

(2020) 01 DEL CK 0550

In the Delhi High Court

Case No : Criminal Miscellaneous Case No. 470 Of 2020

Nidhi Puri

APPELLANT

Vs

State & Anr

RESPONDENT

Date of Decision : 28-01-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164, 439, 439(2), 482
Indian Penal Code, 1860 — Section 376, 376(2)
Protection of Children from Sexual Offences (POCSO) Act, 2012 — Section 6, 31

Citation : (2020) 01 DEL CK 0550

Hon'ble Judges : Suresh Kumar Kait, J

Bench : Single Bench

Advocate : Shilpi Jain, Amit Chadha

Final Decision : Dismissed

Judgement

Suresh Kumar Kait, J

CRL.M.A. 1951/2020

1. Allowed, subject to all just exceptions.

2. Application stands disposed of.

CRL.M.C. 470/2020

3. Present petition is filed under Section 439 (2) of the Code of Criminal Procedure Code, 1973 read with Section 482 of Code seeking cancellation of bail order and modifying bail conditions in bail order dated 22.01.2020 passed by learned ASJ, Special Court (POCSO), Saket in FIR No.237/17 registered at P.S. Malviya Nagar, New Delhi, for the offences punishable under Section 376 IPC and 6 POCSO Act.

4. The petitioner is a divorced lady of 45 years of age who is the complainant in the aforesaid FIR and mother of 7 year old baby named "X" who is the alleged victim of rape, when she was 4 years old, by her own father Sumit

Kapoor i.e. Respondent No.2, who is an NRI and living in America for the last several years, visiting India twice a year or so.

5. An FIR was registered against Respondent No.2 on 22.6.2017 who is also the former husband of petitioner.

6. The petitioner was married Respondent No.2 on 17.4.2009 in New Delhi and thereafter accompanied her husband to USA and was living there till a divorce was granted in USA by mutual consent in the year 2014. Out of the wedlock a daughter was born named "X", who is the victim in the present case. In 2015, the petitioner came back to India and has been living in New Delhi ever since along with her minor child named "X", who was aged 4 years when the offence was committed. The petitioner despite the laws in USA entitling her to 50% share in the assets/income of the respondent No.2, had foregone that and took absolutely no maintenance/any kind of alimony for herself. However, as per the mutual agreement between the petitioner and her, her former husband/respondent No.2 had visitation rights up to a maximum of 6 weeks every year with regard to the minor child, including spending nights also with the minor in absence of her mother.

7. Further case of the petitioner is that after coming back from USA, the minor child was with the respondent No.2/father for about 20 days from 04.05.2016 to 24.06.2016 at his parental home at Shivalik, his residence in Delhi. When the said minor came back after staying with the respondent No.2 for several days, she looked disturbed and physically uncomfortable because the respondent No.2 had exploited her sexually. The minor child was again and again touching her private part and putting her finger there and looked very uncomfortable. When the petitioner asked the minor child the reason, she disclosed that the respondent No.2 used to put his finger in her private part and also gave some graphic description of sexual exploitation by her father/respondent No. 2. The petitioner was too shocked to believe this and thought that she would check and confirm again when the minor child visits her father again. During the period of 28.12.2016 to 15.1.2017, when again respondent No.2 took custody of the minor child for the said period and she remained with him in the night also, this time again, when the minor came back she was very scared and looked pale and shaky and there was a rash around her private part. The petitioner was finding it difficult to come to terms with this fact that respondent No.2/father can actually rape his own daughter. The minor child gave graphic description of the sexual exploitation by Respondent No.2 to the petitioner.

8. It is further case of the petitioner that the agony of petitioner increased when the class teacher of the said minor informed the petitioner in January, 2017 that when the schools reopened after the winter break child minor "X" seemed little unsettled. The petitioner informed the teacher that the said minor was not following her regular sleep routine also. In February, 2017 during Parent Teacher Meeting the said teacher informed the petitioner that a mother of child "Y" (X's classmate) had informed that her daughter had been informed by child "X" that

the child "X" was upset in winter vacation, however the petitioner did not want to make the reason public. The said class teacher also confirmed this fact in her statement under Section 161 Cr.P.C. recorded by the Police, which is part of the Charge Sheet. It also came to the knowledge of the petitioner that the minor "X" had taken in confidence the said friend and shared with her how bad her father was. However, keeping in mind the welfare of the school children, the petitioner did not discuss the sexual exploitation of the child "X" with the friend's mother. However, the petitioner became extremely concerned about the mental state of her daughter and took extra care of her. However, complaint of rape was filed by the petitioner on behalf of the minor against respondent No.2 at P.S. Malviya Nagar on 19.5.2017 and said complaint was also accompanied with CD of conversation of the said minor with the petitioner wherein she gives a graphic description of the commission of offence by respondent No.2. The said complaint was received by the police station on 19.05.2017 along with the CD of the recorded conversation between the minor and petitioner. Despite the complaint disclosing the commission of very serious cognizable offence, the concerned police officials blatantly refused to register FIR, in complete disregard of law. Thereafter, over the next few weeks not only police refused to register the FIR but they also tried to browbeat the petitioner to an extent that she felt nervous and stressed herself. In the following few days, the complainant repeatedly met the police officials and the SHO at the said police station and also visited the concerned DCP and the ACP requesting for registration of FIR. However, not only did the police refuse to register FIR but also harassed the petitioner so much that she felt helpless and victimized herself.

9. On 30.05.2017, the Investigating Officer met petitioner and the minor child along with one more woman who was introduced as Counsellor of DCW (the said statement is part of the charge sheet) and remained with the petitioner and the minor child for about 2 hours and recorded a very long statement of the minor child and the same was written by the Investigation Officer. The minor child gave a detailed description of the commission of rape by respondent No.2. Before leaving, the petitioner was told that the FIR would be registered the next day, however, the same was not registered. Subsequently, FIR was registered only on the direction of the Court under Section 376 IPC and Section 6 POCSO Act at P.S. Malviya Nagar, New Delhi. After registration of the FIR, the statement of the said minor was recorded under Section 164 C.r.P.C. wherein, the said minor has given a graphic description of commission of said offence of rape by respondent No.2.

10. Despite, there being several statements of the 4 year old rape victim giving detailed description of commission of rape by respondent No.2 including her statement under Section 164 of Cr.P.C., the police officials not only refused to file the Charge Sheet against respondent No.2 but also repeatedly became extremely aggressive and hostile to the petitioner and even got the 4 year old child medically examined, despite the fact that the said medical examination was being performed several months after the commission of the said offence.

11. Learned counsel appearing on behalf of the petitioner submitted that petitioner filed a complaint of rape in the month of May, 2017 because she wanted to file the said complaint during the school vacations of the said child as she understood that during the following few weeks the child would be required to make statements regarding the commission of the said offence before the police repeatedly, which would adversely affect the mental state of the child, besides during school days the child would be available only during 3 pm to 7 pm, as she sleeps soon after and even during these 4 hours, the child has to focus some time on her studies and other activities. Besides, the child would take few days to mentally settle down and calm down after repeated interaction with the police. The petitioner was hoping that by the time the school of the minor reopened she would not only calm down but also settle in her new session.

12. Learned counsel further submitted that after waiting for several weeks after the registration of the FIR and seeing the extremely hostile behavior of the investigation authorities at Malviya Nagar, New Delhi, the petitioner was compelled to file a Writ Petition before this Court in August, 2017 praying for transfer of investigation in the investigation in the present case to an independent agency. However, on 01.12.2017 the Investigating Officer informed this Court that the Charge Sheet was being prepared and she (IO) was directed to bring the file on 18.01.2018 before this Court. On said date, this Court was wrongly informed that the Charge Sheet has been filed against respondent No.2 for trial. However, to the utter shock of the petitioner she learnt that despite this statement before this Court, the Charge Sheet has been filed without sending respondent No.2 for trial and he was kept in Column No. 12 of the said Charge Sheet. However, learned ASJ, Special Court, POCSO (South) was pleased to take cognizance of offences under Section 376 Clause 2 of the IPC and Section 6 of the POCSO, consequently summoned the respondent No.2/accused for 29.08.2018 vide order dated 16.07.2018.

13. Learned counsel submitted that the impugned order passed by learned ASJ, Special Court, is without considering the factors relevant for grant of bail, particularly, with regard to an offence punishable with life imprisonment and specially a heinous crime like rape and that too allegedly of a victim, who was only four years old, at the time of offence and did not consider the evasive conduct of the respondent No. 2, who appeared for the first time on 14.01.2020, before the trial court, in a case, in which summons for his appearance were for 19.08.2018. Learned ASJ not only granted bail to respondent No.2 but also refused to direct the Investigating Authorities to impound the passport of respondent No.2 and further refused to put a condition in the said bail order of requiring prior permission of the Court before leaving the country.

14. While concluding her arguments, learned counsel submits that respondent No.2 is an American citizen and has been residing in USA and despite the Summoning Order being passed against him on 16.07.2018 and he being summoned for 29.08.2018, he did not appear before the Trial Court, till the date

when he obtained bail and, in fact, appeared before the Court for the first time on 14.01.2020 that also because he came to India to attend to his mother, who was ill and not specially to appear before the Trial Court.

15. Subsequently the lawyer of respondent No.2, who was appearing before the Family Court, appeared before the Trial Court and sought adjournments on one ground or the other and has sought various adjournments for presenting respondent No.2 without giving any convincing reason for his non-appearance. If respondent No.2 continues to be on bail and he does not attend the trial, it will be bad in law not only to the petitioner and the victim but society as a whole, because in such cases if accused in a case of rape of minor is not brought to book, a wrong message shall go in the society.

16. It is pertinent to mention here that counsel for respondent No.2 argued before the Trial Court that the accused has been falsely implicated in this case by the complainant, by tutoring the victim who is of tender age in order to indirectly curtail the visitation rights of the accused. He further argued that accused was supposed to visit India somewhere in June 2017 and he had written an email dated 09.05.2017 to the complainant (mother of the victim) asserting that he will avail his visitation rights to meet the victim in June 2017. Earlier also, there were discussions with respect to renewal of the passport of the victim as the accused wanted to take the victim to USA for two months. This is discernible from the earlier emails exchanged between the parties in January 2017. He has further stated that the complainant (mother of the victim) had even written an email dated 13.05.2017 to the accused and there is no whisper of any such allegations in that email. On 17.05.2017, this false complaint was made by the complainant so as to frustrate the mutually agreed visitation rights and to prevent him from taking the victim to USA. During the course of investigation, various photographs were handed over to the IO, which have been placed on record and from the said photographs, it can be seen that the victim was very happy with the accused and he had also celebrated the birthday of the victim. Even the police had neither arrested the accused during investigation nor had filed a charge sheet sending the accused for trial.

17. The alleged offences took place in June 2016 and December 2016-January 2017, however the complaint was lodged after an inordinate delay only on 27.05.2017. Alongwith the police report, an email has been placed on record, which has been written by the complainant (mother of the victim) to the accused on 13.05.2017 and there is no whisper of any such allegation in the said email and in fact the complainant has written in the said email that: "This is to let you know that "S" (victim) had her visitation with your (of accused) parents today between 11.30 am and 8.30 pm". It is also seen that from the various photographs of the accused (father of the victim) and the victim, filed along with the police report, it appears that the victim is quite happy with the accused. In addition to above, the learned Court below perused the MLC report of the victim which merely records attempted penetration by finger only and the fact that the

hymen was found intact. Thus, the MLC does not support the case nor is there any scientific evidence. The only allegations against the accused are in the statement under section 164 Cr.P.C., but it is seen that the victim at that time was five years old girl who was in the custody of her mother. It is further seen in the police report that there were certain contradictions in the statement under section 164 Cr.P.C. and FIR, which could not be clarified as the victim girl was not made to join the investigation by the complainant. The complainant also did not cooperate in the investigation and specifically refused to let her daughter join investigation. It has also come on record that now the petitioner/complainant has filed a petition for sole custody of the victim.

18. As per the police report, the accused has not been sent up for trial and his name was arrayed in column no. 12 of the police report, which deals with the accused persons not charge-sheeted.

19. It is trite to say that there are no such limitations on the bar of a Court of Sessions to grant bail to the accused and since the Special Court under POCSO functions as a Court of Sessions by virtue of provisions of Section 31 of POCSO Act.

20. Learned counsel for the petitioner has relied upon the case of "Mansoor vs. State of UP" (2009) 14 SCC 286, wherein the Hon"ble Supreme Court observed that "there is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned."

21. In case of "Neeru Yadav vs. State of UP" (2014) 16 SCC 508 whereby the Hon"ble Supreme Court noted that "no one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilised society. A democratic body polity which is wedded to the rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. Society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible."

22. It is not in dispute that the bail application of the accused is maintainable under section 439 Cr.P.C. because pursuant to his summoning by the Court he has submitted to the jurisdiction and orders of the Court, therefore he is to be deemed to be in custody for the purpose of section 439 Cr.P.C. as held in

"Niranjan Singh v. Prabhakar Rajaram Kharote" reported as (1980) 2 SCC 559 and "Nirmal Jeet Kaur v. State of M.P." reported as (2004) 7 SCC 558.

23. In so far as the plea that the accused may flee from justice is concerned, there is no positive material on record warranting such a conclusion that respondent No.2 is a flight risk. It is not in dispute that even without service of summons, respondent No.2/accused had put in his appearance through his counsel before the Court on 27.04.2019 and even now he has voluntarily appeared before the Court in connection with his bail application. If he wanted to evade the process of the Court, he would not have personally appeared at the first instance.

24. In so far as the issue of influencing or intimidating the victim and the complainant is concerned the same can be taken care of by imposing appropriate conditions. No doubt gravity of the offence also needs to be considered and the offences alleged to have been committed by the accused are punishable with imprisonment for life. It is also not in dispute that gravity of an offence is an important criterion for grant of bail but matter is to be seen comprehensively while keeping in mind the facts and circumstances of the case as well as the material which is available on record.

25. It is pertinent to mention here that after coming back from USA, the minor child was with the respondent No.2/father for about 20 days from 04.05.2016 to 24.06.2016 at his parental home at Shivalik, Delhi. Allegations of the petitioner are that when the said minor child came back after staying with the respondent No.2 for several days, she looked disturbed and physically uncomfortable because the respondent No.2 had exploited her sexually. If the petitioner came to know about her sexually being exploited by her father/respondent No.2, then what prevented the petitioner not to take legal course available under the law at that point in time ? Despite knowing the facts as alleged, the petitioner again sent the minor child to her father/respondent No.2 and further allegations is that again during the period of 28.12.2016 to 15.01.2017, the minor child was again exploited. Accordingly, she noticed that she was very scared and looked pale and shaky and there was a rash around her private part. Then, even second time, she did not make any complaint or got MLC done of the victim. However, in the month of May, after about 4-5 months, the petitioner made complaint by alleging that her daughter's class teacher informed her about her sadness.

26. It is pertinent to note that the victim/minor was 3-4 years at the time of commission of offence and except the period mentioned above, she continued to stay with the petitioner, who is her mother. Such a child needs proper care and protection and a child of such age cannot even bath independently or change her clothes. Therefore, it is difficult to believe that the petitioner never noticed any scar on her private part but upon being informed by teacher of the minor, about her disturbance, she made complaint to the police which immediately was rightly not registered, because the complaint being against father of the minor girl and there was no proof of scientific evidence of the sexual exploitation of the minor

girl.

27. Moreover, on perusal of the impugned order, the Trial Court has put reasonable conditions on respondent No.2 while granting bail. Therefore, I find no illegality or perversity in the said order.

28. Finding no merit in the present petition, the same is accordingly dismissed.

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29. In view of the order passed in the present petition, the application has been rendered infructuous and is accordingly disposed of.