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

+ **BAIL APPLN. 417/2024**

HARISH

..... Petitioner

Through: Mohd. Shamikh and Mr. Aslam
Mansoori, Advocates.

versus

STATE OF DELHI

..... Respondent

Through: Ms. Richa Dhawan, APP for the State
with SI Ravindra, PS: South Rohini.

Ms. Sunita Arora, Advocate for Complainant.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

ORDER

09.04.2024

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1. This application has been preferred on behalf of the applicant Harish S/o Sh. Kailash Kumar under Section 439 Cr.P.C. for grant of regular bail in case FIR No. 269/2022 dated 23.05.2022 under Sections 313/376 IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act'), registered at PS: South Rohini. Charge Sheet has been filed.
2. It is the case of the prosecution that complaint was received from the prosecutrix stating that she was a student of 12th class and when she was 10 years old, her parents had separated. Prosecutrix and her brother continued to live with their mother while her father shifted to Krishan Vihar. A person named Harish was visiting her house for the past 7-8 months, along with her mother's friend Sagar and prosecutrix started talking to him after 2-3 months. Three months ago, Harish came home when her mother was not home. She was alone in the room as her brother was in a different room. Harish asked the prosecutrix to make physical relation, but she refused. He then told her that there was nothing wrong in this and forcibly made physical



relation with the prosecutrix. After one month Harish took her to an OYO hotel and again forced her into a physical relation. Prosecutrix stated that she did not know the exact location of the hotel or the route to the hotel from her house. Few days later, when prosecutrix missed her periods, she informed Harish about the same and he gave her a pregnancy testing kit. On testing, pregnancy was confirmed but Harish forced the prosecutrix to abort and on 16.05.2022 gave her an abortion pill. On 22.05.2022, when prosecutrix started having excessive bleeding she narrated everything to her mother. Both went to the hospital thereafter and after conducting the tests, doctor confirmed the pregnancy. MLC dated 22.05.2022, indicates an alleged history of sexual intercourse between the prosecutrix and her boyfriend Harish aged 25-26 years, twice at some hotel and 3-4 months amenorrhea. Prosecutrix was counselled and exhibits collected from the prosecutrix were seized. Case was registered and investigation was initiated. After completion of investigation, charge sheet was filed under Sections 313/376 IPC and Section 6 of the POCSO Act. Statement of the prosecutrix under Section 164 Cr.P.C. was recorded on 28.05.2022. Matter is at the stage of prosecution evidence before the Trial Court.

3. Learned counsel for the applicant states that applicant is innocent and has been falsely implicated and is in judicial custody since 23.05.2022. Material witnesses including the prosecutrix, her mother, Manager of OYO hotel (*qua* place of alleged incident) and the MCD official (*qua* date of birth of the prosecutrix) have been examined and there is no possibility of the applicant tampering with evidence and/or threatening or intimidating the material witnesses.

4. It is further argued that the case of the prosecutrix is belied from a



bare perusal of the MLC dated 22.05.2022. As per the MLC, prosecutrix had sexual intercourse with her boyfriend i.e. the applicant, twice at some hotel. This is contrary to the statement of the prosecutrix under Section 164 Cr.P.C. recorded on 28.05.2022, wherein she stated that applicant had taken her to the hotel once. Even in the examination-in-chief before the Court, prosecutrix deposed that applicant had taken the prosecutrix to the OYO hotel once in April. It is further mentioned in the MLC that as on 22.05.2022, prosecutrix gave a history of 3-4 months amenorrhea and carried out Urinary Pregnancy Test once in January or February, 2022, simply to check if she was pregnant, but the same was negative and she repeated this in the last week of April, 2022, when it came positive. However, going by the allegations in the FIR and the statement of the prosecutrix under Section 164 Cr.P.C. and deposition during examination-in-chief, the alleged incident of forcible sexual intercourse took place for the first time in March, 2022 and therefore, it is not understood why the prosecutrix conducted the pregnancy test in January or February, 2022. The only conclusion that can be drawn is that prosecutrix levelled false allegations against the applicant.

5. Learned counsel further urges that there are material contradictions in the statements given by the prosecutrix at different stages. In the statement under Section 164 Cr.P.C., prosecutrix narrated that in March, 2022, when her mother was not home, one boy named Harish, from whom the family had once hired a tempo for shifting, came home. Harish sent her brother to fetch something from the market and when no one was at home, he forcibly made physical relation with her. Once the applicant took the prosecutrix to an OYO room on the pretext of introducing her to his friend but there he did



nothing. Contrary to this, prosecutrix deposed before the Court that the applicant was known to the family as he was a friend of her mother's friend, Sagar and had been visiting their home for the last 7-8 months. Prosecutrix categorically deposed that on the day of the first incident in March, 2022, when applicant indulged in the illegal act, her brother was in the house in a different room. She further deposed that in April, 2022, applicant took her to the OYO hotel and made physical relations with her against her wishes. Apart from these contradictions, it is strange that the prosecutrix did not inform her parents or brothers of the incidents. If the applicant had forced the prosecutrix into physical relationship in March, 2022, there was no reason for her to have willingly accompanied the applicant to a hotel in April to meet his friend.

6. Learned counsel further submits that applicant has clean antecedents and his jail conduct is 'satisfactory'. Applicant has deep roots in the society and it is not the case of the prosecution that he is a flight risk. Material witnesses have been examined and no purpose will be achieved in keeping the applicant in judicial custody.

7. Ms. Richa Dhawan, learned APP for the State opposes the application on the ground that the prosecutrix was a minor at the time of incident and the allegations are grave and serious. Applicant repeatedly raped the prosecutrix, aged 16 years and made her pregnant and on getting to know of the pregnancy gave her medicines to abort. PW-1 the prosecutrix has supported the case of the prosecution and the minor discrepancies pointed out on behalf of the applicant cannot be overemphasised for granting bail. Ms. Arora, learned counsel for the complainant adopts the argument on behalf of the State and further submits that recording in the MLC that



prosecutrix had undergone a pregnancy test in January or February, 2022 i.e. before the date of the alleged incident, is no more than an inadvertent typographical error.

8. Heard learned counsel for the applicant, learned APP for the State and learned counsel for the complainant.

9. Indisputably, the case is at the post-charge stage and Court is cognizant of the fact that by virtue of the provisions of Section 29 of the POCSO Act, the threshold of satisfaction required for the purpose of considering the bail application shall be much higher. In this context, I may allude to the observations of this Court in *Dharmander Singh v. State (Govt. of NCT of Delhi)*, 2020 SCC OnLine Del 1267, where the Court has elucidated on the impact of Section 29 of POCSO Act, when considering a bail application at the stage when charges have been framed. Relevant passage is as follows:-

“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.”

10. In the same judgment, the Court enumerated some factors which ought to be kept in mind while deciding a bail plea at post-charge stage, in addition to other factors such as seriousness of the allegations, propensity of the accused to commit crime, nature and quality of evidence etc. Relevant factors are 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.*

78. 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.”

11. Counsel for the applicant has pointed out several contradictions in the statement of the prosecutrix under Section 164 Cr.P.C. and her deposition before the Court, both in examination-in-chief and cross-examination, on material aspects such as the time period for which she had known the applicant prior to the alleged incident, number of visits to the OYO hotel, presence of her brother in the house, etc. Discrepancy in the MLC has also been brought forth during the hearing with regard to the prosecutrix undertaking a pregnancy test in January or February, 2022, i.e. prior to the alleged incident in March, 2022. This Court is conscious that at this stage, probative value of the evidence cannot be considered and nor can the Court go into credibility of the witnesses as that would be the domain of the Trial Court. However, for the limited purpose of bail application, Court can see if there is *prima facie* material to support the allegations levelled and/or look into the material contradictions only to see if there is a potential of the balance tilting in favour of the applicant for grant of bail. By pointing out the alleged discrepancies/contradictions, as aforementioned, in my view, applicant has been able to cross the high threshold required under Section 29 of the POCSO Act.

12. Material witnesses have been examined and there is no possibility of the applicant tampering with evidence and/or threatening the material witnesses. It is not argued on behalf of the State that applicant is a flight



risk. Applicant is in custody since 23.05.2022 and no purpose will be achieved in continuing his incarceration. Nominal roll indicates that applicant has clean antecedents and his jail conduct is 'satisfactory'.

13. In my view, applicant has made out a case for grant of regular bail and is directed to be released on bail, subject to furnishing a personal bond in the sum of Rs.50,000/- with two sureties of the like amount to the satisfaction of the learned Trial Court and further subject to the following conditions:-

- i. Applicant shall not leave the country without prior permission of the Trial Court;
- ii. He shall provide his mobile number to the IO concerned and keep the same active at all times and shall not change the number without prior intimation to the IO and the Trial Court;
- iii. He shall furnish his permanent residential address to the concerned IO and shall intimate the IO as well as the Trial Court by filing an affidavit regarding any change in his residential address;
- iv. He shall appear before the Trial Court as and when the matter is taken up for hearing;
- v. He shall not indulge in any criminal activity or communicate with and/or come in contact, directly or indirectly, with the prosecutrix or any other prosecution witness; and
- vi. He shall report to the IO on every third Monday at 11:00 AM.

14. Needless to state that any observation in the present order will not tantamount to an expression of opinion on the merits of the case.

15. Bail Application stands disposed of.



16. Copy of the order be sent to the concerned Jail Superintendent for information and necessary compliance.

APRIL 09, 2024/shivam

JYOTI SINGH, J