Surinder Singh, Adv.

versus

STATE OF NCT OF DELHI & ORS.

..... Respondents

Through: Mr. Hemant Mehla, APP for State with SI Manju, PS. Moti Nagar. Ms. Kamna, Ms. Dipika Saxena, Ms. Bindita Chaturvedi, Mr. Deepanshu Dudeja and Mr. Suraj Singh, Advs. for victim.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. The present application has been filed under Section 439 CrPC seeking regular bail in FIR No. 474/2022 under Sections 363/376 IPC and Section 4 of POCSO Act, registered at Police Station Moti Nagar, New Delhi.

2. The FIR was registered on the complaint made by the mother of the prosecutrix alleging that her younger daughter along with the prosecutrix (elder daughter), who was then aged about 15 years, had gone out of the house to buy ice cream. At that time, the petitioner



who lives in the neighbourhood came on a motorcycle and coaxed the prosecutrix to sit on his motorcycle and thereafter, the petitioner ran away with the prosecutrix.

3. *Vide* order dated 25.04.2023, this Court directed the learned Trial Court to examine the prosecutrix and the testimony of the prosecutrix was accordingly recorded on 02.05.2023 and 02.06.2023. A copy of the testimony of the prosecutrix has now been filed.

4. The learned counsel for the petitioner submits that the prosecutrix in her testimony has not supported the case of the prosecution. He further submits that from the testimony of the prosecutrix it can be inferred that the petitioner and the prosecutrix were in a consensual romantic relationship. The prosecutrix has not alleged any sexual assault on part of the petitioner. Further, from the testimony of the prosecutrix, it is clearly borne out that the prosecutrix was not being treated well at home by her parents, therefore, she persuaded the petitioner to take her away.

5. Drawing attention of the Court to the statement of the prosecutrix recorded under Section 164 CrPC, the learned counsel for the petitioner contends that even in the said statement, there is no allegation of sexual assault or any sexual relationship having been established between the petitioner with the prosecutrix.

6. It is further argued that the petitioner is a young boy presently aged about 25 years and is already in custody since 23.08.2022 i.e., for almost 11 months now. He also contends that the antecedents of the petitioner are clean.



7. *Per contra*, Mr. Hemant Mehla, the learned APP for the State submits that the prosecutrix is a minor, therefore, even if she has gone with the petitioner out of her own will, such consent has no relevance in law.

8. Referring to the MLC, the learned APP further submits that the doctor who examined the prosecutrix has opined that the possibility of sexual assault cannot be ruled out.

9. I have heard the learned counsel for the petitioner, as well as, the learned APP for the State and have perused the record.

10. This court is conscious of the fact that at this stage when the bail application of the petitioner is being decided, evidence cannot be appreciated in detail as it may prejudice the case of the parties.

11. However, only for the limited purpose of deciding the present bail application, this Court has perused the testimony of the prosecutrix who appeared as PW-1 and finds that the prosecutrix knew the petitioner for the last five years and later on developed friendly relations with him, which was not acceptable to the parents of the prosecutrix. When the prosecutrix continued to be in touch with the petitioner over mobile phone or otherwise, the mother of the prosecutrix expressed her displeasure and stated that she does not want the prosecutrix to stay in her house, which led the prosecutrix to leave her home. After leaving her home, the prosecutrix called the petitioner and persuaded him to take her away.

12. It is also in the testimony of the prosecutrix that the petitioner tried to reason with the prosecutrix to go back to her home but she refused. The prosecutrix has further stated that the petitioner had



asked her to call and inform at her home that she is with the petitioner but the prosecutrix refused. Thus, from the testimony of the prosecutrix, it *prima facie* appears that she left her parents' house on her own accord and persuaded the petitioner to take her away.

13. She has also stated that as long as she stayed with the petitioner, the petitioner did not do anything wrong with her nor did he establish physical relations with her.

14. This Court is cognizant of the fact that the prosecutrix is minor but at the same time it cannot be overlooked that the petitioner at the relevant time was aged about 24 years and the prosecutrix was of sufficient maturity and intellectual capacity, who joined the company of the petitioner on her own will.

15. This Court in “**XXX vs State Govt. of NCT And Anr**” in Bail Application 2729/2022 observed that the intention of POCSO was to protect the children below the age of 18 years from sexual exploitation. It was never meant to criminalise consensual romantic relationships between young adults.

16. Again in “**Dharmender Singh Vs. The State (Govt. Of NCT, Delhi)**” in Bail Application 1559/2020, this Court granted bail to the accused *inter alia* observing that the possibility of reciprocal physical relationship between the accused and the minor victim cannot be ruled out. Further, the Court also laid down the contours within which the bail application of a person accused under the POCSO Act is to be considered. The relevant part of the said decision reads as under:-

“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.*



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.”

17. In the present case, the prosecutrix, who is a material witness, has not supported the case of the prosecution. On the contrary, it appears from her deposition that she was in romantic relationship with the petitioner.

18. No doubt that the victim is a minor and the MLC does not rule out the possibility of sexual assault but what weightage is to be given to the MLC in the light of the testimony of the prosecutrix, is something for the learned Trial Court to decide after conclusion of the trial.

19. However, at this stage while considering the bail application, the testimony of the prosecutrix, who has not supported the case of the prosecution, cannot be ignored. Further, at this stage, apart from the allegations, the other parameters for granting of bail are also required to be considered.

20. The petitioner is in judicial custody since 23.08.2022. The testimony of the prosecutrix has already been recorded, there cannot be any apprehension about the main witness being influenced.



21. Further, it is not the case of the prosecution that there is any criminal history of the petitioner.

22. The object of judicial custody is to secure the presence of the accused during the trial. Since the trial is underway and the statement of the prosecutrix has already been recorded, who has not supported the prosecution version, there is no possibility of the accused absconding or fleeing from justice. The presence of the accused can otherwise, be secured at the time of trial by putting appropriate conditions.

23. In view of the above, I am satisfied that the petitioner has made out a case for grant of regular bail. Accordingly, the petitioner is admitted to regular bail subject to his furnishing personal bond in the sum of Rs.20,000/- and a Surety Bond in the like amount subject to the satisfaction of the Trial Court/CMM/Duty Magistrate, further subject to the following conditions:-

- a) Petitioner/applicant will not leave the city without prior permission of the Court.
- b) Petitioner/applicant shall appear before the Court as and when the matter is taken up for hearing.
- c) Petitioner/applicant shall provide all mobile numbers to the IO concerned which shall be kept in working condition at all times and shall not switch off or change the mobile number without prior intimation to the Investigating Officer concerned. The mobile location be kept on at all times.
- d) Petitioner/applicant shall not indulge in any criminal activity and shall not communicate with or come in contact with the witnesses or any family members of the witnesses.



24. It is made clear that the observations made hereinabove are only for the purpose of considering the bail application and the same shall not be deemed to be an expression of opinion on merits of the case.
25. The application stands disposed of.
26. Copy of the order be forwarded to the concerned Jail Superintendent for necessary information and compliance.
27. Order be uploaded on the website of this Court.

JULY 12, 2023/dss

VIKAS MAHAJAN, J



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