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IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 20th May, 2024

+ **BAIL APPLN. 1281/2022**

SANJAY KHATRI

..... Applicant

versus

STATE OF NCT OF DELHI

.... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Jaideep Malik & Mr. Siddharth
Soni, Advocates.

For the Respondent : Mr. Pradeep Gahalot, APP for the
State alongwith SI Anjali Panwar, PS-
K.N. Katju Marg Ms. Gayatri
Nandwasi & Ms. Mudita Sharda,
Advs. for R2 with mother of victim in
person.

CORAM

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present application is filed under Section 438 of the Code of Criminal Procedure, 1973, seeking grant of pre-arrest bail in FIR No. 273/2022 dated 11.04.2022, registered at police station K.N. Katju Marg, for offences punishable under Section 354/354B/506(II) of the



Indian Penal Code, 1860, ('**IPC**') and Section 10 of the Protection of Children from Sexual Offences Act, 2012 ('**POCSO**').

2. The FIR was registered on a complaint given by the victim, aged about 17 years, alleging that the applicant who is the father of the victim, attempted to commit rape upon her on 17.03.2022.

The FIR

3. It was alleged in the FIR that on the earlier occasion, that is the date of the alleged incident, the victim / complainant did not give any statement to the police, nor during the MLC about the incident of attempt to rape, since she was under threat from the applicant that if he goes to jail, he will get her killed and he has alot of money therefore no one would be able to do anything to him. The victim got the courage after talking to her family members, about the alleged incident, and decided to give the complaint against the applicant, for his illicit act.

4. It was also stated in her written complaint that the applicant being a resident of Bahadurgarh, had specially come to meet his children including the victim on 17.03.2022. It stated that at around 10:30 pm the applicant had taken all of his three children on a drive and after sometime left his two sons at home and but took the victim further on the pretext of having soda.

5. It is alleged that the applicant stopped and left the car for getting the soda, the victim was asked to wait in the car. It is alleged that the applicant returned with vodka and soda and asked the victim to consume vodka to which she initially resisted but consumed later.



6. It is alleged that after reaching home the applicant and all the children were watching television and after half an hour when the victim told the applicant that she is going to sleep, the applicant followed the victim with one of his sons and laid on the victim's bed on the pretext of playing with his son.

7. It is alleged that when the victim was asleep, she felt being touched inside her clothes but was not in a position to raise an alarm or do anything. She alleged that during this attempt, at around 4:00 am, her mother entered the room, turned on the lights, started shouting, and asked the victim to wear clothes since she was naked. The applicant was also beaten by the victim's mother and her brother, and therefore the applicant could not rape the complainant. It is alleged that the accused inappropriately touched the prosecutrix's body and private parts. The mother of the victim also called the police and everyone went to the police station, where the victim did not give any complaint, against the applicant, being under the threat of her father. The victim is stated to be around seventeen and a half years of age at the time of the alleged incident.

Submissions

8. The learned Counsel for the applicant submitted that the he has falsely been implicated. He submitted that there is matrimonial dispute going on between the applicant and the mother of the victim and multiple litigations are pending *qua* the same, and the applicant being a resident of Bahadurgarh, was called to Delhi by the victim's mother,



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on the pretext of a scuffle that happened between the victim and some other persons.

9. He submitted that since the victim is the daughter of the applicant, he rushed to Delhi, and upon reaching Delhi, the applicant was welcomed inside the house and thereafter as per the plan of his wife, the applicant was mercilessly beaten by his wife and her other family members. He submitted that the applicant was seriously injured and the right side of his face was swollen.

10. He submitted that on the day of the incident when the police were called, the victim in her own written statement had stated that her father (present applicant), had done nothing wrong to her, subsequently she gave the same statement at the time of her medical examination and the same was also recorded in the MLC.

11. He submitted that present FIR is an afterthought and an attempt by the applicant's wife to harass him since she had already filed multiple cases against him and the applicant was discharged in the case registered at her behest under Section 498A of the IPC. He submitted that since his wife was unable to get the permanent alimony from the applicant, she's got the present FIR registered by tutoring the daughter, in order to pressurize the applicant and put him in a compromising situation to settle the cases.

12. He submitted that the applicant's wife brainwashed his daughter and got the present FIR registered after a delay of 24 days since the alleged incident took place on 17.03.2022, and on the said date the



victim had already given two statements that the applicant had committed no wrong to her.

13. He submitted that the victim herself gave in writing to the SHO on 18.03.2022, that she was in a lot of stress and depression because of which her mother had called the applicant to console her and because of the said reason the applicant took the victim on a drive and no sexual act of any nature took place.

14. He submitted that the applicant was given interim protection by this Court by order dated 04.05.2022 and since then the applicant has joined investigation and cooperated with the investigation as and when directed by the investigating officer. He submitted that the chargesheet has already been filed before the learned Trial Court and the charges have already been framed.

15. The learned Additional Public Prosecutor ('APP') for State alongwith learned counsel for the victim has opposed the grant of present bail application.

16. The learned APP opposed the grant of bail on the ground that serious offences under Section 10 of the POCSO Act and Sections 354/354B/506(II) of the IPC are alleged, and enlarging the applicant on bail would prejudice the trial.

17. He submitted that the victim in her statement recorded under Section 164 CrPC, has maintained that the applicant sexually assaulted her, and touched her private parts on the alleged date.

18. He submitted that the victim was threatened by the applicant, being her father, and therefore she did not give any statement at the



first instance and later filed the complaint when she gained support from her family members.

19. He submitted that the victim was a minor at the time of the alleged incident and as per the allegations, was molested by her father who has allegedly undressed her, touched her private parts and attempted to commit rape upon her.

20. The learned counsel for the victim also vehemently opposed the grant of present bail application and submitted that the offence committed by the applicant is not only serious but also heinous in nature and the complainant was threatened to give the complaint at the first place. He submitted that the delay in registration of the present FIR was due to life threatening fear extended by the applicant to the life of the victim.

21. He further submitted the act of the accused is worse than a beast for the reason that he attempted to commit rape of his own daughter.

22. He submitted that matrimonial acrimony between mother and father does not allow the father to end the future of the daughter by committing rape for the reason that she staying with her mother.

Analysis

23. I have heard considered arguments advanced by learned counsel for the parties.

24. From the perusal of the record, it is apparent that the applicant and the mother of the victim have a long history of matrimonial discord.



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25. On 17.03.2022, the victim's maternal uncle called the police, alleging that the applicant had committed sexual assault on his niece. When the applicant and the victim went to the police station the victim had given in writing that she was stressed and because of that her mother had only called the applicant and similar statement was also recorded in the MLC.

26. At joint request, the parties were also relegated to mediation before the Delhi High Mediation and Conciliation Centre but the matter could not be settled.

27. The learned Counsel for the applicant had stated that there's a drastic change in the statement of victim after it was recorded at the time of the alleged incident and the same appears to be tutored.

28. The chargesheet has already been filed and the charges have been framed under Sections 354/354B/506(II) of the IPC and Section 10 of POCSO. Therefore, application for Bail is required to be considered keeping in mind the provisions of Section 29 of the POCSO Act.

29. The Hon'ble Apex Court in *State of Bihar v. Rajballav Prasad: (2017) 2 SCC 178*, in relation to offences under POCSO, had held that, while considering the application for bail at a post charge stage, the Court also has to consider the provisions of Section 29 of the POCSO Act. Section 29 reads as under:

“Presumption as to certain offences

Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume,



that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

30. On this point, this Court also refers to the view taken by a coordinate Bench of this Court in *Dharmender Singh v. State* in **BAIL APPLN. 1559/2020**, where the court had considered the aspect of presumption provided in Section 29 of the POCSO Act. It was held that while considering the application for bail even at a stage after charges have been framed, the impact of Section 29 would only be to raise the threshold of satisfaction required before a Court grants bail. The Court, therefore, is required to evaluate whether the evidence placed is credible or ex facie appears to support the case of prosecution.

31. It is admitted that the victim was seventeen and a half years of age, studying in school. It is not the case where she was drugged or was unconscious and could not realise that a man is on top of her and is removing her clothes. It is not disputed that she did not make any hue and cry, and did not allege any sexual act in her statement, at the first instance.

32. It is relevant to note that on 17.03.2022, that is the alleged date of the offence, when the victim's uncle had called the police, the complainant had herself stated in writing and told the police officers that the applicant had done nothing wrong with her. She did not make any allegation against the applicant to the doctor during medical examination as well. Furthermore, in her statement dated 18.03.2024, the victim reiterated her stand to the concerned police authorities that



the applicant had not sexually assaulted her. Thereafter, on 11.04.2022, the victim switched her stance and levelled allegations against the applicant for the first time.

33. Certain considerations that have to be kept in mind while deciding the application in relation to offences under POCSO Act are; the age of the minor victim vis-à-vis the age of the accused, the family relationship, if any, between the victim and the accused, whether the accused is a repeated offender, the chances of the accused threatening the victim after being enlarged on bail etc.

34. From the perusal of the chargesheet and the statement recorded, at this stage, it appears as under:

- a. The allegation of touching her private parts and removing her clothes in order to commit rape was not mentioned to the police or was recorded in the MLC which was recorded on the day of the alleged incident;
- b. Although the incident took place on 17.03.2022, the complaint pursuant which FIR was registered was only given after four days.
- c. Despite the fact that the mother of the victim is alleged to have herself saw the alleged act in the first place, no complaint was given at her behest as well;
- d. The fact of matrimonial disputes between the applicant and the mother of the victim for a relatively long period is undisputed;



- e. As per the statement given by the victim, the applicant came to visit the victim when he was told that she was upset;
- f. The applicant was granted interim protection by this Court on 04.05.2022, and since then there is no complaint of applicant trying to influence any of the witnesses or making an attempt to approach the victim in any manner.
- g. Even though, it was alleged that the applicant had threatened the victim of dire consequences if she files the complaint, but till date no new complaint against the applicant has been given with respect to the same.

35. It has to be kept in mind that in cases where the victim is a child, her statement has to be scrutinized with great care and caution as children can be easily swayed away and are prone to tutoring. It can also be a possibility that the statement is made at the behest of one of the parents. It is the duty of the Court to also examine and analyse other corroborative evidence and circumstances which are important to the case (Ref.: *Atender Yadav v State NCT of Delhi* : 2013 SCC OnLine Del 4322).

36. The allegations like in the present case are of such nature when put to the accused, especially when he happens to be the father of the victim, that he would be inevitably be looked down upon by society and it would have far reaching social consequences. The possibility of getting such complaint lodged, especially when the parents have history of matrimonial discord, cannot be ruled out. In the present



case, as noted above, the parents of the victim have been at loggerheads and have filed multiple complaints against each other.

37. Merely, because Section 29 of the Act provides for a statutory presumption, the same does not bind the Courts to accept the prosecution version as gospel truth and the discretion in relation to grant of bail is still to be exercised considering the facts of the case.

38. The delay between the alleged incident and the filing of the complaint, and the fact that the mother of the victim and the applicant who also happens to be the father of the victim, are litigating against each other due to matrimonial acrimony cannot be ignored by the Court while deciding the application for bail.

39. It is not in doubt that a mere testimony of the prosecutrix can be sufficient for the purpose of convicting the accused and the testimony does not require corroboration as long as same inspires confidence.

40. From the facts as narrated above, the statement at this stage does not inspire confidence.

41. The presumption of guilt is not absolute and is rebuttable. It is the duty of the prosecution to first establish facts on the basis of the evidence which would form the foundation for the presumption to operate.

42. It is not in doubt that an order for pre-arrest bail cannot be passed in a routine manner so as to allow the accused to use the same as a shield. At the same time, it cannot be denied that a great amount of humiliation and disgrace is attached with arrest. The purpose of custodial interrogation is to aid the investigation and is not punitive.



43. It is not the prosecution's case that the applicant, after being granted interim protection, has misused the liberty of interim protection or that the applicant has not cooperated with the investigation thereon.

44. It is not alleged that the applicant is a flight risk or that he will tamper with evidence if released on bail. Any apprehension, even otherwise, can be taken care of by putting appropriate conditions. It is trite law that where the court is of the considered view that the accused has joined the investigation and is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided since, a great ignominy, humiliation and disgrace is attached to arrest. [Ref: *Bhadresh Bipinbhai Sheth v. State of Gujarat* : (2016) 1 SCC 152].

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

- a. The applicant shall provide his mobile number to the concerned IO / SHO and keep it switched on at all times;
- b. The applicant shall provide his address to the concerned IO / SHO:
- c. The applicant shall not leave the Country with the prior permission from the learned Trial Court:



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- d. The applicant shall not in any manner contact the complainant/victim or any of the witnesses;
- e. The applicant shall not reside or visit the locality where the victim resides.
46. 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 way of seeking cancellation of bail.
47. 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.
48. The bail application is allowed in the aforementioned terms.

MAY 20, 2024

AMIT MAHAJAN, J