



2024:DHC:5754



\$~21

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

Date of decision: 02nd AUGUST, 2024

IN THE MATTER OF:

+ **CRL.M.C. 4830/2022 & CRL.M.A. 19399/2022**

.....Petitioner

Through: Mr. Navneet R. and Ms. Roopali
Lakhotia, Advocates.

versus

STATE NCT OF DELHI & ANR.

.....Respondents

Through: Mr. Tarang Srivastava, APP for the
State.

SI Aarti Yadav, PS Kapashera

Mr. Dinesh Mudgil, Mr. Anmol
Gupta, Ms. Bhairabi Das, Ms.
Sanjana Sharma, Ms. Namrata Dua,
Ms. Nagma, Ms. Swati, Mr. Vineet
Bahl, Mr. Abhishek, Mr. Sunny Paw,
Mr. Prashant Dahiya, Mr. Abhinav
Bhatnagar, Mr. Ankit Malothra,
Advocates for R-2.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The father of the Prosecutrix has approached this Court challenging the Order dated 27.08.2022 passed by the learned Trial Court granting bail to the Respondent No.2 herein in FIR No. 443/2019 dated 10.10.2019 registered at Police Station Kapashera for offences under Section 376 IPC read with Section 6 of the POCSO Act.
2. The FIR in question was registered on the statement of the



2024:DHC:5754



Prosecutrix, who at the time of the incident was about 13 years of age. Before the Police, the Prosecutrix has stated that she is studying in 6th Standard and Respondent No.2, who was about 60 years of age at the time of the incident, lives in her neighborhood. It is stated in the FIR that from 10.01.2019 Respondent No.2/accused used to take the Prosecutrix to a bathroom in a building and remove her clothes, insert his fingers in her vagina, applied his mouth on her vagina and on her breast.

3. It is stated that on 09.10.2019, when Respondent No.2/accused had taken the victim to a bathroom in a building, some person had seen this and the victim was rescued from the bathroom. Material on record indicates that the father of the victim was informed and on the statement of the victim, the FIR in question was registered.

4. Statement of the victim under Section 164 CrPC was recorded on 11.10.2019 where again the victim stated that on 09.10.2019 at about 2:30 PM, she had gone to buy a notebook and when she was coming back to her house, Respondent No.2/accused took her to a building which was seen by some person and when they were inside the bathroom someone knocked at the door and asked them to come out.

5. The victim was taken to the hospital on 10.10.2019 wherein it has been recorded that the 13 year old girl child (victim) has a history of repeated sexual assault and the last episode was on 09.10.2019 at 2:30 PM by the 60 year old neighbor (Respondent No.2/accused).

6. Chargesheet has been filed. Respondent No.2/accused has been charged for offences under Section 376 IPC read with Section 6 of the POCSO Act.

7. The victim was examined. In the examination, the victim stated that



2024:DHC:5754



on 10.01.2019, when she had gone for her tuitions, Respondent No.2 took her to a bathroom in some building and asked her to remove her clothes, touched the vagina and applied mouth on her vagina and her breasts. The victim also identified Respondent No.2/accused in Court.

8. Respondent No.2/accused had approached the Trial Court by filing a petition under Section 439 CrPC for grant of bail in the said FIR. The learned Trial Court *vide* Order dated 27.08.2022 has granted bail to Respondent No.2/accused. Paragraph 6 and 7 of the said order reads as under:-

“6. Section 3 POCSO Act defines the penetrative sexual assault. No allegation of penetration in her vagina, urethra, anus or any part of body has been made by the child victim against the accused. Clause (d) of the Section 3 is applicable only if the accused applies his mouth to penis, vagina, urethra, anus. But in this case it has not been alleged that the accused has applied his mouth to any such part as mentioned in Clause (d) of Section 3. As per allegations, accused suck chest of child victim and touched the anus of the child victim, which falls in the definition of sexual assault as defined in Section 7 of POCSO Act.

7. In the back-drop of above discussion, and the fact that accused is aged about 63 year and suffering from old age ailment and he did not misuse his interim bail, the evidence of Public Witnesses has already been recorded, therefore, accused is now admitted on regular bail subject to furnishing of personal bond and surety bond in the sum of Rs. 30,000/- each to the satisfaction of this court/ Duty Magistrate subject to the following conditions:

a. he will make no attempt to influence or contact the prosecution witnesses.



2024:DHC:5754



b. he will appear in the court on each and every date and will not dragged in trial.

c. he will not leave the country under any circumstances.”

9. It is this order which is under challenge before this Court in the present petition.

10. Learned Counsel for the Petitioner contends that the entire reasoning of the learned Trial Court is completely perverse. He states that the Trial Court has erred in coming to a conclusion that the offence under Section 3 of the POCSO Act is not made out.

11. Learned Counsel for the Petitioner draws the attention of this Court to the definition of penetrative sexual assault in Section 3 of the POCSO Act and states that the reading of the FIR and the depositions by the victim given in the Court brings out the offence of penetrative sexual assault defined in Section 3 of the POCSO Act. He further states that under Section 29 of the POCSO Act provides that when a person is prosecuted for committing an offence under Section 3 of the POCSO Act, the Court shall presume that such person has committed the offence unless the contrary is proved. He states that bail has been granted on the ground that the present case is not a case of penetrative sexual assault which is contrary to the language of Section 3 of the POCSO Act.

12. *Per contra*, learned Counsel for Respondent No.2 contends that Respondent No.2 has been granted bail on 27.02.2022 and nearly 2 years have passed and Respondent No.2 has not violated any of the bail conditions and the trial is at the fag-end and therefore bail granted to Respondent



2024:DHC:5754



No.2/accused ought not to be cancelled after two years. He also states that a perusal of the statement of the Prosecutrix under Section 164 CrPC indicates that no offence either under Section 376 IPC or under the POCSO Act has been made out.

13. Learned APP for the State supports the case of the Petitioner herein and states that a supplementary statement of the Victim under Section 161 CrPC has been recorded wherein the Victim has stated that when she was examined under Section 164 CrPC, she was under the misconception that she is only being asked about the incident which took place on 09.10.2019 and she forgot to mention incidents from 10.01.2019. He states that the victim has supported the case of the prosecution in her testimony in the Court. He further states that the Trial court has misread Section 3 of the POCSO Act and therefore bail granted to Respondent No.2/accused ought to be cancelled.

14. Heard learned Counsel for the parties and perused the material on record.

15. Material on record indicates that in the complaint given to the Police on the basis of which the present FIR was registered and in her testimony given in Court the Victim has categorically stated that on 10.01.2019 also she was taken to the bathroom in a building where Respondent No.2/accused removed her clothes, inserted his finger in her vagina and applied his mouth on her vagina and her breast.

16. The Prosecutrix in her supplementary statement under Section 161 CrPC has stated that in the statement under Section 164 CrPC, she was under the misconception that she was being enquired only about the incident which took place on 09.10.2019.



17. At this juncture it is relevant to reproduce Section 3 of the POCSO Act, which 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.”

18. The complaint, the depositions and the supplementary statement of the Victim under Section 161 CrPC clearly brings out a case of penetrative sexual assault. The learned Magistrate has completely erred in ignoring the testimony given in Court and has come to a conclusion that it has not been alleged that the accused has applied his mouth on such parts of the victim as mentioned in Clause (d) of Section 3 of the POCSO Act.

19. The Trial Court has not discussed the testimony given by the victim in Court on 20.09.2021, wherein the victims has deposed as under:

“On 10.01.2019, I went for tuitions in the nearby gali from where one Uncle came and took me to a



bathroom in a building and asked me to remove my cloths. He started to suck my chest and also touched the place from where we do toilet (meri chhati ko chusne laga or toilet wali jagah par touch kiya). ”

20. This part of the testimony has not been demolished in the cross-examination and this Court is of the opinion that this part of the testimony could not have been ignored by the learned Trial Court while granting bail to the Respondent No.2 herein as it clearly makes out the offence under Section 3 of the POCSO Act.

21. The factors to be taken into account while granting bail are as under :
- whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
 - nature and gravity of the accusation;
 - severity of the punishment in the event of conviction;
 - Danger of the accused absconding or fleeing, if released on bail;
 - character, behavior, means, position and standing of the accused;
 - Likelihood of the offence being repeated;
 - Reasonable apprehension of the witnesses being influenced; and
 - Danger, of course, of justice being thwarted by grant of bail.

[Refer to:- Gurcharan Singh v. Delhi Administration, (1978) 1 SCC 118; Ram Govind Upadhyay v. Sudarshan Singh, (2001) 3 SCC 598; ; State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21; and Prasanta Kumar Sarkar v. Ashis Chatterjee, (2010) 14 SCC 496].

22. Bail has been granted to the Respondent No.2 herein by the Trial



2024:DHC:5754



Court ignoring the principles laid down by the Apex Court for grant of bail. The Respondent No.2 is alleged of committing a serious offence for which the Respondent No.2 can be given life imprisonment. The Apex Court in cases where bail has been granted without fulfilling the basic and necessary requirements to grant bail then regardless of the fact that the accused has been granted bail for good period of time, bail that is granted to the accused has been cancelled. It is pertinent to mention that bail was granted to the accused on 27.04.2022 and the present petition has been filed on 03.09.2022 and there has been no delay on the part of the father of the Prosecutrix in approaching this Court.

23. In Gobarbhai Naranbhai Singala v. State of Gujarat & Ors., (2008) 3 SCC 775, where a person had been granted bail by the High Court without taking into account the basic requirement necessary to grant bail, the Apex Court cancelled the bail after a considerable time even though the person who had been granted bail had not misused the bail. The relevant portion of the said judgment reads as under:-

“23. Shri Arun Jaitley, learned Senior Counsel appearing for the respondents, submitted that this Court should not ordinarily interfere in the matters relating to bail. It was pointed out that in the last two years, the respondent has not misused the liberty granted to him. There is no doubt that this Court does not ordinarily interfere in the matters granting bail but the same is subject to certain exceptions. When the basic requirements necessary for grant of bail are completely ignored by the High Court, this Court would be justified in cancelling the bail. In the present case, three witnesses, who had allegedly seen the occurrence, have unequivocally in their statements under Section 161 CrPC stated that the respondent,



2024:DHC:5754



was present at the time of occurrence and he had fired from his gun. Prima facie a case for grant of bail was not made out.”

24. Similarly, in Centrum Financial Services Limited v. State of NCT of Delhi & Anr., (2022) 13 SCC 286, where bail had been granted to an accused without following the principles for grant of bail, the Apex Court cancelled the bail after a substantial period. The Apex Court *vide* the said judgment has observed as under:-

“32. Now so far as the submission on behalf of the accused that as the accused has been released on bail as far as back on 14-9-2020 [Jayant Kumar Jain v. State, 2020 SCC OnLine Del 2103] and that thereafter there are no allegations of misusing the liberty and therefore the bail may not be cancelled and reliance placed upon the decisions of this Court referred to hereinabove more particularly in X [X v. State of Telangana, (2018) 16 SCC 511 : (2020) 1 SCC (Cri) 902] are concerned at the outset it is required to be noted that this is a case where it is found that the order passed by the High Court releasing Respondent 2-accused on bail has been passed mechanically and without adverting to the relevant facts and without considering the nature of accusation and allegations and the nature of the gravity of the accusation. Even in the decisions which are relied upon by Shri Rohatgi, learned Senior Advocate appearing on behalf of Respondent 2, there is no absolute proposition of law laid down by this Court in the aforesaid decisions that once the bail is granted by the High Court, though the High Court could not have granted the bail, in absence of any allegation of misuse of liberty and/or breach of any of the conditions of the bail, the bail cannot be set aside when grant of bail is itself subject-matter of challenge in appeal/revision.



33. What is observed and held is that the rejection of bail in a non-bailable case at an initial stage and cancellation of bail so granted has to be dealt with and considered on different basis and that very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted. Therefore, on very cogent and overwhelming circumstances the bail can be cancelled.

34. At this stage, the decision of this Court in Mahipal v. Rajesh Kumar [Mahipal v. Rajesh Kumar, (2020) 2 SCC 118 : (2020) 1 SCC (Cri) 558] is required to be referred to. In the said decision, it is observed and held by this Court that though this Court does not ordinarily interfere with the order of the High Court granting bail, however, where the discretion of the High Court to grant bail has been exercised without due application of mind and in contravention of the directions of this Court, such an order of granting bail is liable to be set aside. Thereafter after drawing the distinction between the power of an appellate court in assessing the correctness of an order granting bail and an application for the cancellation of the bail, in para 16 it is observed and held as under : (SCC pp. 125-26)

“16. The considerations that guide the power of an appellate court in assessing the correctness of an order granting bail stand on a different footing from an assessment of an application for the cancellation of bail. The correctness of an order granting bail is tested on the anvil of whether there was an improper or arbitrary exercise of the discretion in the grant of bail. The test is whether the order granting bail is perverse, illegal or unjustified. On the other hand, an application for cancellation of bail is generally examined on the anvil of the existence of supervening circumstances or violations of the conditions of bail by a person to whom bail has been



2024:DHC:5754



granted. In Neeru Yadav v. State of U.P. [Neeru Yadav v. State of U.P., (2014) 16 SCC 508 : (2015) 3 SCC (Cri) 527] , the accused was granted bail by the High Court [Mitthan Yadav v. State of U.P., 2014 SCC OnLine All 16031] . In an appeal against the order [Mitthan Yadav v. State of U.P., 2014 SCC OnLine All 16031] of the High Court, a two-Judge Bench of this Court surveyed the precedent on the principles that guide the grant of bail. Dipak Misra, J. (as the learned Chief Justice then was) held : (Neeru Yadav case [Neeru Yadav v. State of U.P., (2014) 16 SCC 508 : (2015) 3 SCC (Cri) 527] , SCC p. 513, para 12)

‘12. ... It is well settled in law that cancellation of bail after it is granted because the accused has misconducted himself or of some supervening circumstances warranting such cancellation have occurred is in a different compartment altogether than an order granting bail which is unjustified, illegal and perverse. If in a case, the relevant factors which should have been taken into consideration while dealing with the application for bail have not been taken note of, or bail is founded on irrelevant considerations, indisputably the superior court can set aside the order of such a grant of bail. Such a case belongs to a different category and is in a separate realm. While dealing with a case of second nature, the Court does not dwell upon the violation of conditions by the accused or the supervening circumstances that have happened subsequently. It, on the contrary, delves into the justifiability and the soundness of the order passed by the Court.’ ”

35. Thus, as per the law laid down by this Court where a court while considering an application for bail fails to consider the relevant factors, an appellate court may



justifiably set aside the order granting bail. The appellate court is thus required to consider whether the order granting bail suffers from a non-application of mind or a prima facie view from the evidence available on record.”

25. Applying the law laid down by the Apex Court to the facts of this case, this Court is of the opinion that the testimony of the Prosecutrix categorically points out that a case under Section 3 of the POCSO Act is *prima facie* made out against Respondent No.2 herein. The Trial Court has not taken into account the testimony of the Prosecutrix in Court while granting bail to the Respondent No.2 herein /accused. In the facts of this case, the presumption under Section 29 of the POSCO Act is attracted. 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.”

26. The punishment for offences under Section 3 of the POCSO Act has been provided under Section 4 of the POCSO Act, which is, imprisonment which shall not be less than ten years, extendable upto imprisonment for life. There is a *prima facie* and reasonable ground to believe that Respondent No.2 has committed a heinous offence of penetrative sexual assault on a minor girl. No doubt, Courts ordinarily do not interfere with orders granting bail but as laid down by the Apex Court, when basic requirements necessary for grant of bail are completely ignored by the Trial Court, the High Court



2024:DHC:5754



would be justified in cancelling the bail. This Court is of the opinion that granting bail to such offenders will have a deleterious effect on the society and will actually run contrary to the purpose for which POCSO Act was enacted.

27. In view of the above, considering the law laid down by the Apex Court in Gobarbhai Naranbhai Singala (supra) & Centrum Financial Services (supra), this Court is inclined to cancel the bail granted to Respondent No.2/accused.

28. Resultantly, Respondent No.2/accused is directed to surrender before the Trial Court on 09.08.2024.

29. Let a copy of this order be transmitted to the concerned Trial Court for necessary action.

30. With these observations, the petition is allowed. Pending application(s), if any, stand disposed of.

SUBRAMONIUM PRASAD, J

AUGUST 02, 2024

hsk