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

+ **BAIL APPLN. 3997/2023**

HUKAM SINGH

..... Petitioner

Through: Mr. Ajay Garg, Ms. Tripti Gola, Ms. Lhingdeihat Chongloi, Mr. Uday Garg, Mr. Prashant Gola and Ms. Surbhi Soni, Advocates.

versus

STATE

..... Respondent

Through: Mr. Mukesh Kumar, APP for the State with SI Mandeep Kumar, P.S. Punjabi Bagh and WSI Richa Sharma, P.S. Cyber (North).
Mr. Gurdeep Singh, Advocate for the complainant (through VC) alongwith the complainant (mother of the victim in person).

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

ORDER

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06.02.2024

1. This is the third application under Section 439 of the CrPC seeking regular bail in case FIR No. 155/2019 under Sections 376/201 of the IPC, Sections 6/21 of the POCSO Act and Section 88 of the Juvenile Justice Act.
2. The case of the prosecution, as per the status report dated 24.12.2023 authored by Inspector Devendra Singh, SHO, PS Punjabi Bagh, is as under:

“That the above said case has been registered on the statement of the complainant/mother of the victim “T” in which she stated that she lived along with her two children consisting one son aged 12 years and daughter/victim aged about 4 years. She worked in loan branch of HDFC bank. Owing to the exam, both the children were residing at her father's house as she was in office from 9:30 am



to 6:00 pm. After the work got over, she also went her father's house. She further stated that on 15/03/19 when she reached at her father's house at around 7-7:30 pm, her sister "S" told her that in the evening at 4pm the victim went for tuition and at about 6:30 pm, victim's tuition teacher Komal/co-accused came to drop the victim at house, at that time victim was draped in the towel on this co-accused replied that that the victim peed in her clothes due to this she draped the towel upon her. Complainant further submitted that her sister made the victim to wear white underwear and when the victim went to pass the urine, and she remove and put on her underwear the blood came at her underwear. Meanwhile the complainant also reached and she took the victim to the Action Medical Balaji, Paschim Vihar. She further stated that when she asked about the same to the victim, the victim replied that her private part was touched by the accused/applicant the father of her tuition teacher Komal and who did this in the bathroom. Complainant further stated that the school teacher of the victim also informed her through telephone that the victim's behavior is abnormal for last 3- 4 days and her work progress also degrade, also the victim looked like scared, the school teacher advised her for taking care of the victim. In the Balaji hospital all the test of the victim got done and for better treatment the victim was taken to the Acharya Bhiksu Hospital, Moti Nagar by the complainant. After that the present case was registered U/s 376 IPC & 6 POCSO Act.

That during the course of investigation the exhibits were taken into police possession which were seized by the doctor of Balaji Action Medical Institute, Paschim Vihar, Delhi.

That on 16/03/19 the statement U/s 164 Cr.P.C. of the complainant, and other witnesses got recorded before the Ld. MM. After that section 201 IPC, 21 POCSO Act & 88 JJ act were added in the present case."

3. Learned counsel for the applicant submits that the present FIR was registered on 16.03.2019 and the applicant has been in custody for nearly five years. It is submitted that in her testimony recorded before the learned Trial Court, the victim has not made any allegations *qua* the present applicant which would be covered by any of the clauses defining 'penetrative sexual assault' as per Section 3 of the POCSO Act.



4. It is further submitted that the victim did not identify the applicant before the learned Trial Court. It is submitted that there is no other medical or scientific evidence to support the case of the prosecution. Learned counsel for the applicant submits that despite specific directions to conclude the trial within six months, issued by a coordinate bench of this Court *vide* order dated 10.03.2022 passed in BAIL APPLN. 806/2022, the trial has not been concluded. It is pointed out that the Investigating Officer of the case still remains to be examined and since the applicant will lead defence evidence as well, the trial is likely to take further time.

5. *Per contra*, learned APP for the State assisted by learned counsel for the complainant submits that the victim was 04 years old at the time of the incident. It is submitted that the allegations against the applicant are serious in nature. Learned APP further submits that the MLC of the victim clearly records that the victim had suffered 'bleeding per vagina'. As far as the testimony of the victim is concerned, it is submitted that being a four year old child, it cannot be expected that she would describe the incident with precise detail and in view of other evidence, it cannot be a ground for disbelieving the case of the prosecution. It is further contended that only one witness, i.e., the Investigating Officer remains to be examined and the trial is about to conclude.

6. On a pointed query from this Court, learned APP for the State, on instructions, submits that there is no subsequent medical report to attribute a reason for such bleeding reflected in the MLC of the victim.

7. Heard learned counsel for the parties and perused the record.



8. The first bail application moved by the applicant, i.e., BAIL APPLN. 1891/2020 was dismissed by a coordinate bench of this Court *vide* order dated 05.04.2021, observing as under:

6. In the present case, the victim who is around four years of age used to go to take tuitions at the house of the petitioner. The victim has been examined in the Court and we must not forget that at the time of cross-examination she was only four years of age and her testimony is to be read keeping in mind the mindset of a child and her age at the time of recording of her statement in Court.

7. I have gone through the statement of the victim recorded in the Court and mother of the victim - complainant, who has been examined as PW-2. As far as identification of the petitioner is concerned, the victim mentioned in the statement that the petitioner is "*didhi ke papa*", and this terminology has been used by the victim time and again in her deposition in the Court. So what effect it is to make to the case of the petitioner is not being discussed by me at this stage in detail. The doctor has categorically stated that the victim was bleeding when she was brought to the hospital and was then referred to gynaecology. The biological examination of the victim also reveals that blood was detected on exhibits 1a and 1b, which are the undergarments of the victim. As far as the contention of learned counsel for the petitioner that there is a mention in the MLC of the victim that no external injury was found, simply because such a finding has been recorded in the MLC, in my opinion, it is of no help to the petitioner at this stage.

8. At this stage, I am not examining threadbare the testimony of the victim and the mother of the victim/complainant, who has been examined as PW2, otherwise it may prejudice the case of either of the parties. Looking into the medical evidence on record, statement of PW-3 Dr. Ashish Kumar Singh, allegations being grave and serious in nature, and the victim involved in the case is four years old who goes to the house of the petitioner for taking tuitions, during that time the alleged incident took place, no ground for grant of bail is made out.

9. The bail application is, accordingly, dismissed."



9. The second application for bail moved by the applicant, i.e, BAIL APPLN. 806/2022 was dismissed as withdrawn *vide* order dated 10.03.2022 passed by a coordinate bench of this Court, in the following terms:

“After some arguments, learned counsel for the petitioner seeks liberty to withdraw the present bail application. However, he submitted that petitioner is in judicial custody for the last 3 years, and PW1 who is the main witness in this case has not supported the case of the prosecution, and there is no other medical or scientific evident which could support the case of the prosecution.

Since counsel for the petitioner wishes to withdraw the bail application, the bail application is dismissed as withdrawn. However, learned trial court shall make all endeavours to complete the trial within a period of six months and shall not grant unwanted adjournments to any of the parties.”

10. *Vide* order dated 03.01.2024 passed in the present application, this Court had called for a progress report from the concerned learned Trial Court. The said report dated 16.01.2024 has been received from the learned Additional Sessions Judge - 01 (POCSO) (West), Tis Hazari Courts, Delhi in a sealed envelope. This court has opened the said envelope, perused the report and re-sealed it. As per the said progress report, the cross-examination of the Investigating Officer, i.e., PW-11 has not been concluded on account of her repeated absence on various occasions. It is further recorded that the next date fixed for prosecution evidence is 23.04.2024.

11. Section 3 of POCSO Act defines ‘penetrative sexual assault’ as under:

“**3. Penetrative sexual assault.**—A person is said to commit “penetrative sexual assault” if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or



(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

Section 5 of the POCSO Act defines ‘aggravated penetrative sexual assault’ and Section 6 of the said Act provides for its punishment.

12. The case of the prosecution is that the present applicant had touched the victim’s urinary area in the bathroom of the former’s house. As per the statement of the victim (PW-1) recorded before the learned Trial Court, the present applicant was not identified by her as the person referred to by her as ‘*komal didi ke papa*’. It is a matter of record that the present applicant is the father of the said Komal Didi, who was the victim’s tuition teacher. The other aspect is the fact that the victim does not support the case of the prosecution with regard to the allegations of touching her private part in her examination-in-chief and as well as in her response to a leading question put to her by the learned APP. On a leading question put to her by the learned APP about whether ‘*komal didi ke papa*’ had taken her to the bathroom, the victim replied in the affirmative. Subsequently, questions were put to the victim about whether the said ‘*komal didi ke papa*’ undressed her or himself, to which the victim replied in the negative. As per the testimony of Dr. Ashish Kumar Singh, CMO, Shri Balaji Action Hospital (PW-3), who had examined the victim, it is recorded that at the time when the victim was brought to the hospital, she was complaining of passing blood through urine and of abdominal pain while ‘micturation’. On a Court question put to the



said witness regarding the aforesaid term ‘micturation’, it was stated by him that ‘it is a medical term and means passing of urine’. As noted hereinabove, no subsequent report has been placed on record as to the cause of such bleeding. It is also a matter of record that as per the MLC dated 16.03.2019, on an examination by Dr. Mala Dixit, Senior Resident, Obstetrics and Gynaecology, it is recorded that ‘*no vaginal tear or any other external injury seen*’. The FSL report also does not support the case of the prosecution *qua* the present applicant. This Court is conscious of Section 29 of the POCSO Act which provides for a presumption of guilt in cases of offences under Sections 3 and 5 of the said Act, however, the aforesaid circumstances which have emerged during the course of trial cannot be ignored for consideration of the present bail application.

13. As per the Nominal roll dated 06.12.2023 received from the concerned Jail Superintendent, the present applicant, as on 05.12.2023, has already undergone 04 years 08 months and 19 days of judicial custody. Despite directions issued by a coordinate bench of this Court, the trial could not be completed within the stipulated period. All the material public witnesses have already been examined. It is a matter of record that only the Investigating Officer/PW-11 remains to be cross-examined in the present case, which could not be concluded on account of her repeated absence on many occasions, as recorded in the progress report received from the learned Trial Court. Learned counsel for the applicant also submitted that the latter would be leading defence evidence, which is likely to take further time.

14. In totality of the facts and circumstances of the case, the present application is allowed. The applicant is directed to be released on bail, on his furnishing a personal bond of Rs. 50,000/- with two sureties of like amount,



to the satisfaction of the learned Trial Court/Link Court, further subject to following conditions:

- i. The applicant shall not leave India without prior permission of the learned Trial Court.
- ii. The applicant shall intimate the learned Trial Court by way of an affidavit and to the Investigating Officer regarding any change in residential address.
- iii. The applicant shall appear before the learned Trial Court as and when the matter is taken up for hearing.
- iv. The applicant is directed to give his mobile number to the Investigating Officer and keep it operational at all times.
- v. The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witness in any manner.
15. The application is allowed and disposed of accordingly.
16. Pending applications, if any, also stand disposed of.
17. Needless to state that nothing stated hereinabove is an opinion on the merits of the case and any observations made are only for the purpose of the present application.
18. Copy of the order be sent to the concerned Jail Superintendent for necessary information and compliance.
19. Order be uploaded on the website of this court *forthwith*.

AMIT SHARMA, J

FEBRUARY 6, 2024/kct