



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

% *Date of decision: August, 28, 2023*

+ **CRL.M.C. 3399/2023**

MS. N

..... Petitioner

Through: Ms. Kamna Vohra, Mr. Dipika Saxena, Mr. Shivam Tyagi, Mr. Deepanshu Dudeja, Ms. Manaswini Singh, Mr. B. Chaturvedi, Mr. Suraj Kumar and Mr. Rohan Khanna, Advocates

Versus

STATE & ANR.

..... Respondents

Through: Mr. Mukesh Kumar, APP for the State with SI Manish, PS. Welcome, Respondent no.2 in person.

CORAM:

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

1. The present petition has been filed under Section 482 of the Code of the Criminal Procedure, 1973 for setting aside order dated 04.02.2023 passed by learned Trial Court in SC no. 331/2021 in FIR no 551/2021 dated 02.10.2021 registered under Section(s) 342/354/354-B/363 of the Indian Penal Code, 1860 and Section 10 Protection of Children from Sexual Offences, 2012 at P.S. Welcome, Delhi.

2. As per the FIR, in the early hours of 02.10.2021 the complainant (father of the child involved), upon waking, did not find his daughter (child involved) aged about 3 years sleeping next to him at the first floor of house. After looking frantically for her the complainant found child involved at the



second floor of his house, where the accused was residing as a tenant, who was indulging in a grievous act of sexual misconduct with the child involved. The accused was then taken into custody on 02.10.2021.

3. Thereafter, the accused applied for the grant of bail before the learned Trial Court in SC no. 331/2021 before ASJ -06 (POCSO), Shahdara District, Karkardooma, New Delhi, wherein the following order dated 04.02.2023 was passed: -

“1. The material witnesses have been examined.

2. The applicant/ accused is in J.C. since 02.10.2021.

3. There is no apparent threat of injury to the family of the victim from the applicant/ accused.

4. The continued detention of the applicant/ accused is therefore, not warranted.

5. Bail application is allowed and accused is admitted to bail subject to his furnishing personal bond in the sum of Rs. 15000/- with one surety in the like amount.

Bail application if disposed of accordingly.

A copy of the order be sent to the concerned Jail Superintendent for intimation and due compliance.”

4. The learned counsel for the petitioner submits that the learned Trial Court has failed to consider the gravity and heinousness of the offence involved while granting bail to the accused and moreover no reasonable amount of time to enter appearance and make submissions opposing the grant of bail was given to anyone on behalf of the child involved. Learned counsel also submits that the impugned order is unreasoned and not apposite in law.



5. The APP for the State enters appearance and supports the case of the petitioner.

6. Before dwelling into the matter at hand, this Court likes to point out that while considering matters involving sexual offences, a Court has to be mindful that the incidents of sexual violence against children (or against the women) in a society always involve the life and limb of a child (or a woman) as what is at stake is the prestige and future of the victim which has been lowered and shattered into pieces. Once a victim being a child (or a woman) has been hurt physically, emotionally, and mentally at a tender age, the same is bound to have adverse effects on the overall growth and development of the said human being. It is, thus in the interest of justice and of course the overall interest of the society at large that proceedings are handled with due care and precaution, especially when the Court is dealing with an application for releasing the accused on bail.

7. This is especially whence the POCSO Act being a special piece of legislation has been enacted by the Indian Parliament with an avowed objective to deal with the sexual offences committed against the children as it was realised that Sexual Offences against the children cannot be dealt in the framework of existing Laws. The legislature, after taking note of the societal milieu of the country, recognised that since offences against the children were neither reported nor penalised. A need was felt for enacting a statute clearly defining the varied degrees of the offences as punishable under the law and which also propagates the restorative and compensatory justice to the sufferer.

8. The POCSO Act is designed to safeguard the interest of children. As per the statement and objective of the POCSO Act, it is a comprehensive



legislation safeguarding the interest of child at every stage of the judicial process, incorporating child- friendly procedure for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy Trial of such offences. One of the special features of POCSO Act is that Section 29 of POCSO Act, presupposes the guilt of an accused.

9. Noteworthy, the preamble of the POCSO Act reads as under: -

“An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. Whereas clause (3) of article 15 of the Constitution, inter alia, empowers the State to make special provisions for children; AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child; AND WHEREAS it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child; AND WHEREAS it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social



development of the child; AND WHEREAS the State parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent—

- (a) the inducement or coercion of a child to engage in any unlawful sexual activity;*
- (b) the exploitative use of children in prostitution or other unlawful sexual practices;*
- (c) the exploitative use of children in pornographic performances and materials; AND WHEREAS sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.”*

10. Furthermore, this Court would also like to reemphasize the basic tenets of law where a Court while considering the grant of bail is required to judicially apply its mind and be satisfied on the basis of the facts that are borne out from the FIR and report of the Investigating Officer and surroundings and the documents and materials in existence. It is a trite law that the order granting or rejecting bail has to be a speaking one justifying the findings arrived at by the Court [*Re.: State of Uttar Pradesh (through CBI) vs. Amarmani Tripathi* (2005) 8 SCC 21; *Prasanta Kumar Sarkar vs. Ashis Chatterjee & Anr.* (2010) 14 SCC 496; *Neeru Yadav vs. State of Uttar Pradesh* (2014) 16 SCC 508].

11. Now entering into the present scenario, a perusal of the impugned order reproduced hereinabove reveals that the learned Trial Court has granted bail to the accused in a purely mechanical manner without expressing any opinion or without application of judicial mind on the facts



and/ or merits of the case. The same is against the very pre-requirements of granting bail to an accused especially in the present case, when it is involving, not only offences under Section(s) 342/354/354-B/363 IPC but also Section 10 POCSO Act. A bare reading of the FIR reveals that specific allegations have been levelled against the accused under such circumstances, it is the duty of a Court while considering the grant bail to ascertain as to whether a *prima-facie* case exist against the accused. In the opinion of this Court, the impugned order being unreasonable, cryptic, ambiguous and is against the settled proposition of law laid down by the Hon'ble Supreme Court and followed by various High Courts across the Country from time to time.

12. This is especially whence grant of bail requires taking into consideration various factors primarily including the nature of the offence, heinousness of the crime, punishment involved and the role of the accused. Additionally, the Court is required to examine if there is a prima facie case made out against the accused or if there is a reasonable doubt created in the mind of the Court for granting bail to the accused. While dealing with cases arising out of the POCSO Act, a Court is called upon to balance 'public cause' of the society at large against the 'private interest/right'. Therefore, in addition of the aforesaid conditions, a Court has to be mindful of purposes, objects and reasons of the POCSO Act supplemental with the basic settled position enshrined in Section 438 of the Cr.P.C. and Section 439 of the Cr.P.C. as held by the Hon'ble Supreme Court in various decisions. A Court of law has to be mindful of the fact that "*Cognizance is in regard to the offence and not the offender.*" [*Re.: Prasad Shrikant Purohit vs. State of Maharashtra & Anr.* (2015) 7 SCC 440].



13. At the outset, this Court likes to point the considerations for a Court for grant of bail to an accused [*Re.: Prasanta Kumar* (supra); *Amarmani Tripathi* (supra) and *Deepak Yadav vs. State of Uttar Pradesh* (2022) 8 SCC 559]: -

- i. whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
- ii. nature and gravity of the accusation;
- iii. severity of the punishment in the event of conviction;
- iv. danger of the accused absconding or fleeing, if released on bail;
- v. character, behaviour, means, position and standing of the accused in the society;
- vi. likelihood of the offence being repeated;
- vii. reasonable apprehension of the witnesses being influenced; and
- viii. danger, of course, of justice being thwarted by the grant of bail.

14. This Court, is of the opinion, that in addition to abovesaid conditions the following considerations should be kept in mind while considering grant of bail to an accused in matters relating to sexual offences specially POCSO Act:

- i. The age of the Victim;
- ii. The age difference between the victim and the accused;
- iii. The ferociousness of the offence;
- iv. The relationship between the victim and the accused and;
- v. The vicinity of residence of the accused and the victim and if they are in proximity then if the accused is willing to reside elsewhere, till the pendency of trial.



15. Relevant are the observations made by the Hon'ble Supreme Court in *State of Bihar vs. Rajballav Prasad* (2017) 2 SCC 178 :-

“24. As indicated by us in the beginning, prime consideration before us is to protect the fair trial and ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully and this Court is convinced that in the present case, that can be ensured only if the respondent is not enlarged on bail. This importance of fair trial was emphasised in Panchanan Mishra v. Digambar Mishra [Panchanan Mishra v. Digambar Mishra, (2005) 3 SCC 143 : 2005 SCC (Cri) 660] while setting aside the order of the High Court granting bail in the following terms : (SCC pp. 147-48, para 13)

“13. We have given our careful consideration to the rival submissions made by the counsel appearing on either side. The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime and if there is delay in such a case the underlying object of cancellation of bail practically loses all its purpose and significance to the greatest prejudice and the interest of the prosecution. It hardly requires to be stated that once a person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent, the accused in order to get away from the clutches of the same indulge in various activities like tampering with the prosecution witnesses, threatening the family members of the deceased victim and also create problems of law and order situation.”

25. Such sentiments were expressed much earlier as well by the Court in *Talab Haji Hussain v. Madhukar Purshottam Mondkar* [Talab Haji Hussain v. Madhukar Purshottam Mondkar, 1958 SCR 1226 : AIR 1958 SC 376 : 1958 Cri LJ 701] in the following manner : (AIR p. 379, para 6)

“6. ... There can be no more important requirement of the ends of justice than the uninterrupted progress of a fair trial; and it is for the continuance of such a fair trial that the inherent powers of the High Courts are sought to be invoked by the prosecution in cases where it is alleged that accused persons, either by suborning or intimidating witnesses, are obstructing the smooth progress of a fair trial. Similarly, if an accused person who is released on bail jumps bail and attempts to run to a foreign country to escape the trial, that again would be a case where the exercise of the inherent power would be justified in order to compel the accused to submit to a fair trial and not to escape its consequences by taking advantage of the fact that he



has been released on bail and by absconding to another country. In other words, if the conduct of the accused person subsequent to his release on bail puts in jeopardy the progress of a fair trial itself and if there is no other remedy which can be effectively used against the accused person, in such a case the inherent power of the High Court can be legitimately invoked.”

26. We are conscious of the fact that the respondent is only an undertrial and his liberty is also a relevant consideration. However, equally important consideration is the interest of the society and fair trial of the case. Thus, undoubtedly the courts have to adopt a liberal approach while considering bail applications of the accused persons. However, in a given case, if it is found that there is a possibility of interdicting fair trial by the accused if released on bail, this public interest of fair trial would outweigh the personal interest of the accused while undertaking the task of balancing the liberty of the accused on the one hand and interest of the society to have a fair trial on the other hand. When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice-delivery system. It is this need for larger public interest to ensure that criminal justice-delivery system works efficiently, smoothly and in a fair manner that has to be given prime importance in such situations. After all, if there is a threat to fair trial because of intimidation of witnesses, etc., that would happen because of wrongdoing of the accused himself, and the consequences thereof, he has to suffer. This is so beautifully captured by this Court in Masroor v. State of U.P. [Masroor v. State of U.P., (2009) 14 SCC 286 : (2010) 1 SCC (Cri) 1368] in the following words : (SCC p. 290, para 15)

“15. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned. In this context, the following observations of this Court in Shahzad Hasan Khan v. Ishtiaq Hasan Khan [Shahzad Hasan Khan v. Ishtiaq Hasan Khan, (1987) 2 SCC 684 : 1987 SCC (Cri) 415] are quite apposite : (SCC p. 691, para 6)

‘6. ... Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective



interest of the community so that parties do not lose faith in the institution and indulge in private retribution.’”

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28. *In Ramesh v. State of Haryana [Ramesh v. State of Haryana, (2017) 1 SCC 529] , which was decided only two days ago i.e. on 22-11-2016, this Court discussed the problem of witnesses turning hostile, and if that is for wrong reasons, observed that it affects the very fabric of criminal justice-delivery system. We would like to reproduce following passages therefrom : (SCC pp. 550-51, paras 44-47)*

“44. On the analysis of various cases, following reasons can be discerned which make witnesses retracting their statements before the court and turning hostile:

- (i) Threat/Intimidation.*
- (ii) Inducement by various means.*
- (iii) Use of muscle and money power by the accused.*
- (iv) Use of stock witnesses.*
- (v) Protracted trials.*
- (vi) Hassles faced by the witnesses during investigation and trial.*
- (vii) Non-existence of any clear-cut legislation to check hostility of witness.*

45. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said: “witnesses are the eyes and ears of justice”. When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice-delivery system. It is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in Zahira Habibullah case [Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] as well.

46. Justifying the measures to be taken for witness protection to enable the witnesses to depose truthfully and without fear, Justice Malimath Committee Report on Reforms of Criminal Justice System, 2003 has remarked as under:



'11.3. Another major problem is about safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise.... Time has come for a comprehensive law being enacted for protection of the witness and members of his family.'

47. Almost to similar effect are the observations of the Law Commission of India in its 198th Report (Report on 'witness identity protection and witness protection programmes'), as can be seen from the following discussion therein:

'The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Penal Code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Penal Code, 1860. It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several general statutes in other countries provide for victim and witness protection.'

16. Relevant observations made by the Hon'ble Supreme Court in ***State of Bihar vs. Rajballav Prasad*** (2017) 2 SCC 178 are produced hereinunder:-

"24. As indicated by us in the beginning, prime consideration before us is to protect the fair trial and ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully and this Court is convinced that in the present case, that can be ensured only if the respondent is not enlarged on bail. This importance of fair trial was emphasised in Panchanan



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‘6. ... Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution.’”

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“44. On the analysis of various cases, following reasons can be discerned which make witnesses retracting their statements before the court and turning hostile:

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45. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said: “witnesses are the eyes and ears of justice”. When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice-delivery system. It is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in Zahira Habibullah case [Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] as well.

46. Justifying the measures to be taken for witness protection to enable the witnesses to depose truthfully and without fear, Justice Malimath Committee Report on Reforms of Criminal Justice System, 2003 has remarked as under:

‘11.3. Another major problem is about safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise.... Time has come for a



comprehensive law being enacted for protection of the witness and members of his family.'

47. Almost to similar effect are the observations of the Law Commission of India in its 198th Report (Report on 'witness identity protection and witness protection programmes'), as can be seen from the following discussion therein:

'The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Penal Code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Penal Code, 1860. It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several general statutes in other countries provide for victim and witness protection.'

17. In view of the aforesaid factual matrix involved and the legal proposition at hand, the order dated 04.02.2023 passed by learned Trial Court, granting bail to the accused, in SC no.331/2021 in FIR no.551/2021 dated 02.10.2021 registered under Section(s) 342/354/354-B/363 IPC and Section 10 of POSCO Act at P.S. Welcome, Delhi, is set aside.

18. Needless to mention, observations made, if any, are only for adjudication of present petition and shall not be construed on the merits of the matter.

19. As the present petition and observations herein are of judicial importance, let a copy of this order be sent to all the concerned Principal



District & Sessions Judges through Registrar General of this Court for information and compliance thereof for better administration of justice.

20. The Registrar (Vigilance) of this Court is directed to seek explanation on the administrative side from the concerned Judge, as to the reasons for passing the non-reasoned impugned order, report whereof shall be placed before the concerned Hon'ble Inspecting Judges Committee of this Court within one week for consideration.

21. Accordingly, the present petition is allowed and stands disposed of.

SAURABH BANERJEE, J.

AUGUST 28, 2023/akr