



2024:DHC:3034



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on:16.04.2024

+ **BAIL APPLN. 3/2024, CRL.M.A. 4740/2024 & CRL.M.A. 4741/2024**

RAJA KHAN

..... Applicant

versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Sanjeev Sehgal, Ms. Sunita Choubey, Mr. Harshit Sharma, Mr. Rajkumar, Mr. Lakshay Midha & Ms. Anshu Kumar Mishra, Advs.

For the Respondent : Mr. Pradeep Gahalot, APP for the State
SI Vinod Kumar with victim in person,
PS Mehrauli

CORAM

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present application is filed under Section 439 of the Code of Criminal procedure, 1973 ('CrPC') seeking bail in FIR No. 286/2019 dated 14.05.2019, registered at Police Station Mehrauli, for the offence under Section 363 of the Indian Penal Code, 1860 ('IPC'). Chargesheet has been filed in the present case for the offences under Sections 363/342/323/376/506 of the IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012.

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2. The case of the prosecution is that the mother of the victim had given a written complaint regarding the victim being missing. During investigation, on 28.10.2019, the elder sister of the victim brought the victim to the police station and informed that the victim had called her from an unknown number and told her about her whereabouts. The victim refused to undergo medical examination.

3. Thereafter, on 30.10.2019, the statement of the victim was recorded under Section 164 of the CrPC. The victim alleged that the applicant was her friend. She stated that the applicant was an Auto Driver and he had offered to take the victim to his home in Fatehpur to meet his sister, whereafter, she had accompanied him. She alleged that the applicant did not allow her to go back to her home. She alleged that when the applicant got to know about the complaint lodged by the mother of the victim, he took her to Ismailpur and raped her when his mother was not in the house. It is alleged that the applicant then took her to Aligaon and forcibly established physical relations with her there as well. She further alleged that the applicant had hit her with the data cable of a charger and also threatened to throw acid on her face. She alleged that she had escaped when the applicant and his mother were not at home and called her sister from the phone of some unknown person.

4. The applicant was arrested on 30.10.2019.

5. On 18.02.2021, the victim resiled from her earlier stand during her examination in chief and stated that the applicant had established physical relations with her only twice and she had come



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to love the applicant. She stated that the applicant had only hit her with the cable charger once in jest.

6. The learned counsel for the applicant submitted that the applicant has been falsely implicated in the present case. He submitted that the investigation is complete and the chargesheet has also been filed.

7. He submitted that the applicant has been in custody since 30.10.2019 and no useful purpose would be served by keeping him in further incarceration. He further submitted that the applicant has deep roots in the society and has clean antecedents.

8. He submitted that there is lapse of around 11 days in registration of the present FIR and there is no plausible explanation for the same and therefore, is a complete afterthought.

9. He submitted that there are material contradictions in the testimony of the victim and her mother (complainant). He states that mother of the victim has turned completely hostile and the victim has partly turned hostile. He contended that the victim in her statement's under Sections 161 and 164 before the learned MM, Saket Courts, Delhi on 30.10.2019 categorically stated that the applicant forcefully established physical relationship with her multiple times and during the victim's examination-in-chief dated 18.02.2021 she deposed that the physical relationship established with the applicant was only with her consent.

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10. He submitted that the testimony of the mother of the victim also has several dichotomies in as much as she alleged in her statement under Section 161 of the CrPC that the applicant did “*Jabardasti*” with the victim but in her statement dated 02.11.2022—she turned hostile by saying that “*mujhe itna nahi pata, meri beti ko pata hai*”.

11. He submitted that the victim has three Aadhar Cards bearing different years and considering the Aadhar card of the year 2000, the victim was an adult at the time of the alleged incident which also shows that they were in a consensual relationship. He also submitted that when the Aadhar card of the victim mentions her date of birth as 31.10.2000, the applicant could not have known that she was a minor at the time of the alleged incident.

12. He stated that the proof submitted by the prosecution with regard to the age of the victim in the form of the school register is not sufficient to arrive at the conclusion that the victim was less than sixteen years of age, especially when there are contradictory evidences before the learned Trial Court.

13. He submitted that the statement of the victim has already been recorded before the learned Trial Court and there are no chances of either threatening the witness or tampering with the evidence by the applicant. The applicant is also not a flight risk.



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14. He submitted that the applicant belongs to the poor strata of the society and is a young man aged around 25 years. The applicant is the sole bread earner in the family and his mother is suffering from cancer.

15. *Per contra*, the learned Additional Public Prosecutor for the State opposed the grant of bail on the ground that severe offences are alleged, and enlarging the applicant on bail would prejudice the trial.

16. He submits that even if the examination in chief of the victim is taken to be credible, the victim has clearly still mentioned therein that she had engaged in physical relations with the applicant on two occasions.

17. He submits that the victim has also clearly stated that she was born on 31.10.2006, which is also corroborated by the certificate from her school register, whereby it is clear that she was a minor at the time when the applicant engaged in sexual relations with her. He submits that consent is immaterial if the victim is a minor.

ANALYSIS

18. While considering the application for bail, the Court has to consider the nature of the offence, severity of the punishment and *prima facie* involvement of the accused. The Court, at this stage, is not required to enter into the detailed analysis of the evidence to



establish beyond the reasonable doubt whether the accused has committed the offence.

19. The Court while considering the application for bail in relation to offences under POCSO Act is also required to consider the factors such as age of the victim; age of the accused, that is, the older the accused the more serious the offence; the age difference between the victim and the accused so as to consider the element of perversion; conduct of the accused after the offence; whether it is a case of consensual relationship; etc.

20. It is pointed out that the victim during her examination in chief turned hostile. She stated that she had gone with the applicant on her own accord and stayed with the applicant at various places. She also stated that she was in a romantic relationship with the applicant. She also stated that she had engaged in sexual relations with the applicant during the period she was with him and stated that she had lived with him as a 'wife'.

21. It is the case of the prosecution that the victim was thirteen years old at the time of the alleged incident as per the school records. It is trite law that the consent of a minor is immaterial. However, it is relevant to note that three Aadhar cards of the victim mentioning different dates of birth have been put forth. One of the Aadhar Cards mentions the date of birth of the victim as 31.10.2000, as per which she was eighteen years of age at the time of the alleged incident.

22. The victim during her examination in chief has stated that her date of birth is 31.10.2006. It is seen that the mother of the victim



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during her cross examination has stated at one instance that the date of birth of the victim is 31.10.2000 and then contradicted herself and said that the date of birth of the victim is 31.10.2006.

23. The victim and her mother were present in Court when the matter was reserved for judgment. They submitted that the victim was eighteen years old at the time of the alleged incident and her age was recorded falsely in the school records for the purpose of admission in the school.

24. While the veracity of the school records of the victim and her correct age at the time of the alleged incident would be determined during the trial, at this stage, doubt has been created as to the age of the victim and the possibility of the victim being a major at the time of the incident cannot be ruled out. The Trial Court while deciding the case has to consider the entire material on record, and can definitely look into the circumstances and other evidence put forth by the prosecution while passing the judgment.

25. It is relevant to note that the victim is not disputing that she was staying with the applicant on her own free will. Even in her initial statement, the victim had not said that she was taken by the applicant forcefully.

26. This Court while considering the application of Bail cannot lose sight of the fact that from the statement of the victim, as discussed, the very foundation of the allegations, at this stage, becomes doubtful.



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27. The applicant is in custody since 14.05.2019. The trial is still at the stage of prosecution evidence. The victim has also already been examined. It is not disputed that the trial in the present case is likely going to take long.

28. The Hon'ble Apex Court in the case of ***Union of India v. K.A. Najeer*** : AIR 2021 SC 712, held that once it is obvious that a timely trial would not be possible, and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.

29. A long period of incarceration, thus, is also a factor which has to be kept in mind at the time of deciding the question of grant or refusal of bail.

30. The applicant has therefore established a *prima facie* case for grant of bail.

31. Considering the totality of facts and circumstances, and without commenting further on the merits of the case, the present bail application is allowed, and the applicant is directed to be released on bail on furnishing a bail bond for a sum of ₹25,000/- with one surety of the like amount to the satisfaction of the learned Trial Court/ Duty Metropolitan Magistrate, subject to the following terms and conditions:

- a) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;



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- b) The applicant shall under no circumstances leave the boundaries of the country without the permission of the learned Trial Court;
- c) The applicant shall, upon his release, furnish a proof of residence where he shall reside, which should be at least 5 KM far from the locality where the victim resides, subject to the satisfaction of the IO;
- d) The applicant shall upon his release provide his mobile number to the concerned IO / SHO and keep it switched on at all times;
- e) The applicant shall not contact the victim and tamper with the evidence in any manner whatsoever.

32. In the event of there being any FIR/DD entry / complaint lodged against the applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

33. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the Trial and also not be taken as an expression of opinion on the merits of the case.

34. The bail application is allowed in the aforementioned terms.

AMIT MAHAJAN, J

APRIL 16, 2024

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