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

+ **BAIL APPLN. 3833/2023**

NAZIMODDIN KHAN @ NAZIM @ MUSLIM Petitioner

Through: Mr. Vikas Padora and Mr. Dipanshu
Chugh, Advs.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Raghuvinder Verma, APP for
State with SI Pooja Saraswat PS
Malviya Nagar
Ms. Asmita Narula, Ms. Apoorv a
Maheshwari and Ms. Nimisha
Menon, Advs. for the complainant

**CORAM:
HON'BLE MR. JUSTICE VIKAS MAHAJAN**

**ORDER
25.04.2024**

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1. The present bail application has been filed under Section 389 Cr.P.C seeking regular bail in connection with FIR No.167/2018 under Sections 376/120B of the Indian Penal Code, 1860 read with Sections 6 & 17 of the POCSO Act and Sections 10 & 11 of the Prohibition of Child Marriage Act, 2006 registered at P.S. Malviya Nagar.
2. The case of the prosecution is that the victim was minor at the time of her alleged *nikah* with the present petitioner which took place in May, 2017. The further allegation is that from May, 2017 to May, 2018 the victim was sexually assaulted. This led to the registration of the present FIR.



3. Learned counsel appearing on behalf of the petitioner at the outset submits that the petitioner has already spent 5 years 10 months in custody and the sentence for the offence under Section 9 of Prohibition of Child Marriage Act, 2006 is two years whereas punishment prescribed for the offence under Section 376 of the Indian Penal Code, 1860 is upto 10 years which may also extend to life imprisonment and there is no minimum punishment prescribed for the same.

4. Insofar as the punishment under Section 6 of the POCSO Act is concerned, learned counsel submits that at the relevant time when the offence was allegedly committed in the years 2017 and 2018, the punishment prescribed for the said offence was for a term which shall not be less than 10 years but may extend to imprisonment for life. He submits that the provisions of the POCSO Act may not be attracted in the present case as the case of the prosecution is that the petitioner established sexual relationship with the victim only after her *nikah*.

5. The further contention of the learned counsel is that the victim along with her mother, was residing in the premises bearing no.12/57A, Hauz Rani from February, 2017 to May, 2017, which is the place of residence of the present petitioner as well. He submits that the allegation against the present petitioner is that from the month of June, 2017 to August, 2017 the petitioner had been regularly establishing physical relationship with the victim, but this version of the prosecution is falsified by the testimony of PW5, the landlady of the said premises, who has stated that the victim as well as her mother vacated the premises in the month of May, 2017.

6. Referring to the testimony of PW4, the submission of the learned counsel is that PW4 was landlady of the premises where the victim, as well



as, her mother stayed subsequent w.e.f. July, 2017 and she also testified that the victim and her mother were staying in her premises w.e.f. July, 2017 and the present petitioner was not resident of the said premises.

7. In the backdrop of the aforesaid evidence, the submission of the learned counsel is that since the present petitioner was not residing in the same premises where the child victim and her mother had been residing from June, 2017 onwards, therefore, there was no occasion for the present petitioner to establish sexual relationship with the victim.

8. He further submits that the testimony of the victim has already been recorded, therefore, there is no possibility of the petitioner threatening or influencing the victim in case he is granted bail. It is also contended that the antecedents of the petitioner are clean and he is not a flight risk.

9. *Per contra*, learned APP for the State has argued on the lines of the status report.

10. The learned counsel appearing on behalf of the complainant has invited the attention of the Court to an order dated 09.01.2024 of learned Trial Court whereby the petitioner's application for bail was dismissed, to contend that an argument was made by the counsel for the petitioner wherein an admission has been made to the effect that the marriage between the petitioner and the child victim was consummated. She, therefore, submits that the stand now being taken by the petitioner is contrary to the stand taken earlier.

11. She contends that it is the case of the prosecution that the petitioner/accused would visit the place of the residence of the victim every night and would sexually assault her. According to her the victim has supported the case of prosecution. She further submits that the maximum



punishment that can be awarded in the present case is life imprisonment.

12. Further apprehension is expressed by the learned counsel for the complainant to the effect that the petitioner may extend threats to the victim if he is enlarged on bail. She, therefore, urges the Court to reject the bail application of the petitioner.

13. I have heard the learned counsel for the petitioner, the learned APP for State, as well as, the learned counsel for the complainant and have also perused the records.

14. This Court is cognizant of the fact that where an offence under the provisions of the POCSO Act, the threshold for granting of bail is higher once the charge is framed.

15. A bird's eye view of the testimony of PW4 and PW5 goes to show that there is some substance in the contention of the learned counsel for the petitioner that the present petitioner was not residing in the same premises where the victim alongwith her mother, was residing w.e.f. June 2018 onwards.

16. Thus, it has come on record that the victim and her mother are no more residing in the same premises where the petitioner was residing. At the same time there is a submission made by the petitioner's counsel at the time of arguing petitioner's bail application which indicates that after *nikah* the marriage between the petitioner and the victim was consummated. However, the probative value of the evidence that has come on record, as well as, the aforesaid submission of the petitioner's counsel will be seen by the learned Trial Court at the stage of trial. *Prima facie* the commission of offence under the POCSO Act under the guise of *nikah* cannot be countenanced. However, this is an aspect that will also be considered by the learned Trial Court.



17. At this stage the testimonies of the aforesaid witnesses cannot be completely ignored which *prima facie* indicates that period during which sexual assault is said to have been made by the petitioner, he was not residing in the same premises where the victim was residing. That apart, the petitioner has already spent 5 years and 10 months in custody and the trial is still underway. Two more prosecution witnesses are yet to be examined which will be followed by leading of defence evidence, if any. Thus, the conclusion of trial is likely to take some time.

18. Further, the testimony of the victim has already been recorded, therefore, there is no possibility of the petitioner threatening or influencing the victim in case he is enlarged on bail. Even otherwise, appropriate conditions could be imposed to dispel the apprehension expressed by the learned counsel for the victim.

19. On a query posed by the Court, the learned APP for State on instructions from the IO fairly states that the petitioner does not have any criminal record. It is also not the case of the prosecution that the petitioner is a flight risk. The presence of the petitioner during the trial can otherwise, be ensured by imposing necessary conditions.

20. The chargesheet reveals that the age of the petitioner at the time of commission of offence was 26 years and he has spent nearly six years in custody. Considering the aforesaid circumstances in totality, the age of the petitioner, the fact that the petitioner will not have easy access to the victim if enlarged on bail and long incarceration of the petitioner, this Court is of the view that the higher threshold required, is met in the present case.

21. In view of the above, the petitioner has made out a case for grant of regular bail. Accordingly, the petitioner is admitted to bail subject to his



furnishing a Personal Bond in the sum of Rs. 15,000/- and one Surety Bond of the like amount to the satisfaction of the Trial Court/CMM/Duty Magistrate, further subject to the following conditions:

- a) Petitioner shall appear before the Court as and when the matter is taken up for hearing.
 - b) Petitioner shall provide mobile number to the IO concerned which shall be kept in working condition at all times and he shall not change the mobile number without prior intimation to the Investigating Officer concerned.
 - c) Petitioner shall not indulge in any criminal activity and shall not communicate with or come in contact with the witnesses.
22. The petition stands disposed of.
23. Needless to say, that nothing stated hereinabove shall be construed to be an expression of opinion on the merits of the case.
24. Copy of the order be forwarded to the concerned Jail Superintendent for necessary compliance.
25. *Dasti* under signature of the Court Master.
26. Order be uploaded on the website of this Court.

VIKAS MAHAJAN, J

APRIL 25, 2024

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