

(2020) 06 DEL CK 0164

In the Delhi High Court

Case No : Bail Application No. 1102 Of 2020

Sunny

APPELLANT

Vs

State (Govt. Of Nct Of Delhi)

RESPONDENT

Date of Decision : 29-06-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 91, 161, 164, 439

Indian Penal Code, 1860 — Section 376(2)(i)

Protection Of Children From Sexual Offences Act, 2012 — Section 3(b), 4, 5(m), 6, 29

Citation : (2020) 06 DEL CK 0164

Hon'ble Judges : Jyoti Singh, J

Bench : Single Bench

Advocate : Aditya Aggarwal, Ankit Mutreja, Ravi Nayak

Final Decision : Dismissed

Judgement

Jyoti Singh, J

1. This is an application filed by the Applicant under Section 439 Cr.P.C. seeking Regular Bail in FIR No. 0035/2020 dated 15.01.2020 under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act'), Police Station Swaroop Nagar, Delhi.

2. Applicant is the younger brother-in-law of the victim's mother (Chacha of the victim) and is aged about 20 years. Applicant has three siblings and he is the youngest of the three. The eldest brother of the Applicant namely, Suresh and his wife Mamta have three daughters aged about 5, 8 and 12 years respectively and the victim herein is the youngest daughter, aged 5 years.

3. Case of the prosecution is that the Applicant repeatedly molested the victim by rubbing and inserting his finger in the private part (vagina) of the victim. In the statement given by the victim under Section 161 Cr.P.C. she clearly stated that the Applicant repeatedly touched her private parts. On 16.01.2020, the statement of the victim was recorded in the Rohini Court under Section 164

Cr.PC, where she reiterated the role of the Applicant. Mother of the victim in her statements under Sections 161 and 164 CrPC stated that the Applicant was indulging in the said act for the past 1½ year and that she had learnt of this around 7-8 months ago.

4. The Applicant had approached the Sessions Court seeking regular bail, but the same was dismissed vide order dated 28.02.2020.

5. Status Report was filed on 17.06.2020. Thereafter, a Supplementary Status Report has been filed on 25.06.2020. The complainant is duly represented by her counsel.

6. Learned Counsel for the Applicant contends that the victim is the youngest daughter of Applicant's eldest brother, who has a matrimonial discord with his wife and the Applicant is being falsely implicated only out of matrimonial vengeance between the two. Applicant and the family of the elder brother lived in the same house. It is further submitted that the time of the incidence in the FIR is 12.30 p.m. on 14.01.2020. As per the CDR of the Applicant filed by the Police in the Charge sheet, at 12.08 and 12.35 p.m., on the said date, Applicant was at his shop i.e. 868, Swaroop Nagar Extension, New Delhi. The shop of the Applicant is about 2 kms from his residence and it is a walking distance of about 15 to 20 minutes. As a routine, even on 14.01.2020, Applicant went to his shop at around 10 a.m. and came back at about 8 p.m. It is impossible that the Applicant would be present at 12.30 p.m, at two locations.

7. Learned counsel further submits that around the area where the Applicant has his mobile repairing shop, 'Krishna Mobile Repairing Shop', there are substantial number of CCTV cameras installed at different locations. Applicant had moved an application before the Trial Court under Section 91 Cr.P.C. to direct the DCP, Police Station, Swaroop Nagar, to produce the CCTV footage of all the cameras installed in the area around the shop of the Applicant so that truth could surface. In the order dated 30.01.2020, the Trial Court recorded the statement of the IO that she had no objection and rather she had already moved an application for obtaining the 500 GB hard disk. Trial Court had accordingly directed that necessary steps be taken for collecting the CCTV footage of the relevant time and the relevant places. Court had also, on the request of the Applicant, directed the IO to look into the CDR and the cell location of the Applicant. It is submitted by the counsel that till date the IO has not furnished the CCTV footage and this raises serious doubts on the fair investigation of the Police and also reflects that there is something which is being deliberately kept away from the Court.

8. Learned counsel further submits that while dismissing the Bail Application, the Trial Court has recorded in its order, the contention of the Applicant that even earlier, prior to the present complaint and the FIR, victim's mother had tried to misuse the legal machinery by levelling similar allegations against the Applicant vis-à-vis her elder daughter. This complaint is also merely a fall out of a well-planned design of the mother of the victim to falsely implicate the members of

the family of her husband, due to a matrimonial discord between her and her husband. Learned counsel has strongly emphasized that on 14.01.2020, when the MLC of the child was conducted, her mother had categorically alleged that the Applicant had been indulging in the alleged act for the last 1½ years, although she had learnt of the same around 7-8 months ago. It is argued that it is inconceivable that a mother, aware of such acts being repeatedly committed on her daughter, would not make a complaint to the police or any of the family members or would not take steps to prevent the crime. It is also unbelievable that she would leave the child all alone in the house in the company of the Applicant, for him to have free access to commit the alleged act.

9. It is further argued that the reason given by the mother, for not reporting the incident for several months, that she was under threat of being thrown out of the matrimonial home, is a reason which cannot be believed. Whatever be the consequences, a mother would not permit such repeated acts on her daughter, by continuing to live in the same house, where the Applicant resides.

10. Learned counsel for the Applicant further argued that the MLC as well as the Emergency Registration Card dated 14.01.2020 records tenderness over genital area, swelling within normal limits, over the vaginal area. There is no aberration and no external signs or injury in the rectal area. There is a scaly region over the Mons Pubis and left Labia Majora, due to infection. The infection can be caused due to several reasons and is not attributable to the alleged act of the Applicant.

11. Relying on the Status Report and the Supplementary Status Report, learned Additional Public Prosecutor for the State assisted by learned counsel for the Complainant submits that the victim has in her statements under Section 161 and 164 Cr.P.C., including a supplementary statement under Section 161 Cr.P.C., clearly stated that the Applicant had touched her private parts and inserted his finger therein. She has further stated that the Applicant used to touch her private parts, whenever her mother was not home. It is further submitted that the CDR of the Mobile of the Applicant was obtained in which it was revealed that the house of the victim was within the mobile location area of the accused. CCTV footage of the place of incidence as well as the neighbouring areas was obtained and has been sent to FSL, for expert opinion, but the result is awaited. IO has confirmed that the mother of the victim has moved out of the matrimonial home and is living in her parental home.

12. Bail is opposed on the ground that the Applicant has committed a heinous offence with the 5 year old child. The charge is yet to be framed. It is informed by the learned APP that the next date fixed before the Trial Court is 24.07.2020. Victim is a minor and in case the Applicant is released on bail, there are chances that he would influence the victim, who is yet to depose before the Trial Court and would also tamper with evidence.

13. Learned counsels further argue that the Applicant has fabricated a story of matrimonial discord between the parents of the victim. There is no record to

support the said story. Reliance of the Applicant on one undated and unsigned handwritten note and one handwritten note dated 14.06.2020 allegedly signed by the victim's mother stating that she has left the matrimonial home and taken her belongings, is of no advantage to the Applicant. Even assuming that the mother has taken away her belongings from the matrimonial home after discovering the sexual assaults on her daughter, it is only a natural conduct of the mother for the well-being of her daughters. It is further argued that the record of the CDR and the CCTV footage cannot be looked at this stage by the Court, and these can be used by the Applicant in defence and as a plea of alibi only during trial.

14. Learned APP has argued that the alleged offence is under Section 6 of POCSO Act and under Section 29 of the said Act there is a statutory presumption of guilt against the Applicant. The Applicant is to be presumed to have committed the alleged offence, unless the contrary is proved subsequently, when the victim enters the witness box. In any case, emphasis on the timings in the CDR is of no avail to the Applicant, as the victim and her mother have brought out in their statements that the alleged incident on 14.01.2020 was not a solitary one, and the Applicant had indulged in this act several times in the past.

15. Learned counsel for the Complainant has additionally argued that the mother of the victim has clearly made a statement on 24.02.2020 that she had not complained of molestation for the past several months as she was threatened by other members in her matrimonial home, that she would be ousted from the home, if she approached the Police. It is argued that the MLC shows that there was swelling and tenderness around the vaginal area including scaling and infection, and this as per her is a result of the heinous act of the Applicant. The victim has clearly stated in her statements that her Chacha used to repeatedly indulge in this act, whenever her mother was out of the house. This is a serious and heinous offence and the Bail application should be dismissed. Learned Counsel further points out that the Trial Court had called the victim to the chamber and has expressed satisfaction after speaking to her that she was not tutored.

16. Learned Counsel for the Applicant responding to these arguments reiterates the submissions made earlier. Lot of stress is laid on arguing that the allegations are false and fabricated as it is wholly unlikely and inconceivable that a mother whose 5 year old daughter is being repeatedly molested by her brother-in-law, would remain a silent and mute spectator. Learned counsel reiterates that had the CCTV footage been brought on record, truth would have surfaced that the Applicant is innocent and is being falsely implicated. However, the Police has not taken any steps to produce the same despite direction of the Trial Court.

17. Learned Counsel further submits that the Applicant is only 20 years in age and was in final year of college on the date of the alleged incident and the incarceration will completely jeopardize his life and career. It is further submitted that the Applicant has been in judicial custody since 15.01.2020 and has already

suffered incarceration for nearly six months on account of false allegations made by the mother of the victim.

18. Learned Counsel relies on an order of the Kerala High Court in the case of *Shibu vs. State of Kerala* in Bail Application No. 7130/2019 passed on 09.10.2019. Counsel points out that in the said case, as per the case of the prosecution, the Applicant aged 38 years was a close relative of one of the neighbours of the victim girl, aged 5 years. A similar allegation had been made that the Applicant had inserted his finger into the genital parts of the victim and case was registered under Section 376 (2)(i) IPC and Sections 3(b), 4, 5(m) and 6 of POCSO Act. State had opposed the Bail on similar grounds that the allegations were serious and the petitioner had access to the house of the victim and there was possibility of intimidating and influencing the witnesses, more particularly, the minor victim girl and her family members, if left on bail. Learned counsel points out that the Kerala High Court, looking to the facts and circumstances of the case, particularly the fact that Applicant had suffered detention for 45 days, had enlarged the Applicant on regular bail, subject of course to stringent conditions. It is submitted that the facts and circumstances of the present case are on a better footing and the Applicant deserves to be admitted on bail.

19. I have heard learned counsel for the Applicant and learned APP as well as learned counsel for the complainant.

20. Charge is yet to be framed in the matter. FSL report of the CCTV footage, on which the Applicant relies so emphatically, is awaited. Perusal of the complaint and the charge-sheet reveals that the victim has made specific allegations against the Applicant and there is no material contradiction in the Statements under Section 161 and Section 164 Cr.P.C. The victim was medically examined on the date of the alleged incident and in the emergency card and the MLC, it is stated that there was swelling, tenderness, scaling and infection around the vaginal area of the victim.

21. After careful scrutiny of the facts and circumstances of the case, the contents of the FIR and the material placed on record, as also in view of the serious allegations against the Applicant and other factors such as severity of the punishment under the law prescribed for the alleged offence, I do not find sufficient ground to grant bail to the Applicant at this stage. As regards the judgement of Kerala High Court relied upon by the Applicant's Counsel, suffice would it be to state that each case turns on its own facts and circumstances. This Court is refraining from commenting any further, lest it prejudices the case of either side, on merits.

22. Court has not expressed any opinion on the merits of the case.

23. Present application is accordingly dismissed.