



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-10266-2024 (O&M)

Reserved on: 29.04.2024

Date of Decision:- 29.05.2024

RADHE SHAM

.....PETITIONER

Vs.

STATE OF PUNJAB

...RESPONDENT

CORAM: HON'BLE MS. JUSTICE HARPREET KAUR JEEWAN

(As on the reserved date)

Present: Mr. A.S. Manaise, Advocate,
for the petitioner.

Ms. Himani Arora, A.A.G., Punjab.

Mr. Goldy Jakhar, Advocate,
for the complainant.

HARPREET KAUR JEEWAN, J.

1. The present petition has been filed under Section 438 Cr.P.C. for grant of anticipatory bail to the petitioner in case FIR No. 100, dated, 08.12.2022, registered at Police Station Khui Khera, District Fazilka, under Sections 376, 506 and 456 of the IPC and Section 4 of the Protection of Children from Sexual Offences, Act, 2012 (for short '*the POCSO Act*').

2. The FIR was registered against the petitioner on 08.12.2022 on the statement of the victim with the allegations that the petitioner had



committed rape upon the victim without her consent. The age of the victim was recorded as 15 years in the FIR. It has been alleged in the FIR that on 04.12.2022, the victim was present in the house along with her grandmother. At about 10:30 p.m. when the victim went to the washroom, the petitioner who is aged about 37 years and residing in the neighbourhood of the victim entered the house of the victim by scaling the boundary wall and forcibly took her to the fields where he committed rape upon the victim.

2.1 The State has filed a short reply, dated 14.04.2024, by way of an affidavit of Sh. Shubeg Singh, PPS, Deputy Superintendent of Police, Fazilka. As per the said status report, on 09.12.2022, the statement of the victim was recorded under Section 164 Cr.P.C (Annexure R-2) and before that her medical examination was conducted from the Civil Hospital on 06.12.2022. The investigating agency has verified the date of birth of the victim as 12.03.2007 as per the school records.

2.2 As per the aforesaid reply, on the basis of an application submitted by the younger brother of the petitioner (Sunil Kumar), dated 01.02.2023, regarding innocence of the petitioner, the Deputy Inspector General of Police, Ferozepur Range, ordered for conducting the inquiry. It is further contended in the status report that in the said application brother of the petitioner alleged that Satdev, son of Mohan Lal, resident of the same village had a suspicion on the character of his minor daughter, as such Satdev inquired from his daughter regarding the said suspicion and she told her father that petitioner (Radhe Sham) usually makes jokes to her. On 06.12.2022, Satdev along with his brother Ram Chander and a relative Vinod Kumar called the petitioner (Radhe Sham) in the house of one Vinod



Kumar and when the petitioner went there, he was beaten up. He was made naked and was insulted and ultimately he was ousted from the said house. Due to the said insult, the petitioner (Radhe Sham) fled away from the village towards the brick lined Canal. His brother and his family members tried to search the petitioner-Radhe Sham but could not find him. So, there was a common saying in the village that he had jumped into the canal. It was alleged that Satdev and his other relatives got the minor admitted in the hospital for her medico-legal examination and got registered the present FIR out of fear. The petitioner Radhe Sham was ready for DNA examination. During the said inquiry/investigation, after recording the statement of various witnesses, it was concluded that the family of victim had merely a doubt upon the character of the victim and there was no link between Radhe Sham and the victim. The blood sample of the petitioner was sent for DNA examination on 27.03.2023 in Civil Hospital, Fazilka. As per the Forensic DNA report, dated 11.09.2023 (Annexure R-3) by the Director Forensic Science Laboratory, Punjab, S.A.S. Nagar, the human semen and the male DNA report, dated 11.09.2023, was not detected on vaginal swab of the victim. As per the reply, thereafter, the SHO of the police station made a recommendation that a cancellation report be submitted in the Court on the basis of investigation, as well as, on the basis of the forensic DNA report.

3. Learned counsel for the petitioner contends that the petitioner has been falsely implicated in this case and he is ready to join the investigation. There is a delay of 04 days in lodging the FIR.

4. The State counsel has not raised objections.



5. Learned counsel for the complainant has opposed the present petition, on the ground that the police is merely supporting the petitioner and they have not taken any action against the petitioner.

6. I have considered the aforesaid submissions.

7. The FIR was registered on 08.12.2022. The statement of the minor victim who is aged 15 years was also recorded by the Judicial Magistrate under Section 164 Cr.P.C on 09.12.2022. The medical examination of the victim was also conducted before the recording of the statement under Section 164 Cr.P.C.. As per the medico-legal report (Annexure R-1), the victim has given the history of sexual assault at a farm house on 04.12.2022. Four vaginal swabs were taken for DNA analysis and detection of spermatozoa. The victim has supported her version in the statement recorded under Section 164 Cr.P.C. on 09.12.2022 before the Magistrate. Merely, on the basis of an application given by the brother and a subsequent another application given by the father of the petitioner, the investigating agency obtained a DNA comparison report by taking the blood sample of the petitioner. On the basis of the said report, the Station House Officer of the police station has recommended for cancellation report as human semen and male DNA was not detected on the vaginal swab of the victim.

8. Keeping in view the aforesaid facts and circumstances of the present case, the recommendation for cancellation report by the Station House Officer is misconceived and contrary to the provisions of Sections 3 & 4 of the Act of 2012. As per Section 3 of the Act of 2012 “the offence of penetrative sexual assault” has been defined whereas the said offence is



punishable under Section 4 of the Act. The FIR is under Section 4 of the Act of 2012.

9. Section 3 of the Act of 2012 reads as under:-

“3. Penetrative sexual assault.—A person is said to commit “penetrative sexual assault” if— (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person. .—A person is said to commit “penetrative sexual assault” if —

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such



person or any other person.”

10. Keeping in view the elaborate definition of the offence of penetrative sexual assault, non-matching of the DNA of the petitioner-accused with the vaginal swab of the victim and absence of human semen from the vaginal swab of a female victim would not rule out the offence of “penetrative sexual assault” wherein the minor victim had supported her version in a statement recorded under Section 164 Cr.P.C., given her history before the Medical Officer regarding sexual assault and there is a *prima facie* medical opinion by the doctor that the offence sexually abusing cannot be ruled out in the medical report (Annexure R-1).

11. In the case under Sections 363, 376, 376 (2) (f) and 302 of the IPC, where there was a failure to conduct the DNA test of the sample taken from the accused, Hon’ble the Apex Court in Sunil vs. Madhya Pradesh 2017 (4) SC 393, has observed that a positive result of the DNA test would constitute clinching evidence against the accused, if however, the result of the test is in the negative, i.e. favouring the accused or if DNA profiling had not been done, the weight of the other material evidence on record still have to be considered. The relevant part reads as under:-

“From the provisions of Section 53A of the Code and the decision of this Court in Krishan Kumar(supra) it does not follow that failure to conduct the DNA test of the samples taken from the accused or prove the report of DNA profiling as in the present case would necessarily result in the failure of the prosecution case. As held in Krishan Kumar (para 44) Section 53A really "facilitates the prosecution to prove its case". A positive result of the DNA test would constitute clinching evidence against the accused if, however,



the result of the test is in the negative i.e. favouring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still have to be considered. It is to the other materials brought on record by the prosecution that we may now turn to.”

12. The investigating agency cannot shut the matter at the investigation stage by preparing a closure report in such cases where the allegations are of sexual abuse of a minor victim. The offence alleged to have committed by the petitioner is grievous in nature where under Section 4 of the Act of 2012, the minimum punishment of 07 years has been prescribed which may extent to imprisonment for life. Merely, on the ground of the DNA examination report in favour of the petitioner, he is not entitled the per-arrest bail, especially keeping in view of the fact that he is a neighbourer of the victim, the age difference between the petitioner and the minor victim and there being *prima facie* no previous enmity between the petitioner and the victim.
13. Keeping in view the aforesaid facts and circumstances, the present petition is devoid of any merits and the petitioner is not entitled to the concession of per-arrest bail.
14. Consequently, the petition stands dismissed.
15. However, it is made clear that nothing expressed hereinabove would be construed to be an expression of opinion on merits of the case.
16. Pending miscellaneous applications, if any, also stand disposed of.

(HARPREET KAUR JEEWAN)
JUDGE

May 29, 2024
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Whether Speaking	Yes
Whether Reportable	Yes