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

Date of Decision: 12th April, 2022

+ BAIL APPLN. 163/2022

SURYA PRAKASH PAL

..... Petitioner

Through: Mr. Nalin Tripathi with
Mr. Divyanshu Priyam and
Mr. Nishank Tripathi,
Advocates.

versus

STATE OF NCT OF DELHI

..... Respondents

Through: Mr. Amit Chadha, APP for the
State, with SI Jagbir Singh, PS
Mundka

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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The proceedings in the matter have been conducted through hybrid mode [physical and virtual hearing].

1. By way of this application under Section 439 of the Code of Criminal Procedure, 1973 ["CrPC"], the applicant seeks regular bail in connection with FIR No. 126/2021, dated 25.02.2021, registered at Police Station Mundka, under Sections 377/34 of the Indian Penal Code, 1860 ["IPC"] and Section 6 of the Protection of Children from Sexual Offences Act, 2012 ["POCSO Act"].

Facts

2. The FIR was registered on the complaint of a 13 year old boy [hereinafter referred to as “X”]. The allegations in the FIR are as follows:

A. On the evening of 24.02.2021, X was approached by the co-accused child in conflict with law [“CCL”] [hereinafter referred to as “R”], who has a stall selling eggs in the lane outside X’s place of residence. R asked X to accompany him for playing Ludo.

B. Subsequently, R took X into the bushes where they were joined by the applicant [hereinafter referred to as “S”], who is a truck driver.

C. R forcefully removed X’s pants and committed a wrong act upon him from behind.

D. Subsequently, S took X to a truck and forcefully committed a wrong act upon him from behind, while he was inside the truck.

E. When X began to raise a hue and cry, S threatened him by stating that if X told anyone about the incident, he shall kill him.

F. About three days prior to the incident in question, R had committed the same act upon X forcefully. X did not apprise anyone of the aforesaid incident out of fear.

G. Upon physical pain being caused to him by the incident in question, which made him cry, he narrated the incident to his mother.

H. X's sister thereafter called the police.

I. On 25.02.2021, X was taken to SGM Hospital for a medical examination, where he complained of experiencing pain while defecating. The examining doctor observed that multiple fissures (tear) were present around the anal opening, however no active bleeding/mucus discharge was present. X was also counselled by the counsellor at the hospital. During the medical examination, certain exhibits taken by the examining doctor were handed over to the police and a seizure memo was prepared.

3. After investigation, the charge sheet was filed in April, 2021. It records *inter alia* that on 26.02.2021, X led the investigating team to the truck in question, where S was found. He was identified by X and arrested. S remains in judicial custody since then. Charges against S under Section 506 of the IPC have also been added in the charge sheet. A site plan has also been prepared at the instance of X. On 27.02.2021, X's statement under Section 164 of the CrPC was recorded. As recorded in the charge sheet, in the statement under Section 164 of the CrPC, X stated that R and S had both committed penile-anal penetrative sexual assault upon him. R was arrested on 25.02.2021 and is currently admitted to bail.

4. On 24.03.2021, blood samples and penile swabs of S and R, as well as the blood sample, rectal swab and clothes worn by X at the

time of the incident were sent to the forensic laboratory for examination.

5. On 07.06.2021, S made an application for regular bail before the Sessions Court, which was rejected on 19.06.2021. It was *inter alia* submitted before the Sessions Court that S be granted bail on the ground of parity with R, i.e. the prime accused, and that S was not at the scene of the incident on 26.02.2021 and was, in fact, at his home. The Sessions Court, however, dismissed the application on the following grounds:

- A. The seriousness of the offences alleged against S.
- B. The contents of X's statement recorded under Section 164 of the CrPC.
- C. S cannot be considered at par with R as R was a CCL who was granted bail under the Juvenile Justice (Care and Protection of Children) Act, 2015.
- D. The apprehensions of threat posed by S, as raised by X.
- E. The fact that X was yet to be examined.
- F. S's plea of alibi and his plea disputing his friendship with R were defenses that needed to be proven at an appropriate stage.

6. S moved a second application for bail before this Court [BAIL APPLN. 2179/2021], which was dismissed as withdrawn vide order dated 23.08.2021, with timebound directions regarding framing of charges and examination of X. S was granted liberty to approach the competent court immediately after the examination of X.

7. On 18.09.2021, charges against S were framed by the Sessions Court.

8. The forensic laboratory submitted its report on 04.10.2021, wherein it *inter alia* reported that no DNA profile could be generated from the two exhibits relating to S [Exhibits 4 and 5].

9. On 30.10.2021, X's statement was recorded before the Sessions Court. X was cross-examined on 15.11.2021 and 17.11.2021.

10. On 20.11.2021, S moved a third bail application before the Trial Court pursuant to the liberty granted by this Court vide order dated 23.08.2021. However, this application was also dismissed vide an order dated 14.12.2021, on the following grounds:

A. The seriousness of the nature of allegations raised.

B. The medical evidence showing commission of penetrative sexual assault upon X.

C. The positive forensic examination result, albeit connecting only R to the offence.

D. The admission regarding the presence of the truck on the spot.

E. The testimony of the truck owner establishing that it was in the possession of S at the relevant time.

G. The statement of X.

E. The element of threat faced by X from S.

11. S has thereafter filed the present application for bail. Notice in the application was issued on 17.01.2022.

Submissions

12. I have heard Mr. Nalin Tripathi, learned counsel for S, and Mr. Amit Chadha, learned Additional Public Prosecutor.

13. Mr. Tripathi submits that X and two other witnesses have already been examined, and there is no need to keep S in custody. He refers me to the aforesaid order of this Court dated 23.08.2021 in BAIL APPL. 2179/2021 in this connection.

14. Mr. Tripathi submits that on the day of the incident, S was not present at the site of the alleged offence in Mundka at all, and, in fact, was at his home in Okhla, which is at a distance of over 30 kilometres. He also relies upon the statement of the owner of the truck, to the effect that he was not on duty on the said day, to substantiate this contention. Relying upon the forensic examination report, Mr. Tripathi further submits that nothing has emerged therein which links S with the alleged offence, and only the DNA samples of R have been matched.

15. Mr. Tripathi relies upon the cross examination of X to highlight certain inconsistencies in his account of events. Principally, he submits that X's evidence that he was given a sedative-laced soft drink finds no mention in the FIR or in X's statement under Section 164 of the CrPC; that there are inconsistencies in his statements as to the duration of the incident; and as to whether Ludo was played on a

mobile phone or physically. He also submits that four minor children, a wife and ailing parents are dependent upon S.

16. Mr. Tripathi relies upon the judgment of the Supreme Court in *Rai Sandeep @ Deepu vs. State of NCT of Delhi*¹ to submit that, in light of the contradictions in X's evidence which he has sought to point out, the evidence is not creditworthy and is insufficient for keeping S in custody. He further relies upon the judgment of a Coordinate Bench of this Court in *Govind Babu vs. The State (Govt. of NCT of Delhi)*² to argue that this Court has granted bail to an accused in a similar matter. Mr. Tripathi also cites the judgment of the Punjab and Haryana High Court in *Ajaib Singh alias Naibu vs. State of Punjab*³ in support of his contention that S ought to be enlarged on bail as the completion of the trial will take considerable time.

17. Mr. Chadha, on the other hand, opposes grant of bail to S. He emphasises the findings of the Sessions Court, as recorded in the orders dated 19.06.2021 and 14.12.2021, regarding the threat perceived by X from S. Mr. Chadha also submits that, at this stage, the Court need not appreciate evidence to examine the veracity of S's claimed alibi, which shall be tested during the trial. He also refers me to the fact in the charge sheet where S has been arrested from the truck in question at X's instance, and that X duly identified S through the one-way visibility window during the course of recording of his statement. Mr. Chadha submits that Section 29 of the POCSO Act has

¹ (2012) 8 SCC 21 (paragraph 22)

² Order dated 28.09.2020 in Bail Appln. 988/2020

³ Order dated 12.06.2020 in CRM-M 11469/2020 (O&M)

become applicable on account of charges having been framed, as a result of which S cannot be afforded the presumption of innocence. Mr. Chadha also submits that the seriousness of the allegation against S disentitles him from being granted bail.

Analysis

18. A Coordinate Bench of this Court, in *Dharmander Singh vs. State*⁴, has reiterated the principles relating to grant of bail in general, and in particular with reference to the POCSO Act. As far as the general principles are concerned, this Court has cited the decisions of the Supreme Court in *Gurcharan Singh vs. State (Delhi Administration)*⁵ and *Mahipal vs. Rajesh Kumar*⁶. The proper approach of the Court was laid down in *Mahipal*⁷ in the following terms:

“12. The determination of whether a case is fit for the grant of bail involves the balancing of numerous factors, among which the nature of the offence, the severity of the punishment and a prima facie view of the involvement of the accused are important. No straitjacket formula exists for courts to assess an application for the grant or rejection of bail. At the stage of assessing whether a case is fit for the grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the accused. That is a matter for trial. However, the Court is required to examine whether there is a prima facie or reasonable ground to believe that the accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused subserves the purpose of the criminal justice system. Where bail has been granted by a lower court, an appellate court

⁴ (2020) SCC Online Del 1267

⁵ (1978) 1 SCC 118

⁶ (2020) 2 SCC 118

⁷ Supra (note 6)

must be slow to interfere and ought to be guided by the principles set out for the exercise of the power to set aside bail.

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*The provision for an accused to be released on bail touches upon the liberty of an individual. It is for this reason that this Court does not ordinarily interfere with an order of the High Court granting bail. However, where the discretion of the High Court to grant bail has been exercised without the due application of mind or in contravention of the directions of this Court, such an order granting bail is liable to be set aside. **The Court is required to factor, amongst other things, a prima facie view that the accused had committed the offence, the nature and gravity of the offence and the likelihood of the accused obstructing the proceedings of the trial in any manner or evading the course of justice.** The provision for being released on bail draws an appropriate balance between public interest in the administration of justice and the protection of individual liberty pending adjudication of the case. However, the grant of bail is to be secured within the bounds of the law and in compliance with the conditions laid down by this Court. It is for this reason that a court must balance numerous factors that guide the exercise of the discretionary power to grant bail on a case-by-case basis. Inherent in this determination is whether, on an analysis of the record, it appears that there is a prima facie or reasonable cause to believe that the accused had committed the crime. It is not relevant at this stage for the court to examine in detail the evidence on record to come to a conclusive finding.”⁸*

19. In *Dharmander Singh*⁹, the Court then considered the particular provisions of the POCSO Act, particularly Section 29 thereof, and came to the conclusion that the presumption against the accused under Section 29 of the POCSO Act is attracted only after framing of charges. Where an application for bail is being considered before charges are framed, Section 29 of the POCSO Act has no application, whereas after framing of charges, the presumption under Section 29 would have to be taken into consideration, with the effect of raising

⁸ Emphasis supplied.

⁹ Supra (note 4)

the threshold of the satisfaction required before bail is granted. Certain guiding factors have been laid down in paragraphs 70 to 78 of the said judgment, which read as follows:

“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 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.

72. It is a settled constitutional principle that, if there are two possible interpretations or applications, a statutory provision must be interpreted or applied in a way that preserves its constitutional validity rather than one that renders it unconstitutional (cf. Kedar Nath Singh v. State of Bihar).

73. Another significant legal principle which we must not omit to consider, is that if a penal provision, whether substantive or procedural, is susceptible to two interpretations, it must be construed strictly, narrowly and in a manner that is favourable to the accused (cf. Bijaya Kumar Agarwala v. State of Orissa).

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.

76. In a given case, the accused may, of his own volition, be willing to disclose his defence even while arguing for bail, to prevail upon the court; in which case, the task of the court would become easier. If however, the accused decides not to disclose his evidence at that stage, he would suffer the consequences of the presumption of guilt engrafted in section 29.

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.*

78. The above factors are some cardinal considerations, though far from exhaustive, that would guide the court in assessing the egregiousness of the offence alleged; and in deciding which way the balance would tilt. At the end of the day however, considering the myriad facets and nuances of real-life situations, it is impossible to cast in stone all considerations for grant or refusal of bail in light of section 29. The grant or denial of bail will remain, as always, in the subjective satisfaction of a court; except that in view of section 29, when a bail plea is being considered after charges have been framed, the above additional factors should be considered.”

20. In the present case, as charges have been framed, the provisions of Section 29 of the POCSO Act are applicable and the Court is required to consider the application on principles enunciated in *Dharmander Singh*¹⁰. The alleged offence under Section 6 of the POCSO Act is indisputably a serious offence. It carries a sentence of

¹⁰ Supra (note 4)

rigorous imprisonment for a term which shall not be less than 20 years but may extend to imprisonment for life or be punished with a sentence of death. S, who is stated to be about 42 years old, is facing trial in relation to an offence committed on a 13 year old child. As stated above, the co-accused-R is also a minor, stated to be about 13 years of age. The difference in the ages of S and R negates any plea of parity on the part of S.

21. Mr. Tripathi's attempt to point out certain inconsistencies in the evidence of X does not persuade me to displace the presumption under Section 29 of the POCSO Act at this stage. In order to obviate any possible prejudice to either side at the trial, suffice it to say that the inconsistencies pointed out were not such as to discredit the *prima facie* case made out against S. Similarly, the defence raised by him, to the effect that he was not in the locality on the date of the incident, is based only upon the argument that he was not on duty with his employer on the said date. The Sessions Court in its orders dated 19.06.2021 and 14.12.2021 has recorded the apprehension and threat to X, who identified him at the time of arrest and during his evidence. The forensic examination report also does not exonerate S at this stage as no DNA was obtained from the samples relating to him.

22. The factors enumerated by this Court in paragraphs 74 to 78 of *Dharmander Singh*¹¹, therefore, militate against the grant of bail to S in the present case. I am of the opinion that S has failed to meet the

¹¹ Supra (note 4)

raised threshold of satisfaction required in terms of *Dharmander Singh*¹².

23. The judgments cited by Mr. Tripathi are also not applicable to the case at hand. The judgment in *Rai Sandeep*¹³ pertains to a challenge against the conviction and sentence in a case under Section 376(2)(g) of the IPC where material prevarications were found in the statement of a prosecutrix. As stated above, there do not appear to be any comparable prevarications in the evidence of the victim in this case.

24. The judgment in *Govind Babu*¹⁴ is also distinguishable on facts as the said case, the age gap between the complainant and the applicant therein was only of two years and that the complainant did not oppose grant of bail to the applicant. This is indicative of the absence of any threat or intimidation at the hands of the applicant if he was enlarged on bail. It is clear from paragraph 24 of the said judgment that the proximity of the complainant and the applicant in age, both being adolescents, their prior relationship, the lack of medical evidence, and the submission of the victim herself weighed with the Court in granting bail to the applicant therein. The Court was also conscious of the restricted functioning of the courts in view of the COVID-19 pandemic and observed that the trial was unlikely to be

¹² Supra (note 4)

¹³ Supra (note 1)

¹⁴ Supra (note 2)

completed any time soon. These factors do not apply in the present case.

25. In *Ajaib Singh*¹⁵, the Punjab and Haryana High Court released the applicant, accused of the offence under Section 376 of the IPC, read with Section 6 of the POCSO Act, on bail, particularly noting that although the material witnesses had recorded their statements, the trial was likely to take some time due to the restricted working of the courts during the COVID-19 pandemic. The present situation is distinguishable as the courts in Delhi are now regularly functioning.

Conclusion

26. For the aforesaid reasons, the present bail application is dismissed.

27. It is made clear that these observations are only for the purpose of disposal of the present bail application and will not prejudice the parties in the trial.

APRIL 12, 2022
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PRATEEK JALAN, J

¹⁵ Supra (note 3)