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

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Judgment delivered on: 01.11.2023

+ **BAIL APPLN. 1576/2023**

SONU

.... Petitioner

Through: Ms. Dolly Sharma, Adv.

versus

STATE

.... Respondent

Through: Ms. Richa Dhawan, APP with SI
Meetu Yadav, P.S. Sangam Vihar
Mr. Abhay Gahlot, Ms. Swadha
Gupta and Mr. Ayush Singh, Adv.
for complainant

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. The present petition has been filed under section 439 CrPC seeking regular bail in FIR No. 282/2022 under section 376, 323, 506 IPC and section 6 POCSO Act, registered at Police Station Sangam Vihar, New Delhi.
2. The FIR was registered at the instance of prosecutrix alleging that the petitioner has cheated the prosecutrix on the pretext of marriage. When the prosecutrix was 16½ years old, the petitioner/accused, who belongs to her village, eloped with her promising to marry her and took her to Sangam Vihar Delhi. Her parents registered a case vide FIR No. 215/2019 U/s 363/366A IPC at PS Sadar, Sonapat, Haryana. In her statement u/ s 164 Cr.P.C, she stated that she had not eloped with the petitioner/accused. Hence, a cancellation report was filed. At that time, the prosecutrix was a minor and didn't want to go with her parents, so she was sent to Bal Gram, Shelter Home.



3. On 09/09/2019, prosecutrix fled from Bal Gram Shelter Home allegedly on the directions of petitioner/accused and met him. Another FIR No. 357/2019 under section 346 IPC registered at PS Rai, Sonipat, Haryana in this regard.
4. On 17.08.2021, when the prosecutrix had attained the age of majority, she gave her statement under Section 164 CrPC in FIR No.357/2019 registered at PS Rai, Sonipat (Haryana) that on 22.05.2019 she had left her home out of her free will and had gone to Bal Gram Rai and had stayed there for four months and after that she had gone to Beas Ashram and on 17.08.2021 she voluntarily came back. The prosecutrix further deposed that she has no complaint against anyone nor she has been pressurised in any manner.
5. Subsequently, the present FIR has been registered on 12.05.2022 under Sections 376/323/506 and Section 6 of POCSO Act at PS Sangam Vihar. It is alleged in the FIR that the petitioner had taken away the prosecutrix from her home when she was just 16½ years on the pretext of marriage. He kept the prosecutrix for one month at Sangam Vihar, Delhi and made physical relations with her. After one month, the prosecutrix went to Sadar Police Station, Sonipat where she got her statement recorded and then she stayed at Bal Gram for four months. Thereafter, she again came in contact with the petitioner. On petitioner's request, she again ran away with him. At that time, her age was 17 years. The petitioner had kept the prosecutrix in a room taken on rent where he had been establishing physical relations with her on the pretext of marriage. When the prosecutrix attained the age of majority, she was asked to give statement at police station. After the prosecutrix completed 18 years, she requested the petitioner to marry her but the petitioner refused and physically assaulted her. On 11.05.2022, the petitioner left the room threatening the prosecutrix and, thereafter, prosecutrix contacted her sister and got the present FIR registered on 12.05.2022.



6. The fact that the prosecutrix was major as on 17.08.2021 at the time of recording of her statement under Section 164 CrPC in FIR No. 357/2019 PS Rai, Sonipat (Haryana) is borne out from the testimony of prosecutrix recorded on 15.11.2022 in the present FIR where she has mentioned her date of birth as 30.03.2023.

7. Learned counsel for the petitioner submits that it is a case of romantic consensual relationship. To buttress her contention, she submits that the prosecutrix in the earlier two FIRs registered at Sonipat (Haryana) have not made any allegation against the petitioner.

8. She invites the attention of the Court to the final report/charge-sheet filed by the police under Section 173 CrPC in connection with the aforesaid FIR No.215/2019, wherein it has been mentioned that the statement of the prosecutrix was recorded under Section 164 CrPC before Duty Magistrate Shri Vinay Kakran, JMIC, Sonipat where she not only refused her medical examination but also stated that parents and brothers of the prosecutrix were forcefully getting her married and to avoid marriage against her wishes she had voluntarily gone to her friend's house. On the basis of the statement of the prosecutrix under Section 164 CrPC closure report was filed observing that no cognizable offence was found to have been committed. It also appears from the final report that the prosecutrix was sent to shelter home as she had refused to go to her own house.

9. She further submits that in the second FIR i.e., FIR No.357/2019 registered at PS Rai, District Sonipat under Section 346 IPC, the prosecutrix voluntarily gave her statement under Section 164 CrPC on 17.08.2021 that she had left her home out of her own free will and had gone to Bal Gram, Rai where she stayed for four months and thereafter, had gone to Beas Ashram from where she came back on 17.08.2021. She submits that the prosecutrix had also deposed that she has no complaint against anyone nor she has been pressurised in any manner.



10. She submits that insofar as the present FIR is concerned, the same came to be registered only after the prosecutrix came in contact with her family members. Referring to the testimony of PW-4, the brother of the landlord of the premises where prosecutrix stayed with the petitioner, she submits that the prosecutrix was voluntarily residing with the petitioner as his wife and she was in consensual relationship with him. While residing with the petitioner, not only the prosecutrix was pursuing her studies and going out of the house but had ample opportunity to raise alarm or to complain to the police, had it not been a voluntary decision to stay with the petitioner.

11. She further submits that the prosecutrix was more than 18 years of age when her statement was recorded under Section 164 CrPC in connection with FIR No.357/2019 registered at PS Rai, District Sonipat.

12. It is also contended by the learned counsel that the petitioner is a young boy having clean antecedents and he was working in the Indo-Tibetan Boarder Police (ITBP) at the time of his arrest. She submits that the petitioner is in custody since 12.05.2022 and his custody is no more required since the investigation is complete and the trial is underway.

13. She submits that the petitioner was granted interim bail by this Court vide order dated 01.06.2023 for a period of ten weeks on his medical grounds and the petitioner duly surrendered after the expiry of the period of interim bail despite his medical condition had not improved much, therefore, there is no apprehension of the petitioner absconding or fleeing from justice.

14. She further contends that since the testimonies of the prosecutrix and other material prosecution witnesses, have already been recorded, there is no apprehension that the petitioner may influence the material witnesses. She, therefore, urges that the petitioner may be enlarged on bail.

15. *Per contra*, Ms Richa Dhawan, the learned APP for the State submits that the prosecutrix was minor when she left her home in the year 2019, therefore, the



consent of the prosecutrix has no relevance in law and that she has supported the case of the prosecution.

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

17. This court is cognizant of the fact that since the charges have been framed by the learned Trial Court, the threshold of satisfaction required would be higher while considering the bail application of the petitioner in view of the impact of Section 29 of the POCSO Act.

18. A co-ordinate bench of this court in ***Dharmander Singh v. State, 2020 SCC OnLine Del 1267***, while considering the effect of Section 29 of the POCSO Act, when an application for bail is to be considered after framing of charges, laid down as under:

*“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.*

19. The Court further enumerated certain real life considerations, any one or more of which if exists in a particular case, are ought to be considered while deciding a bail plea at the post-charge stage, in addition to the nature and quality of the evidence before it. The relevant part of the judgment 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.”

(emphasis supplied)

20. From the above, it is clear that the Court would factor in certain real life considerations to assess as to whether the accused in a given case is entitled to bail or not. Now reverting to the facts and the real life considerations as are borne out from the present case, it is imperative to note that the prosecutrix in her testimony recorded on 15.11.2022 has stated that she and the petitioner belongs to the same village, same caste and gotra. Both were unmarried. As per the FIR, the period of occurrence is from June 2019 to March 2022. During large part of the alleged period of occurrence spent by the prosecutrix with the petitioner, more particularly from 30.03.2021 till 11.05.2022, the prosecutrix was major as she has deposed that her date of birth is 30.03.2003.

21. No doubt that during period of alleged occurrence prior to 30.03.2021, the prosecutrix was minor but at the same time it cannot be overlooked that the prosecutrix was aged 16½ years when she first left her home. Thus, she was of sufficient maturity and intellectual capacity to understand the implication of her conduct. The petitioner was unmarried, aged about 28 years and was working in the ITBP at the relevant time. Thus, legally and financially he was also in a position to start his family life.

22. From the testimony of Deepak Roy/PW-4, who is the brother of the landlord of the premises where the petitioner stayed along with the prosecutrix as tenant, shows that the petitioner and the prosecutrix were staying as husband and wife and the duration of their stay as tenant was about one year and nine months. It is also in the testimony of PW-4 that the wife of the petitioner would go



somewhere for studying and he had seen her leaving the house with books. Apparently, the prosecutrix was not under any threat or pressure from the petitioner. Further, if this fact is seen in the light of the statement of the prosecutrix recorded under Section 164 CrPC in connection with FIR No.215/2019 registered at PS Sadar, Sonipat (Haryana) where she stated that to avoid marriage against her wishes she had left her home, it *prima facie* appears that the prosecutrix was in consensual romantic relationship with the petitioner and it is out of her own free will she had been living with the petitioner ostensibly as his wife.

23. It seems that after the prosecutrix was traced by his family / came in contact with her family members, that the present FIR came to be registered. Till then, prosecutrix had been residing with the petitioner happily and voluntarily apparently as his wife for fairly long period extending to one year and nine months. In such a situation, *prima facie*, it can not be said the prosecutrix had continued under the alleged '*misconception of fact*' within the meaning of Section 90 IPC that the petitioner would marry her. The reason for which the petitioner and the prosecutrix could not marry seems to be the opposition by their respective families, possibly on account of they belonging to the same caste and gotra. However, it is for the Trial Court to form a definite opinion after detailed sifting of evidence, but at this stage, given the facts and circumstances of the case, it cannot be ruled out that the allegation of rape and establishing physical relationship on the false promise of marriage have been made by the prosecutrix under the pressure of her family members.

24. The aforesaid facts and the real life considerations meet the higher threshold required to be met in terms of Section 29 of POCSO Act after the framing of charge and also tilt the balance in favour of the petitioner for grant of bail him.



25. This Court in “*Ajay Kumar 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.

26. That apart, the testimonies of the prosecutrix and material witnesses have already been recorded, therefore, there cannot be any apprehension about the material witnesses being influenced.

27. Further, it is not in dispute that the antecedents of the petitioner are clean. The petitioner, who is aged about 28 years, is already in custody since 12.05.2022. Keeping the petitioner in jail will not serve any useful purpose; rather subjecting young boy in the company of hardened criminals would do more harm than good to him.

28. It is also not in dispute that the petitioner, when released on an interim bail on his medical grounds, did not misuse the liberty, therefore, he does not seem to be a flight risk.

29. 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. 25,000/- and one 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 shall appear before the Court as and when the matter is taken up for hearing.
- b) Petitioner/applicant shall provide his permanent address as well as his mobile number to the IO concerned. The mobile shall be kept in working condition at all times and shall not change the same without prior intimation to the Investigating Officer concerned.



- c) 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.
30. 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.
31. The application stands disposed of.
32. Copy of the order be forwarded to the concerned Jail Superintendent for information and necessary compliance.
33. Order *dasti* under the Signatures of the Court Master.
34. Order be uploaded on the website of this Court.

VIKAS MAHAJAN, J

November 01, 2023
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