

## Abhay @ Kaku vs State on 19 February, 2024

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 19th February,

+ BAIL APPLN. 2350/2023

ABHAY @ KAKU . . . . .

versus

STATE . . . . .

Advocates who appeared in this case:

For the Applicant : Mr. Lalit Yadav & Mr. Rajesh Kumar  
Sharma, Advocates

For the Respondent : Mr. Utkarsh, APP for the State  
Kaushik, PS Raj Park.  
Mr. Vishesh Wadhwa & Ms. Swadha G  
Advocates for the Complainant with  
Complainant in person.

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HON'BLE MR JUSTICE AMIT MAHAJAN

### JUDGMENT

1. The present application is filed under section 439 of Code of Criminal Procedure, 1973 seeking grant of regular bail in FIR No. 148/2023, under Sections 363/365/342/323/506/376 of the Indian Penal Code, 1860 ('IPC') and Section 6 of The Protection of Children from Sexual Offences Act, 2012 ('POCSO') registered at Police Station Raj Park. The chargesheet was subsequently filed under Sections 363/366A/34/109/323/342/506/376 IPC and Section 6 of POCSO.

2. The FIR was lodged on a complaint given by the complainant/ prosecutrix on 24.02.2023, alleging that the present applicant and the co-accused person Aman (both are stated to be brothers), kept her in confinement and established forceful sexual relations.

3. It is alleged that on 29.08.2019, the prosecutrix was 17 years of age and was called to meet the present applicant and co-accused Aman. Upon meeting the accused persons (present applicant and co-accused Aman) she was made to sniff a handkerchief, to which she became unconscious, and when she regained her consciousness, she found herself naked. Thereafter, it is alleged that the present applicant threatened her by showing a knife in case she tried to scream or run away.

4. It is alleged that the present applicant and co-accused Aman, both continued to make physical relations with the prosecutrix, and one day the door of the room in which she was confined was left open, to which she saw co-accused namely, Pooja- the mother of co-accused persons (Aman and the present applicant), who took the prosecutrix to the ground floor and called accused Sunil- her husband. They together requested the prosecutrix not to talk about the incident to anyone and told her that they would drop her home.
5. Thereafter, the mother of the prosecutrix was called, who consoled her and also told her that there would be shame and bad name for their family in the society, and that the Prosecutrix should get married in the accused family. The same was agreed by the accused family and thereafter the parents of the applicant started calling the prosecutrix as her daughter in law.
6. It is alleged that no marriage ceremony took place between the prosecutrix and the co-accused Aman, and there was only a Chunni Ceremony, after which she was taken by the accused family to their home.
7. It is alleged that two days after the ceremony, the prosecutrix along with the co-accused Aman were expelled out of the family home, and were told that the family has disowned co- accused Aman, and he has no right in the family property.
8. The learned Counsel for the applicant submitted that the present FIR was thereafter registered on 24.02.2023, and the applicant was arrested on 28.03.2023.
9. He submitted that the co-accused Aman (brother of the applicant) had left his family along with the prosecutrix, and had shifted to some rented accommodation. He submitted that the present applicant has no relation with the prosecutrix.
10. He submitted that the prosecutrix herself had given a complaint earlier, wherein she alleged that she was in a live-in relationship with the co-accused Aman since 29.08.2019, and during that time she got pregnant and gave birth to a child. The prosecutrix in her complaint also alleged that the co-accused Aman was delaying the marriage on one pretext or other.
11. He further submitted that there is a delay of 3.5 years between the present FIR and the alleged incident, no reason for the delay has been given, and the present FIR is nothing but an attempt to extort the family assets. It is also submitted that the family had already given a complaint dated 27.09.2021 against the prosecutrix, and the co- accused Aman was also disowned by the family.
12. He also submitted that the father of the present applicant (co- accused Sunil) had also filed a civil suit bearing no. 1674/2021, seeking permanent injunction with respect to their property being H.No.486, S-Block, Mangol Puri, North -west, New Delhi 110083, titled as "Sunil & anr v. S & Ors" against the prosecutrix and co- accused Aman.
13. He further submitted that after giving present complaint the prosecutrix was also taken for her medical examination, where she refused to get herself medically examined, the MLC dated

24.02.2023, records that no injuries were reflected on the Prosecutrix.

14. Lastly, he submitted that the chargesheet has already been filed, and no purpose would be served by keeping the present applicant in further incarceration.

15. The learned Additional Public Prosecutor has opposed the present bail application and submitted that the prosecutrix was a minor when the alleged incident took place. He submitted that during investigation a school certificate from a MCD school was obtained which shows that the prosecutrix was a minor.

16. He submitted that the offences alleged are heinous in nature and statement of the prosecutrix, recorded under Section 164 of the Cr.P.C, supports the prosecution's case.

17. He further submitted that the present applicant and his brother Aman were arrested in the present FIR whereas the chargesheet against the other two co-accused persons namely Pooja and Sunil (mother and father of the applicant) was filed without arrest. Analysis

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 provisions of Section 29 of the POCSO Act. Section 29 of the POCSO Act 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. After charges have been framed, the provisions of Section 29 of the POCSO Act have to be considered, which raises the threshold of satisfaction required before a bail can be granted. The Court has to evaluate albeit, prima facie, the evidence relied upon by the prosecution.

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, if any, 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 etc.

21. I have perused the chargesheet filed in the present case. The present case is solely based on the testimony of the prosecutrix. It is not in doubt that for an offence under Section 376 of the IPC, mere testimony of the prosecutrix is sufficient for the purpose of conviction of the accused. The testimony does not require corroboration as long as the same inspires confidence. From the record, following facts emerge:

a. The allegation is that on 29.08.2019 the prosecutrix who was at that time 17 years of age was called by the present applicant and his brother, and thereafter was taken to their family home where both established forceful sexual relation with her;

b. The prosecutrix had alleged that thereafter when the family members of the accused got to know about the alleged incident, they agreed to get the prosecutrix married to the brother of the applicant, namely Aman (Co-accused); c. She has further alleged that there was no marriage ceremony but after a Chunni ceremony she was taken by the family of the accused to their home, where after two days she along with the Co-accused Aman were thrown out of the family house;

d. It is stated in the FIR that when the prosecutrix and the Co-accused Aman were thrown out of the family both of them resided in a rented premises like husband and wife; e. Even though the incident is alleged to have happened on 29.08.2019, when the prosecutrix went to meet the applicant and the co-accused Aman in a park where she was made unconscious and was thereafter kept in confinement by the accused persons, no missing complaint was filed by the family of the prosecutrix;

f. Prosecutrix prior to giving a complaint, which led to registration of the present FIR, also gave a complaint on 21.11.2022, wherein she complained that even though she has a child from the co-accused Aman, but Aman does not work and does not give her any expenses. She further complained that the father of Aman is threatening her to not live with Aman. She had further complained that the present applicant is also threatening her and her brother. It is significant to note that the complaint does not mention anything about the accused persons establishing forceful sexual relations;

g. The prosecutrix has herself stated in the complaint dated 21.11.2022, that she was living in a live-in relationship with the co-accused Aman out of love and affection;

h. It is not disputed that the prosecutrix also gave birth to a child on 18.09.2020. The birth certificate mentions co-accused Aman as father of the child;

i. The applicant has also brought on record a copy of the complaint given by the father of the applicant on 27.09.2021 where they have complained against Aman and the prosecutrix in regard to the house they are staying in.

22. Nothing has been brought on record to corroborate any of the allegations which, at this stage, does not inspire confidence. The presumption as envisaged under Section 29 of the POSCO Act, at this stage, in my opinion, is not satisfied.

23. The Prosecutrix herself stated in the earlier complaint dated 21.11.2022 that she living in a live in relationship with the co-accused Aman and already had a child and subsequently was again impregnated while living with the Co-accused Aman.

24. The incident in regard to which the provisions of POCSO Act have been invoked is of August, 2019. The complaint in relation to the said incident is given belatedly in the year 2023. In between, it is an admitted case that the prosecutrix stayed with the accused persons and also gave birth to a child from the co-accused Aman. No complaint at any stage was given by the prosecutrix or her family that she has been abducted. It is also not denied that birth certificate of the child shows the accused Aman as the father of the child from the prosecutrix.

25. The allegations that she has been living in confinement from the last almost four years and she was subjected to sexual intercourse without her consent, at this stage, only on the basis of statement given by the prosecutrix, does not inspire confidence.

26. The applicant is in custody since 28.03.2023, the chargesheet has already been filed and no further investigation is stated to be pending.

27. There is no allegation that the present applicant is a repeated offender or has any antecedent. Any apprehension of the applicant threatening the victim or the applicant fleeing from justice can be taken care of by putting appropriate conditions.

28. In the view of this Court, when tested on the considerations set out above, the circumstances of the present case, would favour grant of bail to the applicant. Applicant is stated to be 24 years of age and keeping him in further custody would serve no useful purpose.

29. Considering the totality of facts and circumstances, and without commenting further on the merits of the case, the present bail application is allowed; and the applicant is directed to be released on bail on furnishing a bail bond for a sum of 30,000/- with one surety of the like amount to the satisfaction of the learned Trial Court/ Duty Metropolitan Magistrate, subject to the following terms and conditions:

i. The applicant shall upon his release provide his mobile number to the concerned IO / SHO and keep it switched on at all times;

ii. The applicant shall not take unwarranted adjournment and attend the Trial Court proceedings on every date; iii. The applicant shall not leave the boundaries of the National Capital Region without informing the concerned IO / SHO;

iv. The applicant shall not in any manner contact the complainant/victim or any of the witnesses; v. The applicant shall upon his release shall furnish a proof of residence where he shall reside upon his release to the concerned IO/SHO, and in the event of change in address he shall intimate the same to the concerned IO/SHO.

30. 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 filing an appropriate application for cancellation of bail.

31. It is clarified that the observations made in the present judgement/order are for the purpose of deciding the present bail application, and should not influence the outcome of the Trial. The said observations should not be taken as an expression of opinion on the merits of the case.

32. The present application is allowed in the aforementioned terms AMIT MAHAJAN, J FEBRUARY 19, 2024 HK / SK