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

Date of decision: 03rd SEPTEMBER, 2024

IN THE MATTER OF:

+ **BAIL APPLN. 2013/2024**

SAJJAD ALAM

.....Petitioner

Through: Ms. Swati Verma, Advocate.

versus

STATE OF NCT OF DELHI & ANR.

.....Respondents

Through: Mr. Yudhvir Singh Chauhan, APP for
the State.

SI Karan Yadav, PS IP Estate

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. The Petitioner has approached this Court for grant of regular bail in FIR No.130/2020 dated 21.06.2020, registered at Police Station I.P. Estate for offences punishable under Sections 377/224 of IPC and Section 6 of the POCSO Act.

2. The facts of the case reveal that the present FIR was registered on the complaint of the father of the victim who, at the relevant point of time, was 9 years of age. It is stated by the father of the victim that he was working as waiter in Bismillah Hotel. It is stated that he was staying in the said hotel along with the victim. It is stated that on 21.06.2020, he and his son (victim) both were sleeping on the roof of the hotel. It is stated that due to rain at about 04 - 04:30 AM both the father and the victim came down the stairs. It is stated that the father made the victim sleep in a room on the first floor of



the hotel where the Petitioner/Accused, who is the owner of the hotel, was sleeping and the he himself went to the ground floor to sleep. It is stated that at about 09:00 AM in the morning when he got up, his son i.e., the victim told him that the Petitioner has committed penetrative sexual assault on him. It is sated that on hearing his son, the father/complainant called the police and then took his son to Kalawati Hostital where the victim was treated. MLC of the victim was conducted *vide* MLC No.102/20 and, thereafter, the present FIR No.130/2020 for offences punishable under Sections 377/224 of IPC and Section 6 of the POCSO Act was registered against the Petitioner.

3. The Petitioner was arrested on 21.06.2020. Chargesheet has been filed and trial has commenced. The victim and the Doctor have been examined.

4. It is stated by the learned Counsel appearing for the Petitioner that the Petitioner has been in custody for the last four years. She states that the victim and all the public witnesses have already been examined. She draws attention of this Court to MLC of the victim and contends that though it is stated in the MLC that there is a tear at 10 O'clock position at the perianal area of the victim but no active bleeding was present and, therefore, it cannot be said that it is a case of penetrative sexual assault. She also draws attention of this Court to cross-examination of the Doctor wherein it is stated that crosion at the perianal area of a child is possible due to passing of hard stool.

5. Learned Counsel for the Petitioner also draws attention of this Court to FSL Report and submits that the victim has undergone a detailed medical examination and samples were exhibited and were sent for forensic examination. She states that the samples were collected immediately after the commission of the alleged offence. She states that rectal swab and smear



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of victim was taken but no evidence of semen/blood stains/lubricant was found. She states that the DNA profile generated from the source of exhibits '2a', '2b', '2c' (rectal swab and smear of victim) was not found to be matching with the DNA profile generated from the blood gauze of the Petitioner. She, therefore, contends that had any sexual assault taken place then DNA must have matched and semen would have been presented. She also states that there are several inconsistencies in the statement of the victim. She states that since the Petitioner has already spent a substantial amount of time in prison, no useful purpose would be served in keeping the Petitioner further in custody.

6. *Per contra*, learned APP appearing for the State, vehemently opposes the bail application of the Petitioner by contending that the Petitioner is accused of a very serious offence under Section 6 of the POCSO Act wherein the Petitioner can be sentenced for a minimum period of 20 years of imprisonment which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life, and shall also be liable to fine, or with death. He states that the victim was only 9 years of age when he was subjected to penetrative sexual assault by the Petitioner, and therefore, the Petitioner should not be enlarged on bail.

7. Heard learned Counsel appearing for the Parties and perused the material on record.

8. The Petitioner is in incarceration for four years. The Petitioner is accused of aggravated penetrative sexual assault under Section 5(o) of the POCSO Act. He is the owner of the hotel as claimed by the victim and his father, and in view of the punishment as provided under Section 6 of the POCSO Act, the Petitioner can be sentenced for a minimum period of 20



years of imprisonment which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life, and shall also be liable to fine, or with death. The victim has been consistent with his statement given under Sections 161 and 164 of Cr.P.C. The victim has withstood a detailed cross-examination which according to the Trial Court went about for a year. The victim has been consistent in stating that the offence of penetrative sexual assault has been committed on him by the Petitioner. There is no material on record to show that there was any motive on the part of the father of the victim to implicate the Petitioner. This Court has also gone through the statement of the Doctor wherein the Doctor has opined that due to passing of hard stool, erosion at the perianal area of a child is possible but tearing at 10 O'clock position is not possible.

9. The fact that the DNA profile generated from the source of exhibits '2a', '2b', '2c' (rectal swab and smear of victim) does not match with the blood gauze of the Petitioner cannot be said to be conclusive at this juncture and the same would be a matter of trial. Section 3 of the POCSO Act defines penetrative sexual assault reads as under:

"3. Penetrative sexual assault.—A person is said to commit "penetrative sexual assault" if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or



(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

10. It is not necessary that for coming to a conclusion as to whether penetrative sexual assault has taken place, blood of the victim or semen of the accused must be found. As stated earlier, these are matters of trial to be decided at the appropriate stage.

11. The parameters for grant of bail have been laid down by the Apex Court in several judgments. In Gurcharan Singh v. Delhi Administration, (1978) 1 SCC 118, the Apex Court has held as under:-

*"24. Section 439(1) CrPC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), CrPC against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1) CrPC of the new Code. **The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of***



Section 437(1) and Section 439(1) CrPC of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out.” (emphasis supplied)

12. In Ram Govind Upadhayay v. Sudarshan Singh, (2001) 3 SCC 598, the Apex Court explained the factors to be considered for granting bail, wherein the Apex Court has held as under:-

“3. Grant of bail though being a discretionary order — but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the court and facts, however, do always vary from case to case. While placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always to be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic considerations for the grant of bail — more heinous is the crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.

4. Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture, though however, the same are



only illustrative and not exhaustive, neither there can be any. The considerations being:

(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.” (emphasis supplied)

13. In Prasanta Kumar Sarkar v. Ashis Chatterjee & Anr., **2010 (14) SCC 496**, the Apex Court has observed as under:-

“9. We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid



down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

[See State of U.P. v. Amarmani Tripathi [(2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] (SCC p. 31, para 18), Prahlad Singh Bhati v. NCT of Delhi [(2001) 4 SCC 280 : 2001 SCC (Cri) 674] , and Ram Govind Upadhyay v. Sudarshan Singh [(2002) 3 SCC 598 : 2002 SCC (Cri) 688] .]

10. *It is manifest that if the High Court does not advert to these relevant considerations and mechanically*



grants bail, the said order would suffer from the vice of non-application of mind, rendering it to be illegal. In Masroor [(2009) 14 SCC 286 : (2010) 1 SCC (Cri) 1368] , a Division Bench of this Court, of which one of us (D.K. Jain, J.) was a member, observed as follows : (SCC p. 290, para 13)

“13. ... Though at the stage of granting bail an elaborate examination of evidence and detailed reasons touching the merit of the case, which may prejudice the accused, should be avoided, but there is a need to indicate in such order reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence.”

(See also State of Maharashtra v. Ritesh [(2001) 4 SCC 224 : 2001 SCC (Cri) 671] , Panchanan Mishra v. Digambar Mishra [(2005) 3 SCC 143 : 2005 SCC (Cri) 660] , Vijay Kumar v. Narendra [(2002) 9 SCC 364 : 2003 SCC (Cri) 1195] and Anwari Begum v. Sher Mohammad [(2005) 7 SCC 326 : 2005 SCC (Cri) 1669] .)”

14. Applying the aforesaid parameters to the facts of the present case, this Court is of the opinion that the Petitioner is accused of a very serious offence wherein he can be sentenced for a minimum period of 20 years of imprisonment which may extend to imprisonment for life or even death, which shall mean imprisonment for the remainder of natural life, and shall also be liable to fine, or with death, and therefore, the propensity of the Petitioner's fleeing from justice cannot be ruled at this juncture. In view of the fact that the father of the victim was working in the hotel of the Petitioner and if the Petitioner is enlarged on bail, the question of exerting pressure on the father of the victim and the victim by the Petitioner also



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cannot be ruled out. Further Section 29 of the POCSO Act postulates a presumption against the accused and the facts in the case does give rise to a presumption against the Petitioner that he has committed the offence. The victim stood a detailed cross-examination and he has been consistent with his statement which brings out a *prima facie* case against the Petitioner that he has committed the offence.

15. In view of the above, this Court is not inclined to grant bail to the Petitioner at this juncture.

16. With these observations, the bail application is dismissed, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

SEPTEMBER 03, 2024

S. Zakir