

Brij Raj @ Birju vs State Nct Of Delhi on 18 December, 2020

Author: Anup Jairam Bhambhani

Bench: Anup Jairam Bhambhani

via Video-conferencing

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ BAIL APPLN. 2065/2020

BRIJ RAJ @ BIRJU

Through:

..... Applicant
Mr. Kanhaiya Singhal, Mr. Chetan
Bhardwaj, Ms. Prasanna and Mr. Ajay
Kumar, Advocates.

versus

STATE NCT OF DELHI

Through:

..... Respondent
Mr. Amit Gupta, APP for the State
alongwith I.O./A.S.I. Sunita from P.S.:
Harsh Vihar with prosecutrix in-
person.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI
ORDER

% 18.12.2020 The applicant, who is accused in case FIR No. 02/2019 dated 01.01.2019 initially registered under sections 376/506 IPC read with section 4 of the POCSO Act at P.S.: Harsh Vihar; to which sections 376DA/452/323 and section 6 of the POCSO Act were subsequently added, seeks regular bail.

2. Notice in this application was issued on 06.08.2020; whereupon status report dated 26.08.2020 has been filed and nominal roll dated 10.09.2020 has been received from the Jail Superintendent.

3. Since the present case is one inter alia under section 376DA IPC read with section 6 of the POCSO Act, intimation under section 439(1-A) Cr.P.C. read with the Delhi High Court Practice Directions dated 24.09.2019 was also sent to the prosecutrix, informing her that her presence was required at the hearing of the present bail application.

4. Accordingly the prosecutrix joined the video-conference hearing on 11.11.2020, 11.12.2020 and 18.12.2020; and the court has interacted with her in detail, affording to the prosecutrix an opportunity to express her views on the present bail application.

5. Charge-sheet dated 02.03.2019 was filed in the matter on 14.03.2019; whereafter charges were framed against the accused persons on 10.04.2019; and trial is underway.

6. Since the learned APP who had appeared in the matter on 11.11.2020, when it was first heard, was different from the learned APP appearing today, a fresh opportunity for making submissions was given to both sides.

7. On 18.12.2020 i.e. today, the learned APP has also forwarded to this court by email under cover of Index dated 17.12.2020 a copy of order/judgment dated 25.01.2020 made by the learned Juvenile Justice Board (JJB) in relation to CCL 'P' (anonymised, since juvenile), who is co-accused in the matter; and this court has perused the said order, whereby CCL 'P' has been held to be involved in the commission of offences punishable under sections 376DA/506(ii) IPC and section 6 of the POCSO Act.

8. Referring to the contents of the bail application and to brief note dated 22.09.2020 filed on behalf of the applicant, Mr. Kanhaiya Singhal, learned counsel appearing for the applicant has essentially made the following points:

(a) That there are three accused in the matter, by name Ravi, CCL 'P' and the present applicant Brij Raj @ Birju. Though the case of the prosecution essentially is that the three accused persons committed 'gang-rape' upon the prosecutrix on multiple occasions but it will be seen from the contents of the FIR as also from the charge-sheet subsequently filed firstly, that the acts alleged by the prosecutrix, even at worst, amount to three different incidents of rape by three different accused persons independently, and not 'gang-rape' within the meaning of section 376DA IPC;

(b) That while in the FIR and in her statement dated 18.01.2019 recorded under section 161 Cr.P.C., the initial version given by the prosecutrix was of three separate incidents by three different accused persons; however, in her subsequent statement dated 31.01.2019 recorded under section 164 Cr.P.C.

about one month after the registration of the FIR, the prosecutrix changed her version, which new version she has also been narrated in her deposition recorded in court on 31.10.2019 ;

(c) That the prosecutrix's case is that the offences were committed upon her in the middle of the afternoon in a bathroom, which is hardly at a distance of 5-7 feet from the room where she used to reside alongwith her parents; and yet she says that no one in her room nor the other residents of the floor heard her or witnessed the incidents. The prosecutrix further explains that each time that the offence was committed, her father and mother were not present in the premises, since the mother was away at work and the father being unemployed and unwell, was away playing cards;

(d) That the prosecutrix admittedly became pregnant from one of the accused persons but found-out about her pregnancy only in the eighth month, whereafter she delivered the baby. It is argued

however, that upto the eighth month of pregnancy, neither the prosecutrix nor her parents nor even her aunt (mausi), who (latter) is working in a private nursing home noticed any abnormality in the shape of her body; nor did the prosecutrix narrate her alleged ordeal to any of her relatives;

(e) That though the prosecutrix does not give any details of the date or time of any of the assaults committed upon her, the alleged multiple sexual assaults are alleged to have happened between May 2018 and July 2018 but the complaint came to be made some five months later on 01.01.2019, whereupon FIR dated 01.01.2019 was registered;

(f) That moreover, it is not the case of the prosecution that the prosecutrix on her own ever reported the matter to the police or informed anyone else; and it is only when she visited a doctor for some other ailment, that the doctor discovered that the prosecutrix was pregnant and reported the matter to the police;

(g) That there is no forensic or medical evidence whatsoever against the applicant; and the DNA profile of the newborn, if at all, co-relates with the DNA of co-accused Ravi and not with the applicant;

(h) That the bathroom in which the episodes of sexual assault are alleged to have happened was on the ground floor of a three storied building, which bathroom is surrounded by 5-6 other rooms on the ground floor, with more rooms on the first and the second floor, all occupied by different persons/families and was a common bathroom for the use of all such occupants; and yet the prosecution alleges that on no occasion did anyone find anything amiss nor hear nor see anything relating to the alleged offences;

(i) That even otherwise, the photographs of the bathroom show that the space is too small for four persons to be inside at the same time, for the three accused persons to commit the offence; and besides, the inside latch of the bathroom was at a height where the prosecutrix could easily have reached and latched the same, though she alleges that she could not reach the latch and therefore the bathroom door remained unlocked; for which reason the accused persons could enter the bathroom while the prosecutrix was inside;

(j) That in Tejinder Singh @ Lucky Singh vs. State of Delhi reported as 2018 SCC OnLine Del 8939, the factual matrix of which case was very close to the present one, a Division Bench of this court has commented both on the inconsistencies in the prosecutrix's statements in that matter, as also the fact that the prosecutrix had not informed her father and had repeatedly gone back to the same premises where she was allegedly sexually assaulted nor had she displayed any abnormal conduct. Mr. Singhal points-out that in the said case, the Division Bench set-aside the order of conviction and sentence, thereby acquitting the accused persons despite the fact that the prosecutrix was a 13 year old minor;

(k) That as evidenced by the nominal roll, the applicant has been in judicial custody for almost 02 years; that his jail conduct has been 'satisfactory'; and that he has no other or prior criminal involvement;

(l) That to allay any apprehension of possible intimidation of witnesses, it is pointed-out that the three main prosecution witnesses, namely the prosecutrix, her mother and her aunt (mausi) have all been examined, cross-examined and discharged; and the remaining 19 witnesses are police officers and other formal witnesses. Counsel also submits that the applicant is willing to give an undertaking that he will no longer reside in the vicinity or locality where the prosecutrix lives but would move back to his native place in Khurja, District : Bulandshahar, U.P., so as to stay-out of the prosecutrix's way; and would appear before the learned trial court as and when required.

9. Addressing the applicability of section 29 of the POSCO Act, namely the presumption of guilt that applies to an accused, Mr. Singhal submits that since charges have been framed, though section 29 would apply to the applicant's case, on the test of all the illustrative criteria applied by this court in para 77 of its decision in Dharmander Singh @ Saheb vs. State (Govt. of NCT, Delhi) in BAIL APPLN. No. 1559/2020 reported as 2020 SCC OnLine Del 1267, the applicant's case stands clear of the impediment of section

29.

10. On the other hand, opposing the grant of bail, Mr. Amit Gupta, learned APP appearing for the State submits that the applicant is accused of the heinous offence of committing gang-rape of a minor, who was all of 13-14 years of age at the relevant time, by three men living in the neighbourhood, who repeatedly assaulted her sexually to the point that she became pregnant.

11. Mr. Gupta further submits that at the stage of deciding bail, this court may not delve-into the details of evidence, which is required to be appreciated on merits during the course of trial; and that the prosecutrix has narrated the full facts and details in her statement recorded under section 164 Cr.P.C.

12. Referring to order dated 25.01.2020 made by the JJB, the learned APP further points-out that co-accused CCL 'P' has already been held to have been involved in the commission of the offence under section 376DA/506(ii) IPC and section 6 POCSO Act; while the other accused, namely Ravi, continues to be in judicial custody. The learned APP points-out that a perusal of order dated 25.01.2020 aforesaid will show that in the proceedings before the JJB the prosecutrix has consistently and categorically stated that the CCL committed sexual intercourse with her on several occasions when she used to go to the lavatory alongwith co-accused Brij Raj @ Birju (applicant herein) and Ravi; and that such testimony has been accepted by the JJB. In the circumstances, it is submitted that the applicant will most likely be convicted upon completion of the trial pending against him.

13. The learned APP further confirms that the DNA of the newborn delivered by the prosecutrix matches that of co-accused Ravi. He also submits that the presumption of guilt under section 29 of the POSCO Act stands in the way of the applicant being granted bail in the matter.

14. Learned APP also points-out that in her deposition before the court on 31.10.2019, the prosecutrix has said that the accused persons committed the "same act in October, 2018 which they

used to do earlier"; thereby attempting to explain the delay in the registration of the FIR.

15. In the course of interaction with the court, the prosecutrix has also opposed the grant of bail, explaining that the three accused persons committed the offence upon her when she would return from school and her parents were away. Upon being queried however, the prosecutrix has said that since her father used to remain unwell, he did not work but would play cards in a nearby plot beside the building where they used to stay. She has further said that her mother used to work in a nearby location and used to come home for lunch at the time when she came back from school. The prosecutrix also confirms that she used to visit her aunt (mausi) almost on a daily basis; and that at the relevant time she was a student at a public school.

16. It needs to be recorded that on an earlier date of hearing, the prosecutrix had also said that all three accused persons had threatened her in relation to the case.

17. Considering the serious nature of the allegations made, in particular the allegations under section 376 DA IPC read with section 6 of the POCSO Act and the circumstances in which the offences are alleged to have been committed, this court has given its painstaking consideration to the present bail application. This court is also conscious of the heightened threshold for the grant of bail imposed by section 29 of the POSCO Act, which engrafts a presumption of guilt against a person accused of certain offences under the POSCO Act, the offence under section 6 also being covered by the provision.

18. Upon a conspectus of the foregoing however, what weighs with the court is the following :

(a) That while there are contradictions in the statement given by the prosecutrix on 18.01.2019 under section 161 Cr.P.C./FIR when compared with the statement made under section 164 Cr.P.C. and in her deposition made before the learned trial court, it appears that the section 164 Cr.P.C. statement is more in the nature of elaboration rather than contradiction, to what the prosecutrix stated earlier-on; and in her section 164 Cr.P.C.

statement she in fact explains that while she did not narrate anything to the first doctor out of fear; but when a subsequent doctor to whom she was taken gave her courage, she narrated the entire story to that doctor, who then called the police;

(b) That though it is argued that there is delay in registration of the FIR since the offences are alleged to have been committed between May 2018 and July 2018 and the FIR was registered only in January 2019, this aspect remains to be tried, inasmuch as in her section 164 Cr.P.C. statement the prosecutrix clearly says that the last time when the accused persons committed the offence upon her was in October 2018, which could explain the so-called inordinate delay in registration of the FIR;

(c) That though the DNA analysis of the newborn is concordant with the DNA of co-accused Ravi, that in itself does not exonerate the applicant when the prosecutrix has repeatedly and consistently

named the applicant alongwith the other co- accused in relation to the offences alleged; and

(d) That the applicant fails to explain why he would have been falsely implicated nor does he cite any enmity or bad-blood between the prosecutrix or her family and the applicant.

19. Insofar as the presumption of guilt contained in section 29 of the POCSO Act is concerned, in its decision in Dharmander Singh (supra), this court has held that once charges are framed the provisions of section 29 do get triggered; but grant of bail is not barred and inter alia the following considerations should be assessed by the court to decide whether or not to grant bail to an accused. Para 77 of Dharmander Singh (supra) may be usefully extracted for the purpose:

"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;

d. the familial relationship, if any, between the victim and the accused : the closer such relationship, the more odious the offence alleged;

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

f. the conduct of the accused after the offence, as alleged; 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;

i. the comparative social standing of the victim and the accused : this would give insight into whether the accused is in a dominating position to subvert the trial; 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; l. whether the offence alleged was committed alone or along with other persons, acting in a group or otherwise; m. other similar real-life considerations."

20. From the charge-sheet and the nominal roll filed it appears that the applicant is about 31-32 years of age, whereas the prosecutrix is stated to have been about 13-14 years of age at the time of commission of the offence in 2018. Suffice it to say therefore, that the comparative age of the prosecutrix and the accused and the age difference between them, discloses a serious element of perversion in the offences alleged. At 31-32 years of age, the applicant was also clearly in a position to threaten, intimidate and dominate the prosecutrix, as has been alleged inter-alia in her statement recorded under section 164 Cr.P.C. It is also alleged that the offence was committed upon the prosecutrix repeatedly, including by the applicant. The circumstances as described by the prosecutrix in which the offence was committed upon her do not disclose any element of approval or participation on her part in any manner whatsoever. In her section 164 Cr.P.C statement the prosecutrix has also described in distressing detail how the three co-accused used to corner her in the common bathroom; and how they would then take turns in sexually assaulting her; and that this happened on several occasions.

21. Though counsel for the applicant has assured the court that if enlarged on bail the applicant would no longer reside in the prosecutrix's neighbourhood but would go back to his native place in District Bulandshahar, U.P., that alone is no solace since most other illustrative aspects, as referred to above, weigh against the applicant.

22. One very major factor which cannot be ignored is that it is the admitted case that the prosecutrix, who was all of 13-14 years of age, became pregnant at the hands of one of the accused persons, believed to be Ravi; but that she has named the applicant as well as juvenile CCL 'P' as having acted alongwith co-accused Ravi in repeatedly committing sexual assault upon her. This, if anything, lends more credence to the prosecution's case inter alia against the applicant.

23. Upon a conspectus of the foregoing facts and circumstances, and in particular in view of the presumption of guilt engrafted in section 29 of the POCSO Act, this court is not inclined to admit the applicant to bail, at least at this stage.

24. Accordingly, the present bail application is dismissed.

25. Other pending applications, if any, also stand disposed of.

26. It is however made clear that nothing in this order be taken as a reflection on the merits of the evidence in the matter; nor shall this order preclude the applicant from filing afresh for bail, upon

change of any material circumstances, at the appropriate stage, in accordance with law.

27. Although under index dated 17.12.2020 the State has placed on record a copy of order/judgment dated 25.01.2020 made in relation to CCL 'P', who was co-accused in this matter, in keeping with the rules of confidentiality of records relating to juvenile offenders, it is directed that the said order/judgment be retained on record in a passcode locked file and a copy of that order/judgment be not made available to anyone without the permission of this court.

ANUP JAIRAM BHAMBHANI, J.

DECEMBER 18, 2020 j/Ne