

# Govind Babu ..... Petitioner/ vs The State (Govt. Nct Of Delhi) on 28 September, 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. 988/2020

GOVIND BABU

Through: ..... Petitioner/Applicant  
Mr. Amrendra Mehta, Adv.

versus

THE STATE (GOVT. NCT OF DELHI) ..... Respondent

Through : Ms. Neelam Sharma, APP for  
State  
Complainant/Prosecutrix in  
person along with S.I. Usha  
Rawat.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI  
ORDER

% 28.09.2020 The applicant is an accused in case FIR No. 132/2018 dated 12.05.2018 registered under sections 328/376 IPC and section 6 of the POCSO Act at P.S. : Malviya Nagar. By way of the present application, the applicant seeks regular bail pending trial.

2. Earlier-on the applicant had filed for bail before the learned Special Court (POCSO), Saket, which application was withdrawn on 12.12.2019, since it would appear, the learned Special Judge was not inclined to grant bail to the applicant.

3. Mr. Amrendra Kumar Mehta, learned counsel for the applicant submits that the genesis of the matter is that the complainant/ prosecutrix and the applicant/accused had known each other for quite some time and had developed a close friendship; and at the time the applicant was about 18 years 10 months of age, while the complainant was around 16 years-01 month old. Counsel contends that though the applicant admits to a reciprocal friendly relationship with the complainant, he denies that there was any physical relationship between them, muchless any sexual act, as alleged. He contends though that the complainant's family was pressurising the applicant to marry her; and it was in this context, with a view to pressurising him, that a false case of rape came to be lodged.

4. Counsel submits that the applicant was arrested on 12.05.2018 and was produced before the Juvenile Justice Board-II, Delhi; and subsequently vidé order dated 28.05.2018 he was found to be 'major'; and was sent to face trial before the Special Court. For the record, the order of the Juvenile Justice Board holding the applicant to be 'adult' was assailed by the applicant but that appeal was dismissed by the learned Special Judge.

5. It is stated that the very next day, i.e. 29.05.2018, the applicant was remanded to judicial custody and has been lodged in Tihar Jail ever since.

6. The application recites that after completion of investigation, since no substance was found in the allegation under section 6 of the POCSO Act, therefore charge-sheet dated 06.07.2018 was filed against the applicant only under sections 328/376 IPC and section 4 of the POCSO Act.

7. Subsequently, charges were framed against the applicant on 28.11.2018.

8. It is submitted that the prosecution has cited 17 witnesses in the charge-sheet, out of which only 01 witness has so far been examined; and a perusal of the record will show that the trial did not proceed on certain dates only because the Investigating Officer or the regular Public Prosecutor was on leave, or the complainant was not available; and in the meanwhile, it is pointed-out, the applicant has been in judicial custody for more than 02 years, causing him immense hardship.

9. In the application, the applicant has also listed-out material contradictions in the prosecution case, including the delay in filing the complaint, which came to be filed on 11.05.2018 about an alleged incident of 05.05.2018. It is also pointed-out that the Call Detail Records (CDRs) of the applicant and the complainant show that before and after the alleged incident, the two had been talking to each other on phone for hours-on-end.

10. Apart from referring to the contradictions and lacunae in the case against him, the applicant has also cited the prevailing coronavirus pandemic in prison as a ground for bail; stating that he is facing unwarranted exposure to the virus, which is a threat to his life.

11. Mr. Mehta has also pointed-out that the examination-in-chief of the complainant was conducted on 15.01.2020 and her cross-examination was conducted on 04.03.2020; whereupon the complainant has been examined and discharged.

12. It is accordingly submitted that there is no risk of the applicant attempting to influence, pressurise the main witness, namely the complainant; nor is there any basis to think that releasing the applicant on bail would compromise the depositions to be made by the other prosecution witnesses. Insofar as the applicant being a resident of Etawah, U.P. is concerned, counsel for the applicant states that the applicant would even be agreeable to remaining in Delhi while on bail.

13. It is also pointed-out that after the complainant's deposition was complete, the applicant has not moved any bail application before the learned Special Judge.

14. In the circumstances, counsel for the applicant has argued that further detention of the applicant in prison is unjustified and only punitive.

15. Status report dated 26.05.2020 has been filed by the State. Nominal rolls dated 28.05.2020 and 06.06.2020 have also been received from the Jail Superintendent, who has also submitted a separate status report dated 28.05.2020, which confirms that the conduct of the applicant in jail is 'satisfactory'. Nominal rolls dated 28.05.2020 and 06.06.2020 also confirm that the applicant is not involved in any other criminal case.

16. Ms. Neelam Sharma, learned APP for the State has opposed the grant of bail inter alia on the basis that the charge against the applicant under the POCSO Act is a very grave charge; that the maximum sentence under section 4 of the POCSO Act is life imprisonment; and that the applicant's attempt to portray that there was no physical relationship between the complainant and the applicant is false. The learned APP contends that the suggestion that the relationship between the parties or the 'act' was consensual, is irrelevant and untenable in law, inasmuch as consent is immaterial in a case under the POCSO Act; that material witnesses are yet to depose in the trial; and that the applicant being a permanent resident of Etawah, U.P. is a serious flight risk. Ms. Sharma states that during trial the complainant has withstood cross-examination.

17. On the point of the complainant's age, learned APP submits that since the complainant does not have a birth certificate, her age was verified from her school records; and it is found that at the relevant time she was 16 years and 27 days old.

18. At the outset, it may be recorded that in compliance of the mandate of section 439(1A) Cr.P.C. and Practice Directions dated 24.09.2019 issued by the Delhi High Court in that behalf, intimation in the form of Annexure-A to the Practice Directions was issued to the complainant, informing her that her presence via video-conferencing was required at the hearing of the bail application; whereafter she joined the hearing; and was heard in-person in the presence of the concerned police officer.

19. During the hearing given to her, the complainant has made a very peculiar submission. She says that she does not oppose grant of bail; but that an affidavit be taken from the applicant to the effect that he will never do to anyone else, what he has done to her; and that subject to such undertaking, as it were, the applicant may be given an opportunity of mending his ways.

20. One of the cardinal issues that must be addressed in this matter is about the applicability of section 29 of the POCSO Act, which engrafts a presumption of guilt against the accused when he is 'prosecuted' inter alia under section 3 of the POCSO Act. It may be noted that in the present case, while the FIR was registered under section 6 of the POCSO Act, the charge-sheet filed only cites section 4 of the POCSO Act. Since section 4 contains the punishment for an offence under section 3 of the POCSO Act, the question of applicability of section 29 does arise in this case.

21. Now, upon a detailed consideration of the issue, this court has taken a view in Bail Appl. No. 1559/2020 titled Dharmander Singh vs. State, whereby in the opinion of this court section 29

applies only if a bail plea is being considered after charges have been framed against an accused but not prior to that stage. Accordingly, in line with the view taken by this court in the said case, the rigours of section 29 will apply to the present case.

22. In Dharmander Singh (supra), this court has opined that once section 29 becomes applicable to a bail plea, the effect would be to raise the threshold of satisfaction required for a court to grant bail, the satisfaction being in relation to the weightage to be given to the evidence adduced by the prosecution along with the charge-sheet. This court reminds itself of what has been said in para 74 of Dharmander Singh (supra), which reads as under :

"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."

(emphasis supplied)

23. This court has also listed certain illustrative considerations in Dharmander Singh (supra), which should be factored-in to decide how the balance would tilt for or against the accused. These considerations, though not exhaustive, are as under :

"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."

24. In the present case it is noticed that :

- i. The applicant and the complainant are very close to each other in age, with the applicant being about 18 years-10 months of age and the complainant being about 16 years-01 month of age at the relevant time; and both were also at an age when the possibility of almost adolescent, mutual, physical alliance, howsoever unacceptable, cannot be ruled-out and ought not to be viewed with brutal severity;
- ii. The applicant and the complainant had befriended each other since the applicant used to work on the burger rehri (cart) of the complainant's father and were admittedly in a friendly relationship for sometime;
- iii. A perusal of the charge-sheet shows that the alleged offence happened in the complainant's own house, when the applicant visited her at a time when her parents

were not at home; iv. Since the alleged incident occurred on 05.05.2018 but the complaint came to be lodged only on 11.05.2018, the medical examination conducted was of no use; and accordingly there is no medical evidence even of the act alleged; and in the MLC the doctor is stated to have noted that "evidence not collected as sexual assault 7 days back";

v. Due to the aforesaid delay there is also no other evidence, such as clothing worn by the complainant on the date of the alleged incident, available for forensic examination; vi. The charge-sheet further records that the complainant's birth certificate bearing registration No. 1247/2002 dated 12.04.2002, which is stated to have shown her age as 16 years, could not be verified from the Registrar, NDMC since entry No. 1247/2002 dated 12.04.2002 was not found to be in the official records;

vii. There appears to be no allegation of any physical violence being committed on the complainant, in relation to the offence alleged or otherwise;

viii. There is also no allegation that the applicant is a repeat offender;

ix. In the interaction this court had with the complainant, she has said that she was not opposed to bail being granted to the applicant provided he expressed regret. While this may not be dispositive of the bail plea, it certainly indicates that the complainant is not fearful of any threat or intimidation at the hands of the applicant if he was enlarged on bail. Besides, the complainant's deposition is complete, while the other 16 prosecution witnesses are yet to be examined ;

x. The applicant has no other or prior criminal involvement; and his jail conduct is also 'satisfactory';

xi. In the meantime however, the applicant has been in judicial custody for more than 02 years as an undertrial; and by reason of the restricted functioning of courts due to the prevailing coronavirus pandemic, evidently it is unlikely that trial will be completed anytime soon.

25. Upon a conspectus of the foregoing facts and circumstances, this court is persuaded to admit to the applicant to regular bail pending trial, upon the following conditions:

a. The applicant shall furnish a personal bond in the sum of Rs.30,000/- (Rs. Thirty Thousand Only) with 01 local surety in the like amount from a family member, to the satisfaction of the trial court;

b. The applicant shall furnish to the Investigating Officer/SHO a cellphone number on which the applicant may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;

c. If the applicant has a passport, he shall surrender the same to the trial court and shall not travel out of the country without prior permission of the trial court;

d. The applicant shall not contact, nor visit, nor offer any inducement, threat or promise to the first informant/ complainant or to any of the prosecution witnesses. The applicant 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;

26. Nothing in this order shall be construed as an expression on the merits of the pending trial.
27. The bail application stands disposed of in the above terms.
28. Other pending applications, if any, also stand disposed of.
29. A copy of this order be sent to the concerned Jail Superintendent.

ANUP JAIRAM BHAMBHANI, J.

2. SEPTEMBER 28, 2020 uj/Ne