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

+ BAIL APPLN. 2514/2022

MOHD SHARIQ

..... Petitioner

Through: Ms. Pooja Roy and Mr. Aditya
Aggarwal, Advocates.

versus

STATE AND ANR.

..... Respondents

Through: Mr. Shoiab Haider, APP for the State
with Mohd. Zaid, Advocate and SI
Arpita Mishra, P.S.: Shastri Park.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

08.12.2022

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By way of the present petition under section 439 of the Code of Criminal Procedure 1973, ('Cr.P.C.') the petitioner who is facing trial in case FIR No. 294/2022 dated 18.02.2022 registered at P.S.: Shastri Park, pursuant to which chargesheet has been filed on 18.04.2022 under sections 363/376 of the Indian Penal Code, 1860 ('IPC') and section 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO'), seeks regular bail.

2. Notice on this petition was issued on 24.08.2022. Status report dated 06.10.2022 has been filed.
3. Nominal roll dated 05.12.2022 received from the Jail Superintendent shows that the petitioner has been in judicial custody for the last more than 09 months; that his jail conduct has been 'satisfactory'; and that he is not involved in any other offence.

4. After chargesheet was filed on 18.04.2022, charges have been framed against the petitioner on 15.11.2022 under sections 376/363 IPC and section 6 POCSO and trial is underway. The next date of hearing before the learned trial court is 09.02.2023 for recording of prosecution evidence.
5. Though the allegations against the petitioner in the FIR are under section 376 IPC and section 6 POCSO, MLC dated 18.02.2022 does not disclose any evidence of sexual assault but only records that “sexual assault can’t be ruled out”. The MLC further records that the prosecutrix had declined internal examination.
6. In her statement dated 18.02.2022 recorded under section 164 Cr.P.C., the prosecutrix has only said that she was in a relationship with the petitioner/accused for around 1½ years, during which period she engaged in consensual physical relationship with him. It further records that when the prosecutrix asked the petitioner to marry her, he had said that they would get married subsequently. The statement further records that though the prosecutrix waited for 2-3 months, the petitioner subsequently declined to marry her. It is significant to note that in her section 164 statement the prosecutrix categorically says that she made the complaint *because* the petitioner refused to marry her.
7. Even in her statement dated 21.02.2022 recorded under section 161 Cr.P.C., the prosecutrix has narrated a similar scenario, without giving any specifics as to the date or time of the alleged offence.
8. Insofar as the date of birth of the prosecutrix is concerned, while the Aadhaar Card shows her date of birth as 04.05.2003, the certificate

dated 04.04.2022 issued by the school last attended shows the date of birth as 04.05.2005. Since there is no specific date of commission of the alleged offence(s), which are stated to have happened over a span of about a year-and-a-half, as of the date of the complaint on 18.02.2022, the age of the prosecutrix would be somewhere between 17-19 years and the age of the petitioner/accused would be around 22-23 years.

9. Most notably, both the prosecutrix as well as her mother have filed affidavits dated 14.07.2022 before the learned trial court to the effect that the prosecutrix is interested in solemnising marriage with the petitioner and has no objection if bail is granted to him. The affidavits further recite that as on 04.05.2022, the prosecutrix had attained the age of 19 years, relating back to the date of birth disclosed in the Aadhaar Card *viz.* 04.05.2003, further stating that the prosecutrix's correct age was not disclosed to the school authorities.
10. Learned counsel for the petitioner had also drawn attention to four decisions, three of this court in Bail. Appl. No. 2380/2021 titled ***Praduman vs. The State (Govt. of NCT of Delhi) & Anr.***; Bail. Appl. No. 2627/2022 titled ***Bharat vs. State***; Bail. Appl. No. 1926/2022 titled ***Hanzla Iqbal vs. State & Anr.***; and one of the Madhya Pradesh High Court bearing Misc. Criminal Case No. 3716/2022 titled ***Shobit Nigam vs. The State of Madhya Pradesh***, to urge that in similar circumstances, the accused was released on bail.
11. Based on the status report filed, Mr. Shoiab Haider, learned APP for the State opposes grant of bail, submitting that as per school records the prosecutrix was about 16 years old at the time of the alleged

offence; and that though investigation is over and chargesheet has been filed, considering the gravity of the offence, there is possibility that the *accused may intimidate the prosecutrix and other witnesses*.

12. Furthermore, though this issue has not been argued in much depth, this court must address the applicability of section 29 POCSO which gets triggered once charges relating to certain offences are framed under that law. This aspect has been dealt with by this court in its earlier decision in *Dharmander Singh @ Saheb vs. The State (Govt. of NCT, Delhi)*^I, of which the following portions are relevant:

“68. In view of the above discussion and after considering the opinion of the Supreme Court and the views taken by the other High Courts, this court is persuaded to hold that the presumption of guilt engrafted in section 29 gets triggered and applies only once trial begins, that is after charges are framed against the accused but not before that. The significance of the opening words of section 29 “where a person is prosecuted” is that until charges are framed, the person is not being prosecuted but is being investigated or is in the process of being charged. Accordingly, if a bail plea is considered at any stage prior to framing of charges, section 29 has no application since upto that stage an accused is not being prosecuted.

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“70. Now coming to a scenario where a bail plea is being considered at a stage after charges have been framed, in keeping with the observations of the Supreme Court in Rajballav Prasad (supra), the presumption of guilt contained in section 29 would get triggered and will have to be “taken into consideration”.

“71. However, the dilemma would remain as to how the presumption of guilt contained in section 29 is to be applied even after charges have been framed, when the accused has not been given the opportunity to rebut such presumption. When section 29

^I 2020 SCC OnLine Del 1267

engrafts the presumption of guilt against the accused, it also affords an opportunity to the accused to rebut the presumption by proving to the contrary. It cannot possibly be that the court should invoke half the provision of section 29 while ignoring the other half, much less to the detriment of the accused. But even after charges are framed, the accused does not get the opportunity to rebut the presumption or to prove the contrary by leading defence evidence, until prosecution evidence is concluded. It would be anathema to fundamental criminal jurisprudence to ask the accused to disclose his defence; or, worse still, to adduce evidence in his defence even before the prosecution has marshalled its evidence. Again therefore, even for a stage after charges have been framed, section 29 cannot be applied in absolute terms to a bail plea without doing violence to the 'due process' and 'fair trial' tenets read into Article 21 of our Constitution.

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“74. As always, when faced with such dilemma, the court must apply the golden principle of balancing rights. In the opinion of this court therefore, at the stage of considering a bail plea 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. What this means is that the court would consider the evidence placed by the prosecution along with the charge-sheet, provided it is admissible in law, more favorably for the prosecution and evaluate, though without requiring proof of evidence, whether the evidence so placed is credible or whether it ex facie appears that the evidence will not sustain the weight of guilt

“75. If the court finds that the evidence adduced by the prosecution is admissible and ex facie credible, and proving it during trial is more a matter of legal formality, it may decide not to grant bail. If, on the other hand, the court finds that the evidence before it, is either inadmissible or, is such that even if proved, it will not bring home guilt upon the accused, it would grant bail.

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*“77. Though the heinousness of the offence alleged will beget the length of sentence after trial, in order to give due weightage to the intent and purpose of the Legislature in engrafting section 29 in this special statute to protect children from sexual offences, while deciding a bail plea at the post-charge stage, in addition to the nature and quality of the evidence before it, the court would also factor in certain real life considerations, illustrated below, which would **tilt the balance against or in favour of the accused** :*

a. the age of the minor victim : the younger the victim, the more heinous the offence alleged;

b. the age of the accused : the older the accused, the more heinous the offence alleged;

c. the comparative age of the victim and the accused : the more their age difference, the more the element of perversion in the offence alleged;

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e. whether the offence alleged involved threat, intimidation, violence and/or brutality;

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g. whether the offence was repeated against the victim; or whether the accused is a repeat offender under the POCSO Act or otherwise;

h. whether the victim and the accused are so placed that the accused would have easy access to the victim, if enlarged on bail : the more the access, greater the reservation in granting bail;

j. whether the offence alleged was perpetrated when the victim and the accused were at an age of innocence : an innocent, though unholy, physical alliance may be looked at with less severity;

k. whether it appears there was tacit approval-in-fact, though not consent-in-law, for the offence alleged;

..... ”

(emphasis in original)

13. Upon a conspectus of the circumstances of the case, and after duly considering the submissions made on behalf of the petitioner as well as the State, what weighs with this court is:
- a. Investigation in the matter is complete; chargesheet has been filed; and charges have been framed on 15.11.2022;
 - b. There is no medical evidence disclosing the commission of penetrative sexual assault, let alone aggravated penetrative sexual assault, which would invite punishment under section 6 of the POSCO Act;
 - c. In fact, there is no medical evidence even of the alleged offence under section 376 IPC;
 - d. In her statement recorded under section 164 Cr.P.C., the prosecutrix does not allege any non-consensual physical act, and in fact states that she had had physical relations with the petitioner over a period of 1 ½ years, which, upon a dispassionate reading discloses that the physical relationship between the two over the past 1 ½ years was neither forced nor involuntary. The prosecutrix specifically says that she only made a complaint since the petitioner declined to marry her, after having earlier deferred such request;
 - e. Save and except the question of the age of the prosecutrix, which would be subject matter of the trial, and the legal question as to whether her 'consent' is relevant or not, all other facts and circumstances point unerringly to a *consensual physical relationship* between the prosecutrix and the petitioner.

- f. The petitioner has been in judicial custody for the last more than 09 months; trial has just commenced; and will take its own time to be completed.
 - g. Applying the principles enunciated in *Dharmander* (supra), though section 29 POCSO will apply, far from there being any admissible evidence of the offence against the petitioner, considering the affidavits furnished by the prosecutrix and her mother, in all likelihood both these witnesses will not support the prosecution's case. The higher threshold of satisfaction required under section 29 POCSO is therefore met in the present case, persuading the court to lean in favour of granting bail.
 - h. Furthermore, considering the age difference between the prosecutrix and the accused; and since there appears to have been no threat, intimidation or brutality; and further that the prosecutrix and the accused were at an age of innocence, it is evident that the physical alliance between the two, though conventionally unholy, clearly lacks any element of perversion, abhorrence or odiousness.
 - i. Also, from the facts and circumstances, it can hardly be gainsaid that the physical relationship had the prosecutrix's approval-in-fact, though not consent-in-law.
14. Insofar as the apprehension expressed by the State that the petitioner is likely to intimidate or threaten witnesses, that apprehension loses significance since the prosecutrix, as also her mother, have both filed affidavits before the learned trial court to the effect that the prosecutrix is desirous of marrying the petitioner; and accedes to the petitioner being granted bail. In such circumstances, the apprehension

that the petitioner would threaten or intimidate the prosecutrix or other prosecution witnesses, strains credulity.

15. Upon an overall conspectus of the foregoing, this court is of the view that the present petition deserves to be allowed.
16. The petition is accordingly allowed, admitting the petitioner to bail on the following conditions:
 - a. The petitioner shall furnish a personal bond in the sum of Rs.25,000/- (Rs. Twenty-five Thousand Only) with 01 surety in the like amount from a family member, to the satisfaction of the learned trial court;
 - b. The petitioner shall furnish to the Investigating Officer/S.H.O., P.S.: Shastri Park, Delhi a cellphone number on which he may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;
 - c. If the petitioner has a passport, he shall surrender the same to the learned trial court and shall not travel out of the country without prior permission of this court;
 - d. The petitioner shall not offer any inducement, threat or promise to any of the prosecution witnesses or other persons acquainted with the facts of case.
 - e. The petitioner shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial.
17. Nothing in this order shall be construed as an expression of opinion on the merits of the pending matter.

18. A copy of this order be sent to the concerned Jail Superintendent *forthwith*.
19. The petition stands disposed-of.
20. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

DECEMBER 8, 2022

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