

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 16th January, 2023

Pronounced on: 24th January, 2023

+

BAIL APPLN. 1949/2022

ROHIT SRIVASTAVA

..... Petitioner

Through: Mr. Lokesh Kumar Mishra, Mr.
Nadeem Ahmad, Advocates.

versus

STATE OF NCT OF DELHI AND ANR

..... Respondents

Through: Mr. Aman Usman, APP for State.
Mr. Hemant Singh, Ms. Ruchika
Sharma, Advocates alongwith
complainant in person.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA J.

1. The present application under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'CrPC') seeks grant of regular bail in case FIR No. 71/2019, under Sections 376/377/328/506 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO').
2. The present case was registered on 17.02.2019, on the complaint of the

prosecutrix, wherein it was alleged that the prosecutrix, an eight-year-old minor, was sexually assaulted by the applicant on various occasions.

3. The facts of the present case, as stated in the status report, authored by Inspector Sanjay Neolia, SHO, P.S. New Ashok Nagar, dated 26.08.2022, are as under:

"I. That the brief facts of the case are that on 17.02.19, DD No 19A regarding sexual assault with minor girl was received in Police Station, on which SI Seema Bhati reached at spot i.e H.No. B-1/302, Gaii No. 1, New Ashok Nagar, Delhi where victim along with her parents met her. Medical examination of victim was conducted at LBS Hospital on 17.2.19 vide MLC No. 75/19. Statement of victim was recorded in which victim stated that a person namely Rohit (petitioner), who was also residing at the same building on first floor. When victim had gone to first floor to play then petitioner called her and he put his penis in her mouth and forced her to suck and left her only when she started weeping. One day petitioner also gave her Rasna to drink then she slept there (in the room of petitioner). Petitioner used to kiss her oil lips and also threatened the victim that if she narrates the incident to anyone then he will kill her parents. Thereafter, a case u/s 376/377/328/506 IPC & 6 PocsO Act was registered on the statement of victim and investigation was taken up."

4. Thereafter, the statement of the prosecutrix under Section 164 of the CrPC was recorded. After completion of the investigation, chargesheet was filed against the applicant for the offences punishable under Sections 376/377/328/506 of the IPC and Section 6 of the POCSO Act, before the learned Additional Sessions Judge.

5. Learned counsel for the Applicant submits that there is discrepancy in the testimony of the prosecutrix and her parents, with respect to the number of times the alleged incident took place, and no specific details of the alleged incident have been stated by them in either the MLC, FIR or during their Chief and Cross-examination, therefore, no reliance can be placed on the

same. He further states that the prosecutrix and her mother had refused to undergo internal medical examination, therefore, there is no medical evidence on record to support their allegation.

6. The learned counsel for the Applicant further submits that the applicant has clean antecedents and has been in custody since 18.02.2019. He had earlier been granted interim bail by this Court, which was not misused by him. It was further urged that the trial is likely to take a long time and this should be considered for grant of bail.

7. Furthermore, it is averred by the learned counsel for the applicant that there was a financial dispute between the applicant and the father of the prosecutrix due to which he has been falsely implicated in the present case. He relies upon the CDR filed alongwith the supplementary chargesheet to show that numerous calls were exchanged between the father of the prosecutrix and the applicant.

8. It is further argued by the learned counsel for the applicant that no case under Section 377 of the IPC is made out against the applicant, therefore, he shall be granted bail. In support of his argument, the learned counsel relied on the following judgments:

- State (Govt. of NCT of Delhi) v. Mullah Muzib (Criminal Leave Petition No. 62/2015, dated 09.02.2015)
- Shiv Chander v. State of NCT of Delhi & Anr., (2021) 01 DEL CK 0254.

9. Further, the learned counsel for the Applicant pressed on the submission that during cross-examination, the mother of the prosecutrix stated that the incident had taken place on 14.02.2019 at around 02:00 – 03:00 PM, when her daughter, i.e., the prosecutrix, was found unconscious by her and

her two other children, on the stairs between the ground floor and the first floor. However, in the MLC, dated 17.02.2019, it has been recorded that the incident happened multiple times in the last six months and the last one was a week ago.

10. Learned APP for the State has strongly opposed the bail on the ground that the victim was of tender age when the alleged incident took place and the charges framed against the accused are serious in nature. He further added that there are no inconsistencies in the statements of the prosecutrix and she has duly supported her complaint in the statement under Section 164 of Cr.P.C, as well as, in her testimony recorded before the trial Court.

11. As per the report received by the Ld. Principal District & Sessions Judge, East District, Karkardooma Court, on 12.09.2022, in view of the order dated 30.08.2022 passed by this Court, with respect to the stage of trial and the time period in which the trial is likely to be completed, it has been informed that out of the 16 prosecution witnesses that have to be examined, the prosecution has already examined the material witnesses, including the prosecutrix, her parents and the landlord, and only 7 witnesses are left to be examined. It is also stated that sincere effort shall be made to conclude the prosecution evidence, as well as recording of the statement of the accused, as expeditiously as possible and preferably within 2-3 months from the next date of hearing, i.e., 03.11.2022, however, exact time to conclude the trial cannot be specified since after recording of the statement of the accused, it will be decided whether accused wants to lead evidence in defence or not.

12. A perusal of the record reflects that charges *qua* the applicant in the present case have been framed under Sections 376AB/328 of the IPC and Section 6 of the POCSO Act.

13. This Court has perused the records of the case, including the testimony of the prosecutrix and her parents, recorded before the trial Court. So far, there is no substantive material in support of the defence taken by the applicant regarding false implication on the ground of a subsisting money dispute between the applicant and the father of the prosecutrix. It is further observed that the testimony of the prosecutrix is consistent with respect to the alleged act committed by the present applicant. During cross-examination, she recalled one incident of quarrel between her father and the applicant, however, she denied the suggestion that the said case was registered falsely due to some money dispute between her father and the applicant. It is pertinent to note that the prosecutrix was 8-year-old at the time of the incident, thus, minor inconsistencies will not materially affect the testimony of the said witness.

14. The judgments relied upon by learned counsel of the applicant do not apply to the facts of the present case as the charges have not been framed under Section 377 of the IPC.

15. Furthermore, Section 29 of the POCSO Act provides that in cases of offences under Section 3, 5, 7 or 9 of the said Act, the Special Court shall presume that the person being prosecuted for the said offences has, as the case may be, committed or abetted or attempted to commit the alleged offence. The said Section reads as under:

"29. Presumption as to certain offences.—Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved. "

It is pertinent to note that in the present case, the applicant has been charged under Section 6 of the POCSO Act, which provides for punishment for 'aggravated penetrative sexual assault'. The said offence has been defined under Section 5 of the POCSO Act and thus the presumption provided for under Section 29 of the said Act would apply to the facts of the present case.

16. In view of the aforesaid facts and circumstances, this Court is not inclined to grant bail to the applicant.

17. The present application is dismissed at this stage and disposed of. Pending application(s), if any, also stand disposed of accordingly.

18. Needless to state, nothing herein shall be construed as an expression on the merits of the case pending before the trial Court.

**AMIT SHARMA
JUDGE**

JANUARY 24, 2023/ab

