



2024:DHC:2643

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

%

Judgment delivered on: 03.04.2024

+ **BAIL APPLN. 303/2023**

BABUL HUSSEN

..... Applicant

versus

GOVT. OF NCT OF DELHI & ANR.

..... Respondents

Advocates who appeared in this case:

For the Applicant : Mr. Syed Urfee Haider, Adv.

For the Respondent :Mr. Utkarsh, APP for the State with SI
Dharmveer, PS Chhawla
Mr. Vishesh Wadhwa & Ms. Swadha Gupta,
Advs. for complainant with complainant in
person

CORAM
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT**AMIT MAHAJAN, J**

1. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973, ('Cr.P.C'), for the grant of regular bail in FIR No. 181/2021, dated 18.04.2021, under sections 363/366/376/506 of the Indian Penal Code, 1860 and Section 6 of the Protection of Children from Sexual Offences Act, 2012, registered at Police Station Chhawala.

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2. The FIR was registered pursuant to a complaint made by the father of the victim dated 17.04.2021, alleging that his daughter who is 15 years of age is missing since 4:00 p.m. from their house. The FIR with respect to the same was registered on 18.04.2021.

3. On 16.05.2021 the victim was rescued by her father and was brought to the Police station on 20.05.2021, where her statement under section 161 Cr.PC. was recorded.

4. In her statement, the victim stated that her father used to work in co-accused Mahboob's *Gaushala* and a boy named Babul also used to work there. She stated that on 17.04.2021 when the victim was alone at her home, Babul came and forced her to go along with him. She stated that she was forced to sit in an autorickshaw and was taken to Gurgaon, and was told by Babul that he has received Rs. 21,000/- from Mahboob.

5. She further stated that on 21.04.2021 Babul took her to Assam *via* flight and threatened her with dire consequences if she did not inform the people present that she was 18 years old. For the next few days, they stayed at different places and she was finally taken by Babul to his village where she met Babul's father and they discussed plans to marry the victim however, the same could not happen due to her young age.

6. She stated that on 28.04.2021, Babul brought her to Gurgaon *via* train and stayed with her in a rented accommodation whereupon Babul made sexual relations with her.

7. On 14.05.2021 the Victim contacted her father and gave him information regarding her whereabouts, following which on 16.05.2021

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the victim's father along with her maternal Uncle recovered her from the premises.

8. The applicant was thereafter arrested on 26.05.2021.

9. The learned Counsel for the applicant submitted that the learned Trial Court while dismissing the bail application by its order dated 23.08.2022, passed the order on conjectures and surmises and not on the basis of records.

10. The learned Counsel submitted that the present applicant was not 21 years of age as stated in his Voter Id card and was merely 19 years old at the time of alleged offence. The applicant and the victim (who was around 15 and a half years of age) got into a love affair, being unaware of the consequences. She relied upon the copy of Birth Certificate issued by Department of Health Services, Government of Assam.

11. The learned counsel further submitted that there are material contradictions / inconsistencies in the statements given by the victim under Section 161 and Section 164 Cr.PC and the examination-in-chief.

12. Lastly, the learned Counsel submitted that the chargesheet has already been filed and the trial is likely to take time since there are 28 witnesses in the main chargesheet, and the applicant is under judicial custody since 26.05.2021. She submitted that the complainant and the victim have already been examined, therefore no purpose would be served by keeping the applicant in further incarceration.

13. The learned Additional Public Prosecutor opposed the grant of the bail and submitted that the victim has supported the case of the



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prosecution and had reiterated the same allegations as levelled against the applicant in her statement under section 164 Cr.PC. He submitted that during the investigation, the age of the victim was also confirmed to be 15 years at the time of the incident.

14. He further submitted that during the investigation, documents were seized through the maternal uncle of the victim from the bag of the victim which contained the boarding pass in the name of the present applicant of Air Asia flight No – 15776 PNR No YYTD9R, seat No - 34A, From New Delhi to Guwahati dated 21/04/21. Many witnesses are yet to be examined, the trial is at nascent stage and the allegations against the present applicant are heinous in nature and therefore the applicant is not entitled to bail.

Analysis

15. While considering the application for bail, the Court has to consider the nature of the offence, severity of the punishment and *prima facie*, involvement of the accused. The Court, at this stage, is not required to enter into the detailed analysis of the evidence to establish beyond the reasonable doubt whether the accused has committed the offence. However, the Court is definitely required to examine whether *prima facie* case for bail is made out on the basis of the evidence on record. In the present case, charges have been framed in relation to offence under Section 6 of the POCSO Act. The same attracts the provisions of Section 29 of the POCSO Act which reads as under : -

“29. Presumption as to certain offences.—Where a person is prosecuted for committing or abetting or attempting to commit any



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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.”

16. The prosecutrix in the present case is stated to be 15 and a half years of age and the applicant at the time of incident was stated to be 19 years of age.

17. The issue in relation to presumption of guilt has been address by the Hon'ble Apex Court in relation to a number of statutes. The presumption of guilt is not absolute and is rebuttable. It is the duty of the prosecution to first establish facts on the basis of the evidence which would form the foundation for the presumption to operate.

18. In **Noor Aga v. State of Punjab, (2008) 16 SCC 417**, while dealing with the NDPS Act, having similar provisions containing the presumption of guilt on the accused charged for the offences under NDPS Act, the Hon'ble Apex Court held that the presumption would operate only in the event the circumstances contained therein are fully satisfied. It was held that initial burden exists on the prosecution and only when it stands satisfied would the legal burden shift and even then the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. It was held that whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable doubt” but for the accused it is “preponderance of probability.”



19. Incorporation of Section 29 of the POCSO Act would, therefore, raise the threshold of satisfaction required before the Court considers an application for grant of bail. The Court, therefore, at the stage of considering the application for bail has to consider the evidence and evaluate whether the same would prima facie sustain the guilt of the accused. The Court while considering the application for bail in relation to offences under POCSO Act ought to consider the factors such as age of the victim; age of the accused, that is, the older the accused the more serious the offence; the age difference between the victim and the accused so as to consider the element of perversion; conduct of the accused after the offence; whether it is a case of consensual relationship etc.

20. In the present case, the evidence against the applicant is the statement of the victim that she was forcefully taken away from the custody of her father and the applicant forcefully had sexual relations with her. The allegations that she was forcefully taken to Assam is sought to be corroborated with the Boarding Pass of the airlines of the relevant date.

21. It is not in doubt that a mere testimony of the prosecutrix can be sufficient for the purpose of conviction of the accused in relation to Section 376 of the IPC. The testimony does not require corroboration as long as same inspires confidence.

22. As noted above, the complaint was initially given on 17.04.2021 by the father of the victim alleging that the victim is untraceable. The father, thereafter, on 20.05.2021 went to the police with the victim and



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narrated the incident. Certain inconsistency and contradictions in the statement given by the victim and her father at different stages cannot be ignored at this stage while considering the application for bail.

23. The victim in her statement during the MLC mentioned that she was sexually assaulted on 16.05.2021 at 8:00 PM and, thereafter, on 17.05.2021. The father of the victim, however, stated that victim was recovered on 16.05.2021. Victim in her statement under Section 161 of the CrPC stated that the accused worked with the co-accused Mahboob. The co-accused threatened her and asked her to go with the accused Babul Hussain where after Babul took her in an autorickshaw. In her statement under Section 164 CrPC, victim stated that she did not know Babul Hussain and that the applicant and the co-accused Mehboob both had taken her without her consent. The victim was, thereafter, taken to some place in Gurgaon for two days and from there, the applicant and the victim had flown to Assam on 21.04.2021.

24. It is not disputed that the victim did not raise any hue and cry or raised any alarm. It is not alleged that she was kept in a captivity due to which an alarm could not be raised.

25. In the present case, the victim has stated that the applicant took her to Assam in a flight. Any person be it a child or an adult being taken to Assam in a flight without the consent appears, at this stage, doubtful. It is also to be seen that the accused is also stated to be only 19 years of age at the relevant time.

26. Victim further mentions that applicant's father tried to marry him with the victim but the marriage could not take place because the victim



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was not of marriageable age. She alleged that applicant then took her to a rented accommodation where he kept her for 15 days and committed rape on daily basis. She had further alleged that applicant then kept a knife on her neck and forced her to call her father. Thereafter, her father traced the location of the mobile phone and recovered her on 16.05.2021.

27. It is significant to note that the father of the victim did not inform the police that the victim has called him and he has traced the location from the mobile number. Father of the victim had deposed that he had traced the location since he had told someone to put the number on surveillance. It is significant to note that the number can be put surveillance by an order of the Ministry of Home Affairs on a request given by the Investigating Agency. However, no such request in the present case was made by the Police.

28. Thus, the father of the victim finding the location from the mobile number, from his own efforts, at this stage, does not inspire confidence. He further mentions that when he reached Gurgaon, he found the victim alone and the room was locked from inside and was opened by the victim. No explanation has been given as to why the victim had not run away on her own when the door was closed from inside. There is further delay in informing the police of the fact that the victim has been recovered on 16.04.2021. The complaint in that regard was admittedly made to police on 20.04.2021.

29. Whether the applicant sexually assaulted the victim would be a matter of trial. Also, whether any act, as alleged, was a unilateral act of



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the applicant so as to make the applicant liable for the offence as alleged, would be tested during the course of the trial.

30. The accused persons are in custody since 20.05.2021. Only 15 witnesses have been examined till date and the trial is likely to take considerable period of time. The applicant was 19 years old at the time of incident and is now 22 years. Keeping a young man of 22 years of age having no antecedents would do more harm than any good. The victim and the father of the victim have already been examined. Therefore, there is no apprehension that the accused, if released on bail, would threaten the witnesses, or would hamper further investigation. It is also not alleged that the accused is a flight risk. Moreover, any such apprehension can be taken care of by putting appropriate conditions.

31. The applicant has therefore established a prima facie case for grant of bail.

32. Considering the totality of facts and circumstances, and without commenting further on the merits of the case, the present bail application is allowed, and the applicant is directed to be released on bail on furnishing a bail bond for a sum of ₹25,000/- with one surety of the like amount to the satisfaction of the learned Trial Court/ Duty Metropolitan Magistrate, subject to the following terms and conditions:

- I. The applicant shall, upon his release, furnish a proof of residence where he shall reside, which should be at least 5 KM far from the locality where the victim resides, subject to the satisfaction of the IO;
- II. The applicant shall upon his release provide his mobile number



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to the concerned IO / SHO and keep it switched on at all times;

III. The applicant shall not take unwarranted adjournment and attend the Trial Court proceedings on every date;

IV. The applicant shall not contact the victim and tamper with the evidence in any manner whatsoever.

33. In the event of there being any FIR/DD entry / complaint lodged against the applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

34. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the Trial and also not be taken as an expression of opinion on the merits of the case.

35. The bail application is allowed in the aforementioned terms.

AMIT MAHAJAN, J

APRIL 3, 2024

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