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IN THE HIGH COURT OF DELHI AT NEW DELHI
BAIL APPLN. 678/2024 & CRL.M.A. 6068/2024

LUCKY

..... Applicant

Through: Mr. Pradeep Rana, Mr.
Inderpreet Singh and Mr.
Tushar Rohmetra, Advs.

versus

THE STATE GOVT. OF NCT OF DELHI Respondent

Through: Mr. Pradeep Gahalot, APP
for the State with Mr.
Shantanu Narayan, Adv.
with W/SI Sanju Kumari,
PS Palam Village.
Ms. Sommya Chaturvedi,
Adv. for victim /
complainant.

CORAM:

HON'BLE MR. JUSTICE AMIT MAHAJAN

ORDER

08.04.2024

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1. The present bail application is filed under Section 439 of the Code of Criminal Procedure, 1973 (**CrPC**) seeking grant of regular bail in FIR No. 117/2019 dated 13.03.2019, registered at Police Station Palam Village, for offences under Section 354 of the Indian Penal Code, 1860 (**IPC**); Section 8 of the Protection of Children from Sexual Offences Act, 2012 (**POCSO Act**); and Section 66 of the Information Technology Act, 2000 (**IT Act**). Chargesheet was filed against the applicant and other accused under Sections 376D/354/366A/328/34 IPC and Sections 6 & 8 of the POCSO Act.

2. The FIR was registered on 13.03.2019 at the instance of the victim, who is stated to be 16 years of age at the time of the alleged incident.

3. It is stated that the alleged incident relates back to

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sometime in April – May, 2018, the date of the alleged incident is not stated by the victim, in the FIR. It is stated that on the day of the alleged incident the victim with her cousin (Ms. M) and three of her friends – Lucky (present applicant), Badal and one Atul – planned to visit a lounge (1011 lounge). As per the FIR, the victim after spending sometime in the 1011 left to visit another club in Janakpuri, where she met some of her other friends, who forced her to consume cold drinks which were spiked by alcohol, to which she became inebriated but kept dancing with her friends who were present at the club. It is stated that the applicant became jealous of the same. Thereafter, the co-accused Badal told her that the applicant is angry as she had come with him but was dancing with other persons.

4. After some time, the victim was asked to leave from the said club for the reason that she was inebriated. It is alleged that, thereafter, the victim wanted to go home but the applicant and the co-accused Badal persuaded her to go to MSK hotel to eat something so that she could get over her intoxication.

5. It is alleged that inside the hotel room, co-accused Badal had attempted to misbehave with her but she had repelled his advances. After some time, the applicant came in the room with a bottle of rum. It is alleged that the applicant and co-accused forced her to consume alcohol. As per the victim, the co-accused mixed the alcohol in the cold drink and gave it to her. After consuming the drink, she started feeling intoxicated and dizzy and lied down on the bed. At that stage, the applicant committed the alleged offence. It is alleged that the applicant kissed her; removed her clothes; and started touching and kissing her breast. It is stated that the victim was helpless and could not move. According to her, the applicant attempted to engage in sex with



her. In a subsequent statement under Section 161 of CrPC, she stated that the applicant had raped her.

6. The learned counsel for the applicant submits that admittedly when the complaint was given to the police, it was not alleged that the applicant has committed any offence of rape. He submits that it was specifically alleged that the applicant has attempted to have a sexual intercourse and when the victim resisted, the applicant had stopped.

7. He submits that it is also a case of the victim that it was the applicant himself, who had gone to drop the victim to her house. He submits that there has been substantial delay in registration of the FIR. The alleged incident is of April – May, 2018 whereas the complaint was admittedly given in March, 2019.

8. He further submits that even in the statement given under Section 164 of the CrPC, which was recorded on 14.03.2019, the victim had not alleged that the applicant had sexual intercourse with the victim. The statement was improved when subsequent supplementary statement was recorded under Section 161 of the CrPC on 20.04.2019, where for the first time, the victim alleged that the applicant had a forceful sexual intercourse with the victim.

9. He further submits that the FIR was registered under Section 354 of the IPC read with Section 8 of the POCSO Act, and Section 66 of the IT Act, however, for the reason of supplementary statement under Section 161 of the CrPC, the charges under Section 376D were added.

10. He submits that the victim has already been examined and the perusal of the testimony also indicates that the applicant at best had attempted to have sexual intercourse.

11. He lastly contends that the maximum punishment for



attempt to commit an offence may extend to one half of the imprisonment for life, which has been interpreted to be maximum ten years.

12. The applicant has already undergone more than five years of incarceration and is, therefore, entitled for benefit of Section 436A of the CrPC.

13. The learned counsel for the complainant, however, opposes the grant of bail to the applicant. She submits that the victim at the time of incident was only 15 years of age and the applicant had taken the advantage of inebriated condition of the victim and took her to the hotel. The applicant, at that stage, was 22 years of age.

14. She submits that the victim had categorically stated that the applicant had sexual intercourse without her consent, which would attract the maximum punishment for life which shall mean imprisonment for the remainder of natural life in terms of Section 4(2) of the POCSO Act.

15. She further submits that the applicant used to reside in the vicinity of the victim and if the applicant is released on bail, there is an apprehension that he would threaten the victim.

16. I have heard learned Counsel for the parties.

17. The chargesheet has been filed, and charges have been framed under Sections 376D/354/366A/328/34 IPC and Sections 6 & 8 of the POCSO Act. Therefore, application for Bail is required to be considered keeping in mind the provisions of Section 29 of the POCSO Act.

18. 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

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provisions of Section 29 of the POCSO Act. Section 29 reads as under:

“29. 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.”

19. In the present case, the victim has stated that she had herself gone to two different clubs with the applicant and co-accused Badal; the victim went to appease the applicant when he was upset with her for dancing with other friends; and after the alleged incident she had also gone to buy a top with the applicant, thus this is not a case where the victim was coerced in any manners by the applicant.

20. 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 relationship, 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.

21. From the perusal of the statement given by the victim under Section 164 of the CrPC, it is apparent that no allegation was made that the applicant, at any stage had sexual intercourse with the victim. The applicant had also gone to drop the victim to her house.

22. As per the allegations, the offence was committed sometime in April – May, 2018, whereas the complaint for the same was given in the month of March, 2019. It is apparent that



there has been a considerable delay in reporting the incident. It is alleged that the accused persons had made video recording and had threatened to circulate the same. It is, however, not denied that nothing has been recovered from the mobile phone of the applicant.

23. It is trite law that mere delay in lodging of an FIR is not always fatal to the case of the prosecution, however, it is incumbent on the Court to see whether the delay has been satisfactorily explained and if the explanation provided for such delay is sufficient to believe the case of the prosecution. (**Ref: *Sekaran v. The State of Tamil Nadu: 2023 INSC 1062***)

24. It is significant to note that the complaint which led to registration of the FIR, did not allege that the applicant had sexual intercourse with the victim. At that stage, the allegation was in relation to use of force with intent to outrage the modesty of the victim and sexual assault punishable under Section 8 of the POCSO Act. It was also alleged that the applicant had attempted to have sexual intercourse, which is punishable under Section 18 of the POCSO Act

25. The statement of the victim under Section 164 of the CrPC was also recorded on 14.03.2019 pursuant to the registration of the FIR and it was not alleged that the applicant had sexual intercourse with the victim. The allegation at that stage was that the applicant attempted to have sexual intercourse.

26. The supplementary statement under Section 161 CrPC was recorded subsequently on 20.04.2019, where the victim for the first time alleged that the applicant had sexual intercourse with the victim. There is clearly an improvement and contradiction in the statements.

27. The Court while considering the application for bail is not

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required to believe every statement given by the victim as a gospel truth.

28. If the statement given by the victim under Section 164 of the CrPC is considered, no allegation in relation to sexual intercourse has been made.

29. In terms of Section 18 of the POCSO Act, whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

30. The Hon'ble High Court of Bombay in **Criminal Appeal No. 272 of 2017** titled as *Suresh @ Pintya Kashinath Kamble v. The State of Maharashtra* had considered the meaning of punishment of an imprisonment for a term which may extend to one half of the imprisonment for life and had held that the same would mean imprisonment for 10 years.

31. In such circumstances, *prima facie*, the applicant would also be entitled for the benefit of Section 436A of the CrPC for having spent more than five years in custody.

32. Whether the applicant sexually assaulted the victim would be a matter of trial. Also, whether any act, as alleged, was a unilateral act of the applicant so as to make the applicant liable for the offence as alleged, would be tested during the course of the trial. The same in view of the facts as stated above cannot be presumed.

33. It is not in dispute that the applicant has clean antecedents and is presently aged around 24 years of age.

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34. The object of jail is to secure the appearance of the accused persons during the trial. The object is neither punitive nor preventive and deprivation of liberty has been considered as a punishment without the guilt being proved. The applicant cannot be made to spend the entire period of trial in custody specially when the trial is likely to take considerable time.

35. Considering the aforesaid discussion and without commenting further on merits of the case, this Court is of the opinion that the applicant has made out a case for grant of bail.

36. In view of the above, the applicant is directed to be released on bail on furnishing a bail bond for a sum of ₹20,000/- with one surety of the like amount subject to the satisfaction of the learned Trial Court/ Duty Metropolitan Magistrate, on the following terms and conditions:

- a. The applicant shall upon his release provide his mobile number to the concerned IO / SHO and keep it switched on at all times;
- b. The applicant shall not take unwarranted adjournment and attend the Trial Court proceedings on every date;
- c. The applicant shall not contact the witnesses or tamper with the evidence in any manner whatsoever.
- d. The applicant shall furnish a proof of residence where he shall reside, which should be at least 5 KM far from the locality where the prosecutrix resides, subject to the satisfaction of the Investigating Officer.

37. 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 seeking cancellation of bail.



38. 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.

39. The bail application is allowed in the aforementioned terms.

AMIT MAHAJAN, J

APRIL 8, 2024

'KDK'