

217 IN THE HIGH COURT OF PUNJAB & HARYANA

AT CHANDIGARH

CRM-M-50533-2023

Date of decision: 20th March, 2024

Shamsher

...Petitioner(s)

Versus

State of Haryana

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. Karan Singh, Advocate for the petitioner.
Mr. Neeraj Poswal, AAG, Haryana.

MANISHA BATRA, J (ORAL):-

The present petition has been filed under Section 439 of Cr.P.C.

seeking regular bail in FIR mentioned below:-

FIR No.	Date	Police Station	Sections
58	29.02.2020	Sahlawas, District Jhajjar	363, 366-A and 34 of Indian Penal Code, 1860 (for short ‘IPC’) (Sections 4, 6, 17 of Protection of Children from Sexual Offences Act, 2012 (for brevity ‘POCSO Act added later’)

2. Brief facts of the case relevant for the purpose of disposal of the instant petition are that the aforementioned FIR was registered on the basis of written complaint filed by the complainant ‘K’ (name withheld) alleging therein that the victim ‘P’ (name withheld) who was her 17 years old daughter has gone to answer the call of nature outside the house in the evening of 28.02.2020 along with her son but he came back alone and noticing that she had gone outside her house and saw the victim being taken away by the accused Raju and Narsingh by making her sit between them on a motorbike. She also noticed that accused Sunder @ Gamando and his

brother-in-law were following the motorbike on which the victim was made to sit, by riding another motorcycle. The complainant called them but they did not stop. By alleging that all the above named persons had kidnapped her daughter by alluring her, she prayed for taking penal action against the culprits. Initially, a case under Section 363 and 366-A of IPC was registered. Investigation proceedings were initiated. On 17.03.2020, an information was received regarding recovery of the victim by the police officials of Police Station Kanina in connection with another FIR bearing No. 404 dated 29.11.2019 under Section 363 and 366 of IPC. The concerned Investigating officer of this case reached at Police Station Kanina and recorded the statements of the victim and her mother on the basis of offence under Section 17 of POCSO Act was added. The victim was medically examined on the same day. Her statement under Section 164 Cr.P.C. was recorded on the basis of which offences under Sections 4 and 6 of POCSO Act were also added. The co-accused Sunder who was in custody in case bearing FIR No. 404, joined the investigation of this case. He suffered a disclosure statement on the basis of which offence under Section 120-B IPC was added. The motorcycle which was used by the accused-Sunder at the time of occurrence was also recovered. The petitioner was arrested on 06.08.2020. He was also medically examined. The co-accused Nar Singh and Vikram were also arrested subsequently and after completion of necessary investigation and usual formalities, challan under Section 173 Cr.P.C. was presented as against the present petitioner and co-accused-Sunder, Vikram and Nar Singh. The accused-Raj Kishan @ Raju who too

was involved in the occurrence was arrested subsequently and supplementary challan was presented against him. The petitioner and co-accused are facing trial for commission of offences punishable under Sections 363/366-A read with Section 34 and 376 of IPC as well as under Sections 4, 6 and 17 of POCSO Act. The petitioner had moved an application for grant of bail before the learned Trial Court which has been dismissed vide order dated 29.03.2022.

3. It is submitted in the petition and learned counsel for the petitioner had argued that the petitioner was not named in the FIR as one of the kidnappers/abductors of the prosecutrix nor the allegation that he had enticed the victim away have been levelled in the FIR. Even in her statement recorded under Section 164 of Cr.P.C. the prosecutrix has not implicated her in the commission of offence of kidnapping and had stated that she had gone with Sunder and Raju and was living with the petitioner willingly after solemnizing marriage with her own consent with him in the Court and did not want to initiate any action against the petitioner. It is further argued that in FIR No. 440 of 29.11.2019 which was lodged by the complainant against the petitioner previously, neither the prosecutrix nor her mother had implicated him in commission of the offences for which he had been booked in the said case and both of them had resiled from their respective statements as recorded before the Court. Learned counsel for the petitioner has laid much stress on the point that in the statements so recorded in the abovementioned FIR No. 440, (Annexure P-17 and P-18 respectively) the prosecutrix had deposed that she was twenty-one years old and her mother

had deposed that in the school record was showing her to be under age as her husband had not mentioned the correct age of the petitioner in that record.

4. It is further argued that now the prosecutrix under the pressure of her parents has changed her version while recording her sworn deposition before the Court and has claimed herself to be a minor at the time of occurrence which allegedly took place on 28.02.2020 infact, there was relationship between the petitioner and the prosecutrix since long and they have even solemnized marriage. The plea of the prosecutrix being below the age of eighteen years stands falsified from her own statement as recorded in FIR No. 404. The petitioner is in custody for over a period of more than three years. There are no chances of his intimidating the witnesses as prosecutrix and her mother who was complainant already stand examined. His further detention would not serve any useful purpose. Therefore, it is argued that he deserves to be extended benefit of bail.

5. Status report has been filed by respondent-State as per which, there are specific and serious allegations against the petitioner to the effect that in connivance with him, the co-accused had taken away the prosecutrix out of her lawful guardianship and had handed over her custody to the present petitioner as on 28.02.2020. The prosecutrix has recorded her sworn deposition in the Court in this case stating that she had been taken by the co-accused to the petitioner who had kept her confined in a room and had repeatedly ravished her. He had impregnated her and her pregnancy was got aborted. It is submitted that the school record shows that the prosecutrix was a minor at the time of occurrence. It is further argued that the DNA report is

awaited. The prosecutrix has deposed that she had recorded her statement under Section 164 of Cr.P.C. under the pressure of petitioner and his family as on 17.03.2020. The allegations against the petitioner are quite serious in nature. The trial is going at a fast pace and there is nothing on record to show that there would be any undue delay in conclusion of the same. Therefore, it is argued that the petitioner does not deserve to be given concession of bail.

6. I have heard learned counsel for the petitioner as well as learned State counsel at considerable length and have gone through the record carefully.

7. As per the version of the prosecution, the accused Raju, Nar Singh, Sunder and Vikram had kidnaped the victim on 28.02.2020 in connivance with the present petitioner and had left her in his custody and the petitioner had induced/seduced the victim to illicit inter-course on the pretext of performing marriage with her and she had been repeatedly ravished by him. The further case as set up by the prosecution is that she was recovered from the custody of the petitioner as on 17.03.2020 Annexure R-1 is copy of statement of the prosecutrix as recorded under Section 164 of Cr.P.C. before the Magistrate on the same date, as per which, she had gone to Bikaner from her village with accused Sunder and Raju on 02.03.2020; they had left her with the present petitioner; she had performed marriage with him as per her own consent and was living willingly with him. She is even shown to have stated that she did not want any action against the present petitioner. The contention raised by learned State counsel is that in

her statement as recorded before the trial, she has levelled allegations that the petitioner had kept her confined in a room in Bikaner; had repeatedly ravished her for about one month; impregnated her and also got her pregnancy aborted.

8. Though, while considering the plea of an accused for grant of bail, the Court is not required to go into the merits of the case as it is only after evaluation and assessment of the evidence led before the trial Court that the truthfulness or otherwise of the allegations levelled against an accused the findings as to his guilt or innocence are to be arrived at. In the instant case, undoubtedly while appearing as a witness before the trial court, the prosecutrix is shown to have deposed against the petitioner. However, there are certain peculiar circumstances compelling this Court to be discussed before delving into the question that a case for extending benefit of regular bail to the petitioner has been made out or not. These circumstances are discussed as follows.

8. As already mentioned, another case bearing FIR No. 404 dated 19.11.2019 had been registered by the complainant who is mother of the prosecutrix against the present petitioner as well as some other persons levelling allegations of the prosecutrix having been kidnapped, on the pretext of performing marriage with the petitioner, her trafficking and further making allegation of having committed attempt to rape upon her. The FIR of this case was registered on 29.02.2020 at Police station Sahlawas i.e. after a gap of more than three months from the date of lodging of FIR No. 404. In this case, the prosecutrix has claimed herself to be a minor. She also stands

examined as witness before the trial Court and copy of her statement has been placed on record as Annexure P-14 wherein she is shown to have mentioned her date of birth as 10.02.2004 and is also shown to have stated that she was kept confined by the petitioner in a room at Bikaner for about one month and was repeatedly raped and her pregnancy was got aborted. In this manner, she is shown to have supported the version of the prosecution, but it is strange to note that in the case bearing FIR No. 404 which is also pending against the present petitioner, she is shown to have recorded her statement on 16.12.2021 i.e. after a gap of more than one and half years from the date of lodging of FIR of this case. Meaning thereby during the trial of this very case. Annexure P/7 is copy of her statement recorded in that case, which shows that in case bearing FIR No. 404 not only she stated that she was 21 years old and that she had gone with the accused-petitioner(Shamsher) and one of her cousin sisters to different places; she was already in relationship with the petitioner against the wishes of her family members and that nothing wrong had been done with her. But in her sworn statement recorded in this Court, she claims to be 16 years old which goes a long way to show that she has been concealing her exact age either in this case or in the case bearing FIR No. 404. If she was actually twenty-one years old as on 16.12.2021, then the question of her being a minor as on 28.02.2020 does not arise.

9. Moreso, from her statement Annexure P-7, it is apparent that she was in relationship with the present petitioner. Then her statement under Section 164 of Cr.P.C. recorded in this case also shows that she was having

lovable relationship with him and had voluntarily gone with him. Though the question that she was below the age of 18 years as on 28.02.2020 has to be finally decided by trial Court, but this Court is constrained to observe that after lodging of FIR of this very case, the prosecutrix is shown to have disclosed her to be twenty-one years old in case bearing FIR No. 404 registered against the petitioner himself and she is showing herself to be a minor in this case wherein a question which is certainly debatable as to her being minor as on the date of occurrence.

10. Another circumstance which is worth mentioning at this stage is that the statement of the **complainant** has also been recorded in case bearing FIR No. 404 (Annexure P-18) and a perusal of the same reveals that she had been declared hostile in that case as she did not support the prosecution version but the point which is important for the purpose of this case is that she is shown to have categorically stated that in the school record of the victim, her husband had shown her as under age. Meaning thereby that her actual age had not been mentioned in her school record. Then the petitioner has also placed on record Annexure P-15, copy of statement of brother of the victim who is shown to have deposed in this case that on the fateful day i.e. 28.02.2020, he had not seen the victim being taken away by any person.

11. Annexure P-16 is copy of statement of the complainant who is also shown to have admitted that on the day when her daughter had gone missing, she had gone to Narnaul and was not even present in the village and she was intimated about the occurrence by her son. Not even this she is also shown to have stated that she could not even tell the date of birth of the

victim. Apparently, from the statements recorded by the complainant i.e. mother of the victim and her brother, the victim was not kidnapped by any person in their presence. Moreso, the question as to the victim being a minor has also become debatable in view of fact that not even in this case but in case bearing FIR No. 404 different stands have been taken with regard to her age. In view of the discussion as made above, this Court is persuaded to hold that since the question of age of the prosecutrix itself is debatable in view of the different stands taken by her and in her worn depostion, she is also shown to have contradicted her statement recorded under Section 164 of Cr.P.C. with regard to her willingly staying with the petitioner and performing marriage with her, further incarceration of the petitioner would not serve any useful purpose and he deserves to be given benefit of bail. With these observations, the petition is allowed and the petitioner is ordered to be released on bail subject to his furnishing personal/surety bonds to the satisfaction of the Chief Judicial Magistrate/ Duty Magistrate concerned.

9. It is clarified that observations made hereinabove shall not be construed as an expression of opinion on the merits of the case.
10. Since the main petition has been allowed, pending application if any is rendered infructuous.

[MANISHA BATRA]

JUDGE

20th March, 2024

Parveen Sharma

1. Whether speaking/ reasoned

:

Yes / No
2. Whether reportable

:

Yes / No