

(2023) 08 DEL CK 0099

In the Delhi High Court

Case No : Bail Application No. 1957 Of 2023

Varun Arya

APPELLANT

Vs

State Of Nct Of Delhi

RESPONDENT

Date of Decision : 14-08-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 164, 439

Indian Penal Code, 1860 — Section 376, 506

Protection of Children from Sexual Offences Act, 2012 — Section 6, 29

Citation : (2023) 08 DEL CK 0099

Hon'ble Judges : Vikas Mahajan, J

Bench : Single Bench

Advocate : Pradeep Kumar Arya, Aditya Kumar Yadav, Gaurav chaudhary, Pulkit Chadha, Himanshu Kumar, Naveen, Richa Dhawan

Final Decision : Disposed Of

Judgement

Vikas Mahajan, J

1. The present petition has been filed under Section 439 Cr.P.C. seeking regular bail in connection with FIR No. 64/2023 under Sections 376/506 IPC and Section 6 of POCSO Act, registered at P.S. K.N. Katju Marg, Delhi.

2. The case of the prosecution is that Ms. 'G' (mother of victim) made a complaint on 01.02.2023, alleging that she had started living separately from her husband (the petitioner/accused herein) w.e.f. April, 2019.

3. When the complainant left her matrimonial house, both her children, a minor son and a minor daughter, were residing with their father i.e. the petitioner herein. On 12.05.2019, her daughter (victim) left her father's house and shifted with her mother in the rented accommodation, wherein her mother was residing. When the victim left the petitioner's house, the petitioner / accused would visit the complainant's rented accommodation in the absence of the complainant, to meet their daughter.

4. On 13.01.2023, the victim disclosed to her mother (complainant) that on 11.05.2019, when the victim was at her father's house and no other member was present, the petitioner (father) took off his clothes and molested the victim under the influence of alcohol and forcefully inserted his fingers into her private part. The victim also disclosed that she was sexually assaulted by her father (petitioner herein) at her mother's rented accommodation on 24.11.2020 and 06.02.2022 when her mother was away.

5. On the basis of above allegations, the aforesaid FIR came to be registered on 02.02.2023. During the course of investigation, medical examination of the victim was conducted and her statement under Section 164 Cr.P.C. was recorded.

6. Thereafter, the petitioner was arrested on 21.02.2023 and sent to judicial custody on 22.02.2023 and since then the petitioner is in judicial custody. In the status report filed by the State it has been mentioned that after completion of investigation, chargesheet was filed before the concerned court and the case is pending trial.

7. The learned counsel appearing on behalf of the petitioner submits that the complainant is the wife of the petitioner and their marriage was solemnized on 02.11.2006. Out of the said wedlock, two children were born - one daughter and one son. The daughter is elder to the son.

8. He submits that on account of marital discord the complainant left the matrimonial house and is staying separately. Further, as per the mutual understanding between the petitioner and the complainant, the girl child (victim) aged about 15years 09 months is residing with the complainant while the son who is aged about 10 years and 08 months is in the care and custody of the petitioner.

9. He submits that various cross cases have been filed by the complainant as well as the petitioner against each other. He invites the attention of the court to paragraph 10 of his petition where the details of as many as 11 FIRS /complaints/ civil suit which have been lodged / instituted either by the complainant or by the petitioner or his mother have been mentioned. The details of said pending litigations are reproduced herein below for ready reference:

S.No.

FIR No./

Complaint

/ Civil Suit

Date of FIR/

Complaint/ Civil Suit

Under Sections

PS

Lodged / instituted by

Against

1.

270/2020

22.10.2020

498A/406 IPC

Prashant Vihar

Complainant P @ G w/o Varun Arya

Varun Arya

2.

90/2022

08.03.2022

307/506/427

IPC

Madhuban Bapudham, Ghaziabad

Sadhna Arya M/o Varun Arya

G @ P And

Sandeep Kumar

3.

179/2022

29.04.2022

380/447/448

IPC

Madhuban Bapudham, Ghaziabad

Varun Arya

G @ P and Sandeep

Kumar

4.

304/2022

12.07.2022

420/447/448

IPC

Madhuban Bapudham, Ghaziabad

G @ P

Varun Arya, Navneet Kumar and Ranveer Singh

Yadav

5.

Civil Suit No.

1233/2021

22.12.2021

Ghaziabad Court

P and TechMan Builder

6.

Complaint

with DD No. 67

19.01.2022

K.N. Katju Marg

Varun Arya

7.

Complaint

with DD No. 33

29.01.2022

K.N. Katju Marg

Varun Arya

8.

Complaint

02.03.2022

Madhuban Bapudham,

Ghaziabad

Saadhna Arya M/o

Varun Arya

9.

Complaint to ACP

08.04.2022

K.N. Katju Marg

Saadhna

Arya M/o Varun Arya

Sandeep Kumar

10.

Complaint

to DCP

02.05.2022

K.N. Katju

Marg

Varun Arya

Sandeep

Kumar

11.

Complaint to SHO

30.06.2022

K.N. Katju Marg

Varun Arya

G @ P

10. He submits that the complainant/wife at present is residing with one Mr. Sandeep Kumar, who is a Police officer and is helping the complainant to file frivolous and bogus complaints/FIRs against the petitioner.

11. He submits that since the complainant was not able to achieve anything against the petitioner / accused in the previous false FIRs / complaints, the complainant has conspired with aforesaid Mr. Sandeep Kumar to falsely implicate the petitioner by concocting a story of sexual assault on the minor daughter-victim.

12. He submits that the victim who is now residing with the complainant for more than 4 years has been tutored by the complainant and every attempt is being made to alienate the victim from her father i.e. the petitioner herein.

13. He submits that the FIRs at S.No. 1 and 4 in the aforesaid tabulated chart were registered at the instance of the complainant on 22.10.2020 and 12.07.2022, respectively.

14. He contends that in both these FIRs there is no reference as regard to the alleged three instances of sexual assault, despite the fact that the alleged incident of 11.05.2019 is prior to the registration of FIR No. 270/2020 dated 22.10.2020 and the other two instances of 24.11.2020 and 06.02.2022 are prior to the FIR No. 304/2022 dated 12.07.2022.

15. He further submits that since the present petitioner is in custody, there is no parent available to take care of the minor son and to attend to his other needs. The old mother of the petitioner is incapable to look after the son of the petitioner.

16. Premised on the above grounds, the learned counsel for the petitioner urges the Court to grant bail to the petitioner.

17. Per contra learned APP for the State has argued on the lines of the status report. She submits that the offence alleged against the petitioner is of serious nature. She further submits that the evidence of the complainant and the victim is yet to be recorded. She also submits that in case the petitioner is released, he may intimidate, induce or threaten the victim, being her father. She thus, urges that the bail application of the petitioner be dismissed.

18. I have heard the learned counsel for the petitioner as well as the learned APP for the State and have perused the record.

19. This court is cognizant of the fact that since the charges have been framed by the learned Trial Court, the threshold of satisfaction required would be higher while considering the bail application of the petitioner in view of the impact of Section 29 of the POCSO Act.

20. A co-ordinate bench of this court in Dharmander Singh v. State, 2020 SCC OnLine Del 1267, while considering the effect of Section 29 of the POCSO Act, when an application for bail is to be considered after framing of charges, laid down as under:

"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.

21. The Court further enumerated certain real life considerations, any one or more of which if exists in a particular case, are ought to be considered while deciding a bail plea at the post-charge stage, in addition to the nature and quality of the evidence before it. The relevant part of the judgment reads as under:

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.

22. This Court in *State (NCT of Delhi) v. Sanjeev Kumar Chawla*, 2020 SCC OnLine Del 1970 after considering various judgments of the Hon'ble Supreme Court has summed up the general principles governing grant of bail. The relevant paragraph of the judgment reads as under:-

"33. The principles governing grant of bail which the courts have to consider can be enumerated, though not exhaustively, as under:—

- a) The gravity and severity of the offence and the nature of accusation;
- b) Severity of punishment;
- c) The position and status of the accused vis-à-vis the victim and the opportunity to approach the victims/witnesses;
- d) The likelihood of the accused fleeing from justice;
- e) The possibility of tampering with the evidence and/or the witnesses;
- f) Obstructing the course of justice or attempting to do so;
- g) The possibility of repetition of the offence;
- h) The prima facie satisfaction of the court in support of the charge including frivolity of the charge;
- i) The peculiar facts of each case and nature of supporting evidence."

(emphasis supplied)

23. Now coming back to the facts of the case, a perusal of the chargesheet shows that the victim is residing with the complainant (mother) from the year 2019 and the incidents alleged are of 11.05.2019, 24.11.2020 and 06.02.2022 but the complaint has been made for the first time with regard to these incidents only on 01.02.2023. Evidently, there is an inordinate delay in the registration of FIR.

24. Even in the two FIRs registered at the instance of the complainant on 22.10.2022 and 12.07.2022, there is no mention of the alleged incidents. The alleged incident of 11.05.2019 is prior to the first FIR No.270/2020 lodged by the complainant on 22.10.2022 and likewise, the other two alleged incidents of 24.11.2020 and 06.02.2022 are prior to the second FIR No.304/2022 lodged by the complainant on 12.07.2022, but there is not an iota of reference to the said incidents in the two FIRs.

25. Undisputedly, the allegations are serious, but this court cannot shut its eyes to the fact that there is a matrimonial dispute pending between the victim's parents; there are cross FIRs/complaints lodged both from the complainant's as well as from petitioner's side; there is also an inordinate delay in the registration of present FIR; in the two FIRs lodged earlier by the complainant, there is no reference to the alleged three incidents; and the victim is residing with the complainant (mother) for the past more than 4 years. In this factual backdrop, false implication of the petitioner by the complainant by tutoring the minor girl child who is in complainant's custody, cannot be ruled out.

26. I am prima facie of the view that the above factors have the potential of creating dent in the case of the prosecution. However, the probative value of these factors shall be considered by the learned Trial Court during the trial, but at this stage whilst considering the bail plea of the petitioner, I am of the opinion that facts of the case meet the requirement of higher threshold of satisfaction required in view of the provisions of Section 29 of the POCSO Act.

27. Further, this court cannot be unmindful to the peculiar facts of the case that a son aged about 10 years 08 months, who is in the custody of the petitioner, requires attention and care of his father i.e. the petitioner herein.

28. Further, the object of keeping a person in custody is to ensure his availability to face the trial and to receive the sentence that may be awarded. Detention is not supposed to be punitive or preventive. Seriousness of the allegation or the availability of material in support thereof is not the only considerations for declining bail. Delay in commencement and conclusion of trial is a factor to be taken into account and the accused cannot be kept in custody for indefinite period if trial is not likely to be concluded within reasonable time [Vinod Bhandari v. State of Madhya Pradesh, (2015) 11 SCC 502]. The investigation is complete, the charge-sheet has been filed but the evidence of the prosecution is yet to commence, therefore, the conclusion of trial is likely to take time. In the given circumstances, no useful purpose will be served in keeping the petitioner behind bars.

29. The petitioner has a mother and a minor son to look after and he is permanent resident of Delhi, therefore, the petitioner is not a flight risk. It is also not the case of the prosecution that the petitioner has a criminal record.

30. In so far as the apprehension of the prosecution is concerned that the petitioner if released on bail may intimidate, induce or threaten the victim, it can

be addressed by imposing a condition that the petitioner shall not contact the victim, who happens to be his daughter, during the pendency of the trial, .

31. Having regard to the circumstances discussed above, the petitioner has made out a case for grant of regular bail. Accordingly, the petitioner is admitted to bail subject to his furnishing a Personal Bond in the sum of Rs.25,000/- and one Surety Bond of the like amount subject to the satisfaction of the Trial Court / Jail Superintendent/Duty Magistrate, further subject to the following conditions:-

a) Petitioner/applicant will not leave the city without prior permission of the Court.

b) Petitioner/applicant shall appear before the Court as and when the matter is taken up for hearing.

c) Petitioner/applicant shall provide all mobile numbers to the IO concerned which shall be kept in working condition at all times and shall not switch off or change the mobile number without prior intimation to the Investigating Officer concerned.

d) Petitioner/applicant shall not communicate with or come in contact with the victim or other witnesses.

32. The petition is disposed of.

33. It is made clear that nothing stated above shall be construed as an expression of opinion on the merits of the case.

34. Copy of the order be forwarded to the concerned Jail Superintendent for necessary compliance.

35. Order dasti under signatures of the Court Master.