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IN THE HIGH COURT OF DELHI AT NEW DELHI

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BAIL APPLN. 287/2022

AFSAR SAIFI ALIAS SONU

..... Petitioner

Through: Mr.K.B. Shankar & Mr.Aaftab
Husain, Advs.

versus

STATE NCT OF DELHI

..... Respondent

Through: Mr.Aman Usman, APP with
Insp. Braj Mohan, SI Rajendra
Kumar.

Mr.Shiv Chopra, Ms.Aadhyaa
Khanna & Mr.Siddharth Arora,
Advs. for the prosecutrix.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

08.01.2024

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1. This application has been filed seeking regular bail in FIR No.0013/2019 registered with Police Station: Old Delhi (Delhi Main) Railway Station under Sections 363/366/376/505/34 of the Indian Penal Code, 1860 (in short, 'IPC') and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (in short, 'POCSO Act'). The FIR was initially registered only under Section 363 of the IPC, however, on the statement of the victim, the other Sections were added thereto.

2. It is the case of the prosecution that on 27.01.2019, when the victim went along with her maternal grandfather to the Old Delhi Railway Station to catch a train to Lal Kuan, Uttarakhand, she went missing from the said station. Later, she was recovered from the Court premises at Meerut. In her statement under Section 164 of the Code of



Criminal Procedure, 1973 (in short, 'Cr.P.C.'), she stated that the accused had taken her on a false pretext of marriage to Meerut, from where they went to Haridwar, where he made physical relation with her, thereafter he brought her back to Meerut and left her at the Court premises. Based on the above allegations, the charge-sheet has been filed against the applicant and he is facing trial.

3. The learned counsel for the applicant submits that the victim has been examined before the learned Trial Court, and she has stated that she went with the applicant out of her own free will and volition. He further submits that the other main witnesses, that is, the family members of the victim, which include her mother and the maternal grandfather, have also been examined before the learned Trial Court, and only the formal witnesses remain to be examined. He further states that the applicant has been in custody since 19.02.2019, and has already undergone imprisonment of almost five years.

4. The learned APP for the State opposes the prayer made by submitting that in the present case, keeping in view the statement of the victim, presumption under Sections 29 and 30 of the POCSO Act would be attracted. He further opposes the prayer for bail stating that the nature of the crime does not warrant the applicant to be released on bail.

5. The learned counsel for the victim also opposes the present application, and submits that the victim was being threatened to give a statement in favour of the applicant, as has also been recorded by the learned Trial Court while rejecting the earlier bail applications vide orders dated 11.09.2020 and 12.01.2022. She submits that the victim



has been consistent in her statement that the applicant has made a physical relationship with her on the pretext of marriage. She submits that charges under Section 6 of the POCSO Act and Section 376 of IPC stands established. She further submits that keeping in view the nature of the offence alleged, the applicant should not be enlarged on bail. She submits that the presumption of the guilt of the applicant under Sections 29 and 30 of the POCSO Act would also be applicable.

6. She submits that even assuming that the victim's statement that she went with the applicant of her own free will is to be accepted, as the victim was a minor, her consent would be immaterial and this would be no ground to enlarge the applicant on bail. In support, she places reliance on:

- (i) the judgment and order dated 21.02.2022 passed by the Supreme Court in Criminal Appeal No.263/2022, titled ***X (Minor) v. The State of Jharkhand & Anr.***;
- (ii) ***Surya Prakash Pal v. State of NCT of Delhi*** 2022 SCC OnLine Del 1036;
- (iii) ***Jagbir v. State (NCT of Delhi)***, Neutral Citation No.2022:DHC:2727; and,
- (iv) ***Raghav Yadav @ Manoj @ Anurag v. The State NCT of Delhi***, Neutral Citation No. 2022:DHC:1705.

7. She further submits that under Section 436 of the Cr.P.C., it is not mandatory to release the accused on bail only because he has undergone more than the minimum sentence prescribed for an offence.

8. I have considered the submissions made by the learned counsels for the parties.

9. At the outset, it is important to note that as on the date of disappearance of the victim, she was aged around 15 years and 6



months. It is also evident that though she was stated to be missing from the Railway Station on 27.01.2019 at around 3:30 p.m., the FIR was lodged only on the next day, that is, 28.01.2019 at about 8:30 p.m. The applicant is also stated to have visited Meerut, thereafter Haridwar, and then back to Meerut with the victim. The victim was found in the Court premises at Meerut, where she states that the applicant had taken her for getting their marriage registered. The statement of the victim has also been recorded in the trial and she has stated that she had voluntarily and of her own free will gone with the applicant, who was aged around 22 years at that time. Therefore, *prima facie* it appears that the victim went with the applicant of her own free will and volition.

10. Whether the applicant did or did not enter into a physical relationship with the victim is a fact that shall be considered by the learned Trial Court on appreciation of evidence led before it.

11. The applicant has already undergone about 5 years of imprisonment. As noted earlier, he was aged only around 22 years at the time of the commission of the alleged offence.

12. Though, his earlier application seeking bail was rejected by the learned Trial Court by its order dated 11.09.2020 on the ground that the testimony of the victim was yet to conclude and he was also pressurising the victim, now the statement of victim and her family members, that is, her mother and her maternal grandfather has already been recorded before the Trial Court.

13. Similarly, while rejecting the application filed by the applicant seeking bail, the learned Trial Court in its order dated 12.01.2022



appears to have been persuaded by the statement of the victim that at the time of recording of her evidence, a friend of the applicant had threatened her. However, the learned Trial Court failed to appreciate that the statement of the victim was being recorded by the Court and the Court had put various questions to the victim. From her answers, it does not appear that the victim was being pressurized.

14. While, it is true that in terms of Sections 29 and Section 30 of the POCSO Act, there will be a presumption against the applicant, at the same time, the said Sections cannot be applied in absolute terms to an application seeking bail. The Court has to consider the evidence so far led by the prosecution, and applying the presumption, consider if the applicant has still been able to make out a case for being released on bail.

15. In ***Dharmander Singh v. The State (Govt. of NCT, Delhi)***, 2020 SCC OnLine Del 1267, the Court explained the effect of Section 29 on the application seeking bail, in the following words:

“71. However, the dilemma would remain as to how the presumption of guilt contained in section 29 is to be applied even after charges have been framed, when the accused has not been given the opportunity to rebut such presumption. When section 29 engrafts the presumption of guilt against the accused, it also affords an opportunity to the accused to rebut the presumption by proving to the contrary. It cannot possibly be that the court should invoke half the provision of section 29 while ignoring the other half, much less to the detriment of the accused. But even after charges are framed, the accused does not get the opportunity to rebut the presumption or to prove the contrary by leading defence evidence, until prosecution evidence is



concluded. It would be anathema to fundamental criminal jurisprudence to ask the accused to disclose his defense; or, worse still, to adduce evidence in his defence even before the prosecution has marshalled its evidence. Again therefore, even for a stage after charges have been framed, section 29 cannot be applied in absolute terms to a bail plea without doing violence to the 'due process' and 'fair trial' tenets read into Article 21 of our Constitution.

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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.

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*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.

79. It goes without saying that while considering a bail plea at any stage, whether before or after framing of charges, the court would of course apply all the other well settled principles and parameters for grant or denial of bail.

80. It is important to state here that the aforesaid considerations are only to be applied while deciding a bail plea and may not have a bearing on the merits of the case.”

16. Applying the above principles to the facts of the present case, in my opinion, with the statement of the victim having already been recorded, in which, she does not fully support the case of the prosecution; statement of the other material witnesses, that is, the mother and the maternal grandfather of the victim also having been recorded by the learned Trial Court; the applicant having suffered imprisonment for a period of more than 5 years; and with the trial not likely to be concluded in near future, in my opinion, the applicant has been able to make out a case for grant of bail.

17. In *X (Minor) v. The State of Jharkhand & Anr.* (supra), the accused had suffered imprisonment only for a period of around 4 months; and the victim was aged around 13 years at the time of alleged offence. It was in those facts that the Supreme Court set aside the order of the High Court releasing the accused on bail, observing that bail could not have been granted to the accused therein merely



because the Court felt that it was a case of a love affair.

18. In *Surya Prakash Pal* (supra), the accused was aged around 42 years and was facing trial in relation to an offence committed upon a 13 year old child. The prosecution's case was also one of forceful sexual intercourse. It was on those facts that the Court denied bail to the accused.

19. In *Jagbir* (supra), the accused, during the course of investigation, had tried to mislead the Investigating Agency by suppressing the whereabouts of the victim. Even the polygraph test had to be conducted. The victim when found was also pregnant. It is on those facts that the Court again denied bail to the accused therein.

20. In *Raghav Yadav* (supra), the Court found that there was no denial of a physical relationship being developed between the accused and the victim, who was a minor as on the date. The victim had also stated that the same was established forcefully by the accused.

21. The above judgments would, therefore, have no application to the facts of the present case.

22. In view of the above, the applicant is directed to be released on bail on furnishing a personal bond in the sum of Rs. 25,000/- with one surety of the like amount subject to the satisfaction of the learned Trial Court, and further subject to the following conditions:

- i. Applicant will not leave the country without the prior permission of the learned Trial Court.
- ii. Applicant shall provide his permanent address to the learned Trial Court. The petitioner shall intimate the



Court by way of an affidavit and to the IO regarding any change in the residential address.

- iii. Applicant shall appear before the learned Trial Court as and when the matter is taken up for hearing.
 - iv. Applicant shall provide his mobile numbers to the IO concerned, which shall be kept in a working condition at all times and shall not be switched off or changed without prior intimation to the IO concerned. The mobile location shall also be kept on at all times.
 - v. Applicant shall report before the concerned IO every 15 days.
 - vi. The applicant shall not communicate with or come in contact with any of the prosecution witnesses, the victim or any member of the victim's family or tamper with the evidence of the case while being released on bail.
 - vii. Applicant shall not indulge in any criminal activity.
23. Needless to state, any observation touching the merits of the case is purely for the purposes of deciding the question of grant of bail and shall not be construed as an expression on merits of the matter.
24. Copy of the order be sent to the Jail Superintendent for information and necessary compliance.
25. The Bail Application is disposed of in the above terms.

NAVIN CHAWLA, J

JANUARY 8, 2024/rv/RN/RP

Click here to check corrigendum, if any