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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**Date of decision: 14th AUGUST, 2024IN THE MATTER OF:+ **BAIL APPLN. 2419/2023**

SAHIL

.....Petitioner

Through: Mr. J.P. Singh, Mr. Arjun Gupta, Mr. Sooraj Bhalla, Mr. Lalman Yadav, Mr. Neeraj Kumar Jha, Mr. Akash Khatri, Mr. Gautam Singh, Advocates.

versus

THE STATE NCT OF DELHI

.....Respondent

Through: Mr. Shoaib Haider, APP for the State SI Neeti, PS Jahangir Puri
Mr. Faraz Maqbool, Ms. Sana Juneja & Mr. Chandan Kumar, Advocates for R-2.

CORAM:**HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD****JUDGMENT (ORAL)**

1. Petitioner has approached this Court seeking bail in FIR No.858/2021, dated 04.10.2021, registered at Police Station Jahangir Puri initially for offences under Sections 363 IPC which was later on converted to offences under Sections 363/366/376 IPC and Section 6 of the POCSO Act.
2. The facts, in brief, leading to the present Petition, are that 04.10.2021 a complaint was registered by the mother of the Prosecutrix stating that her daughter, the Prosecutrix herein, aged about 17 years, left her house on 30.09.2021 at about 2:30 PM and since then she has not come back and the



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Complainant suspects that her daughter might have been lured by some unknown person. On the said complaint the present FIR was registered and the investigation was carried out. During investigation it was revealed that earlier also the Prosecutrix went missing from her home twice and in this regard FIR No. 219/2021 and FIR No. 444/2021 both under section 363 IPC were registered but later on the Prosecutrix returned back home. The investigation further revealed that the Prosecutrix was living with the Petitioner herein somewhere in Narela and on 18.12.2021 the Prosecutrix was found.

3. It is stated that before Doctors, the Prosecutrix gave a statement that she had gone with the Petitioner herein, who is her boyfriend, of her own free will and thereafter they got married and that now she is pregnant. In her statement it was further stated by the Prosecutrix that her family members were aware about her marriage with the Petitioner and her mother had told her that she will accept the marriage only if the Petitioner converts to Muslim religion but since the Petitioner refused to convert to Muslim religion, the mother of the Prosecutrix lodged the complaint against the Petitioner. It is stated that in her statement under Section 161 Cr.P.C also, the Prosecutrix stated that she went to the house of the Petitioner on her own will and got married with the Petitioner and they lived together as husband and wife and established physical relations with the Petitioner with her own free will. It is stated that since the Prosecutrix was minor, Sections 366/376 IPC and Section 6 of the POCSO Act were added in the FIR and the Petitioner was arrested on 19.12.2021.

4. In her statement under Section 164 Cr.P.C, the Prosecutrix has stated that about 2 months back she along with her friend had gone out of the



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house for eating *Gole Gappas* and while they were eating *Gole Gappas*, the Petitioner herein came there in an auto and took her to a room at Safiabab, Narela in the said auto and thereafter he committed rape on her. After completion of investigation, Charge-sheet has been filed.

5. The Petitioner has approached this Court seeking bail.

6. Learned Counsel appearing for the Petitioner contends that the Petitioner is in custody since 19.12.2024. He states that there is a change in the stand of the Prosecutrix between her statement given to the Doctors, her statement under Section 161 Cr.P.C wherein she has stated that she went with the Petitioner on her own free will and her statement under Section 164 Cr.P.C wherein a new story has been told that the Petitioner herein had taken the Prosecutrix forcefully. He further states that the Prosecutrix had went missing from her house on two earlier occasions as well and later on she has returned home and on both the occasions FIRs have been lodged by her mother. He states that charge-sheet has been filed and investigation is complete and there is no danger of the Petitioner tampering with evidence and, therefore, the Petitioner be released on bail.

7. *Per contra*, learned APP for the State and the learned Counsel appearing for the Prosecutrix vehemently opposes the present Petition contending that the Petitioner is accused of a very heinous offence. It is, therefore, stated that bail ought not be granted to the Petitioner herein.

8. Heard the Counsels for the Petitioner and the Prosecutrix and the learned APP for the State and perused the material on record.

9. Material on record indicates that at the time of incident, the Prosecutrix was about 17 years old and the Petitioner was about 21 years old. A reading of the statements of the Prosecutrix given before the Doctors,



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her statement under Section 161 Cr.P.C and her statement under Section 164 Cr.P.C shows a marked change in the stand of the Prosecutrix. In her statement before the doctors and in her statement under Section 161 Cr.P.C. the Prosecutrix has stated that she has gone with the Petitioner on her own while in her statement under Section 164 Cr.P.C the Prosecutrix has stated that the Petitioner took her forcefully. This Court can also take judicial notice of the fact that the Prosecutrix has eloped from her house twice and has returned back. This Court is of the opinion that the present case is of love affair between the Prosecutrix and the Petitioner. Consensual sex between girls who are just below the age of 18 years and boys who are just above 20 years has been in legal grey area because the consent given by a minor girl cannot be said to be a valid consent in the eyes of law.

10. At this juncture, this Court is not going into the question as to whether the Petitioner has committed offences under Sections 363/366/376 IPC and Section 6 of the POCSO Act or not. This Court is only concerned with as to whether a youngster who is in jail for the last three years should be granted bail or not in light of the fact that the Prosecutrix has changed her stand in her statements given under Section 161 Cr.P.C and 164 Cr.P.C.

11. This Court has been constantly seeing that POCSO cases are being filed at the behest of the girl's family who object to her friendship and romantic involvement with a young boy and the law is being misapplied in such cases which results in young boys, who have genuinely fallen in love with girls who are just below 18 years of age, languishing in jails.

12. The age of the Prosecutrix, her statement given to the doctors, her statement under Section 161 Cr.P.C and the fact that she has been found missing on two earlier occasions as well, tilt the case in favour of the



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Petitioner herein for grant of bail.

13. In Anant Janardhan Sunatkari v. State of Maharashtra, (2021) SCC Online Bom.136, the Bombay High Court, while dealing with a case involving a 19 year old boy who had been convicted of rape of a 15 year old girl, released the accused on bail and has observed as follows :

“11. I have perused the impugned judgment; evidence of victim, mother of victim and of PW-6 (Classmate of the victim) as well the evidence of Medical Officer.

12. I am conscious of the fact that the passing of POCSO has been significant and progressive step in securing children's rights and furthering the cause of protecting children against sexual abuse. The letter and spirit of the law, which defines a child as anyone less than 18 years of age, is to protect children from sexual abuse.

13. I am also conscious of the fact that consensual sex between minors has been in a legal grey area because the consent given by minor is not considered to be a valid consent in eyes of law.

14. In the case at hand, facts are distinctive in the sense, victim is first cousin sister of the appellant. At the relevant time, she was 15 year old and appellant was 19 year old. Both were students and living in one house. A fact cannot be overlooked that the victim had resiled from her statement and further disowned the contents of portion marked B of her statement recorded under Section 164. Even her mother was unfriendly to prosecution. Opinions of doctor that victim was subjected to sexual assault was subject to FSL report. The FSL report was not obtained till the conclusion of the trial. Victim said, her statement to the police and narrative in statement under Section 164 was at the instance of Class teacher. Therefore, in the



proceedings, wherein suspension of sentence is sought, this Court cannot ignore the 'evidence of victim' and 'her mother'. At the same time, the age of the victim and of appellant their relations also cannot be overlooked. Though the prosecution vehemently argued and relied on Section 29 and 30, which provides for presumption of culpable, mental state as to certain offences, in my considered opinion, this submission and argument of the prosecution is to be gone into, when appeal is to heard finally."

14. A similar view has been taken by the Gujarat High Court in Jayantibhai Babulbhai Alani v. State of Gujarat, (2018) SCC Online Guj. 1223, wherein the High Court has observed as under:

"6. This is an unusual case of boy and girl having affair. As the prosecutrix was minor, the applicant is sent behind prison because of the complaint lodged by the father of the prosecutrix. Undoubtedly, a minor girl is to be protected under law as there are number of instances of sexual abuses of minor girls and therefore, there is a special legislation of POCSO in the year 2012 and amendment in sections 375 and 376 of the IPC in 2014. The judiciary takes a very serious note of sexual offences against women and specially against minor girls. Upon reading of the statement of the prosecutrix, they both eloped. Further, the trial Court rejected bail application mainly on the ground that the girl is minor and her consent is immaterial.

7. In the present case, the prosecutrix is 17 years 11 months old and the accused is 18 years old. It appears from the record and the statement of the prosecutrix dated 07.04.2018 that the prosecutrix was in love with the applicant and left the home of her own and moved with the applicant at various places. These are the mitigating factors and therefore, present application deserves consideration." (emphasis supplied)



15. A co-ordinate Bench of this Court in Dharmander Singh v. State, (2020) SCC Online Del 1267, has laid down the parameters that are to be followed when considering bail of a person accused under the POCSO Act, and the same reads 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



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considered after charges have been framed, the above additional factors should be considered.”

(emphasis supplied)

16. The statement given by the Prosecutrix before the doctors that her mother knew about her relationship with the Petitioner and that the FIR has been lodged by her mother only because the Petitioner herein had refused to change his religion, gives an indication that the present FIR was lodged at the behest of the parents of the Prosecutrix who did not approve of the relationship between the Petitioner and the Prosecutrix. This Court can also take judicial notice of the fact that after the Prosecutrix was found and returned to her parents, the Prosecutrix would have been pressurized by her parents to change her statement.

17. This Court is of the opinion that if the Petitioner continues to be in jail, the chances of the Petitioner coming out as a hardened criminal are very high. The future of a youngster cannot be ignored by this Court at this juncture.

18. Accordingly, considering the facts and circumstances of the present case, and also considering the age of the Prosecutrix and the Petitioner herein, the fact that the Prosecutrix has changed her stand in her statements and the fact that she has been found missing on two earlier occasions as well, and also the fact that the Petitioner is not of such strata that he would be in a position to influence the Prosecutrix, this Court is inclined to grant bail to the Petitioner on the following conditions:

- a) The petitioner shall give a security in the sum of Rs.20,000/- with two sureties in the like amount to the satisfaction of the Trial Court;



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- b) The Memo of Parties shows that the petitioner is residing at Gali No.1, Om Vihar, Bankner, Narela, Delhi. The Petitioner is directed to continue to reside at the same address and in case there is any change in the address of the Petitioner, the Petitioner is directed to intimate the same to the Investigating Officer.
 - c) The Petitioner is directed not to leave the city of Delhi without prior permission of the concerned Court;
 - d) The Petitioner is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times;
 - e) The petitioner shall not, directly or indirectly, tamper with evidence or try to influence the witnesses in any manner;
 - f) The petitioner shall attend all the Court proceedings.
 - g) In case it is established that the petitioner has tried to influence the witnesses or tamper with the evidence, the bail granted to the petitioner shall stand cancelled forthwith.
19. The petition is disposed of along with all the pending application(s), if any.
20. Be it noted that this Court has not made any observations on the merits of the case.

SUBRAMONIUM PRASAD, J

AUGUST 14, 2024

Rahul