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

+ **BAIL APPLN. 771/2023**

MUKESH

..... Petitioner

Through: Mr. Anuj Aggarwall, Mr. Abhishek Gupta, Ms. Reema Singh, Mr. Vineet Kr. Jain and Mr. Vivek Kr. Gautam, Advocates with Vanita, sister-in-law of the Applicant in person.

versus

THE STATE & ANR.

..... Respondents

Through: Mr. Yudhvir Singh Chauhan, APP for the State with SI Sangeeta, PS: S.B. Dairy with Victim and her mother in person.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

ORDER

27.03.2024

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1. This is an application preferred on behalf of the Applicant Mukesh S/o Sh. Khup Chand @ Khoob Chand, under Section 439 Cr.P.C. seeking regular bail in case FIR No.327/2022 dated 05.05.2022 under Section 363 IPC registered at PS: Shahbad Dairy. Charge Sheet has been filed in which Sections 109/376 IPC and Section 6 of Protection of Children from Sexual Offences Act, 2012 ('POCSO Act') were added.
2. Case of the prosecution is that on 05.05.2022, Complainant came to the Police Station and stated that she was living with her family members including 5 sons and 5 daughters. On 04.05.2022 at about 10.30 PM, she along with her family members had gone off to sleep and at about 02.00 AM (mid-night), when she woke up, she found that her daughter "S" aged about



16 years was missing. Complainant informed the other family members and they tried to search the missing girl but she could not be traced. It was suspected that S had been enticed by some unknown person. On 06.05.2022, Complainant came with her daughter S to the Police Station and on enquiry, S stated that she had been speaking to the Applicant once or twice over the phone prior to the incident. On the intervening night of 04.05.2022 and 05.05.2022, Applicant made a call on the mobile number of her mother and asked her to come down for going to the market. When she came down, he asked her to sit on the motorcycle which she did and he drove the motorcycle but did not stop at the market and instead took her to a hotel in Prahalapur, where he committed rape on her twice. On this statement of the victim, Sections 376/109 IPC and Section 6 POCSO Act were added. It is stated in the status report that after registration of the FIR, investigation was carried out wherein statements of witnesses were recorded, evidences were collected and statement of victim was recorded under Section 164 Cr.P.C. wherein she reiterated the earlier version given to the Police. Applicant was thereafter arrested.

3. Learned counsel for the Applicant submits that Applicant is innocent and has been falsely implicated in the present case. Applicant is in custody since 22.09.2022 and the evidence of the material witnesses i.e. the victim and her mother has concluded. There are serious discrepancies and contradictions in the testimonies of the victim and her mother. Victim was unable to explain why she came down to go with the Applicant in the middle of the night. She could not name the hotel where the offence allegedly took place. The hotel has no record of the victim or the Applicant and the Manager was unable to give any statement about their entry or stay in the



said hotel. The most glaring flaw in the evidence is that the victim throughout maintained that the Applicant spoke to her on her mother's mobile phone, both on the date of the alleged incident and prior thereto, as that was the only phone in the house while the mother categorically deposed that she does not have a mobile phone. The victim refused for her internal medical examination even though she was given the option on the very next day of the alleged offence, which itself reflects falsity of the allegations against the Applicant.

4. Learned APP, on the other hand, opposes the application on the ground that the allegations are grave and serious. Victim is a young girl of 16 years and was raped twice by the Applicant, after enticing her and taking her to the hotel. There are chances that the Applicant may threaten the victim, if released on bail, as his house is located close to the house of the victim and the Complainant.

5. Heard learned counsel for the Applicant and learned APP for the State and perused the testimonies of the victim and the Complainant, which have been placed on record.

6. The offences alleged against the Applicant include Section 6 of the POCSO Act and therefore, in view of the impact of Section 29 of POCSO Act, threshold of satisfaction required is higher. In ***Dharmender Singh v. State, 2020 SCC OnLine Del 1267***, a Co-ordinate Bench of this Court considered the effect of Section 29 of the POCSO Act while deciding the application for bail at the post-charge stage and observed as under:-

“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.”

(emphasis supplied)

7. The Court also enumerated some of the factors, illustratively, that ought to be considered when deciding a bail application at the post-charge stage, which are as follows:-

“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.”*

8. Keeping the above factors in the backdrop and examining the testimonies of the victim and her mother for the limited purpose of deciding this application, this Court finds that *prima facie* there are material contradictions in the testimonies, with regard to how the Applicant established contact with the victim in the night, in view of the testimony of the mother that she does not have a mobile phone and the victim did not have one as per her own version. Counsel for the Applicant has urged that the hotel, where the alleged act was committed, contains no record of the Applicant or the victim having stayed or even entered the said hotel. During investigation, the undergarments of the victim were never handed over to the Police and she also refused for internal examination despite an option given to her on the next date of alleged offence. The age of the victim is also doubtful at this stage, as neither the birth certificate nor any document pertaining to the school first attended could be produced on record and while



the victim stated that her mother would know if there was a birth certificate and that she had studied upto 5th class in a place near her village though she did not know name of the school, her mother stated that no child in her family went to school.

9. In my considered view, having examined the testimonies only for deciding the present application, Applicant has succeeded in crossing the higher threshold required in terms of the decision of this Court in ***Dharmender Singh (supra)*** and has made out a case for grant of regular bail. Moreover, the material witnesses have been examined including the victim and the Complainant and there is no possibility of the Applicant threatening the witnesses or tampering with the evidence, if enlarged on bail. It is not the case of the prosecution that the Applicant is a flight risk.

10. At this stage, both learned APP and the Complainant, who is present in Court along with the victim, state that the Applicant and his family reside close to the house of the victim and there could be a threat to their life and liberty, if the Applicant is enlarged on bail. Responding to this, counsel for the Applicant, on instructions from Ms. Vanita, sister-in-law of the Applicant, states that Applicant shall not reside in House No.D-302, near Roop Krishna Public School, Shahbad Dairy, Delhi-110042, where he was residing prior to the arrest and will shift his residence to a distant place and will make no attempt to contact the victim or any other member of her family and that an affidavit of undertaking to this effect shall be filed.

11. Considering the aforesaid facts and circumstances, it is directed that Applicant be released on regular bail, subject to his furnishing a personal bond in the sum of Rs.25,000/- with two sureties of the like amount to the



satisfaction of the 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 mobile number without prior intimation to the IO and the Trial Court;
 - iii. He shall provide his residential address to the concerned IO where he would be residing after being released on bail and shall intimate the IO as well as the Trial Court by filing an affidavit regarding any change in the said address;
 - iv. He shall appear before the Trial Court as and when the matter is taken up for hearing unless exempted by the Trial Court;
 - v. He shall not indulge in any criminal activity or contact the victim, her mother or any witness and/or any other person associated with the present case in any manner whatsoever;
 - vi. He shall report to concerned IO once a month on every third Monday at 2:00 PM; and
 - vii. He shall file an affidavit before the Trial Court, within 10 days of his release, undertaking that he will not reside in house bearing No. D-302, near Roop Krishna Public School, Shahbad Dairy, Delhi-110042 and that he will not make any attempt to contact the victim or any of her family members.
12. In case, affidavit of undertaking is not filed within the time granted by this Court and/or if the Applicant violates any condition of bail, it would be



open to the State and/or the Complainant to file an application for cancellation of the bail.

13. Nothing stated in this order shall tantamount to an expression on the merits of the case.

14. Application stands disposed of.

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

JYOTI SINGH, J

MARCH 27, 2024/shivam