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

Date of decision: 19th June 2023

+ **BAIL APPLN. 3093/2022 and CRL.M.A. No. 3550/2023**

BABU LAL BHAWARIYA

..... Petitioner

Through: Ms. Suruchi Aggarwal, Senior Advocate with Mr. Jugal Wadhwa, Mr. Rishabh Wadhwa, Mr. Prashant Sodhi, Mr. Rishab Bhalla and Mr. Harshit Sharma, Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Amit Sahni, APP for the State with SI Sangeeta, P.S.: S.B. Dairy.
Mr. Sunil Dalal, Senior Advocate with Ms. Manisha Saroha and Mr. Nikhil Beniwal, Advocates for complainant.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition filed under section 439 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") the petitioner seeks



grant of regular bail in case FIR No. 448/2022 dated 25.06.2022 registered under section 376 of the Indian Penal Code, 1860 (“IPC”) and section 6 of the Protection of Children from Sexual Offences Act, 2012 (“POCSO Act”) at P.S.: Shahbad Dairy.

2. Notice on this petition was issued on 17.10.2022; consequent whereupon Status Report dated 23.01.2023 has been filed. Though no nominal roll was called for, the Investigating Officer confirms that the petitioner has been in custody from the day of his arrest on 27.06.2022.
3. Chargesheet and supplementary chargesheet have been filed in the matter.
4. The court has heard Ms. Suruchi Aggarwal, learned senior counsel appearing for the petitioner as well as Mr. Amit Sahni, learned APP appearing for the State; as also Mr. Sunil Dalal, learned senior counsel appearing for the prosecutrix in compliance of section 439(1A) Cr.P.C. The court has also heard the prosecutrix who appeared *via* video-conferencing, and also in chambers in-person.

Prosecution Case

5. The petitioner and the prosecutrix are acquainted since the petitioner was her schoolteacher and also used to give out-of-school tuitions to her. It is the prosecution’s case that the prosecutrix received a call from the petitioner sometime in April 2021 asking her to meet him at the Rithala Metro Station on the pretext of providing her with some notes for an exam. Upon meeting the prosecutrix, the petitioner is alleged to have informed her that he needed to give her some more



notes which were at his residence. He assured her that his family was at his home; and the prosecutrix accompanied him to his residence at Sector-28 Rohini on his motorbike. It is alleged that at his residence, the petitioner offered the prosecutrix some water and snacks, after consuming which the prosecutrix fainted and the petitioner committed forcible sexual intercourse upon her. When the prosecutrix regained consciousness, the petitioner showed to her an objectionable video-recording of the incident and threatened the prosecutrix against telling anyone about the incident, else he would make the video 'viral'. It is stated that thereafter the prosecutrix went to her *bua*'s house.

6. It is further alleged that subsequently, using the threats of making the objectionable video viral, the petitioner committed sexual intercourse with the prosecutrix about 4 times at his house; and about 7 times at one Hotel Florence Residence, near East Rohini Metro Station. As per the prosecutrix's Class-II School Leaving Certificate and her Class-X Mark Sheet filed along with the chargesheet, at the time of commission of *some* of the alleged sexual assaults, the prosecutrix was 'minor'.
7. The prosecutrix attained majority on 16.01.2022. The alleged sexual acts by the petitioner upon her are alleged to have continued even thereafter.
8. The last incident is said to have occurred on 24.06.2022. The allegation is that at about 7:30 p.m. on 23.06.2022 the petitioner called the prosecutrix, asking her to meet him at the same hotel on



24.06.2022. It is stated that though she refused to meet him, the petitioner called the prosecutrix again while she was on the way to her aunt's house for her grandmother's *tehrvi*, and again threatened her about spreading the objectionable video, whereupon the prosecutrix met the petitioner at the hotel, where he again committed forcible sexual intercourse with her.

9. After the incident of 24.06.2022, a complaint was filed with the police on 25.06.2022 and the FIR came to be registered. Following that, the statement of the prosecutrix was recorded under section 164 Cr.P.C. and her MLC was conducted on the same day *vide* MLC No 111/2022 dated 25.06.2022, which noted that the prosecutrix's hymen was ruptured.

Submissions on behalf of the petitioner

10. Denying the allegations in the FIR, Ms. Aggarwal, learned senior counsel appearing for the petitioner submits, that this is at worst a case of consensual sexual intercourse. It is submitted that though the prosecutrix alleges that sexual assault was committed upon her under threat that the petitioner would make an objectionable video viral, and that the petitioner had shared with her that video, no such video has been given by her to the Investigating Officer, nor has her mobile phone been seized by the police, which betrays the possibility that no such video exists. It is further submitted, that there are glaring contradictions in the prosecutrix's versions *inter-alia* that she narrates in the FIR that the petitioner showed to her a *video of him committing the act with her*, in her subsequent narration she says that



the petitioner had shown to her *an objectionable video*. It is further submitted that entry dated 24.06.2022 in the reception register of the hotel shows that the petitioner and the woman who accompanied him had checked-out of the hotel on the next day at 8:30 p.m., which contradicts the prosecutrix's version, who says that she had left the hotel on the same day itself. Besides, it is also pointed-out that the prosecutrix's version cannot be believed since there is nothing to show that it was the prosecutrix who went to the hotel with the petitioner, and the hotel register in fact shows that the petitioner was accompanied by one Mannu Rana.

11. Senior counsel appearing for the petitioner further submits, that the CDRs of the petitioner and the prosecutrix show that they were talking to each other even at the time when they were allegedly present together in the hotel room, which again belies the possibility of the offence alleged, since they could not have been calling each other on phone while they were allegedly in the same hotel room. It is further pointed-out that the CDRs also show that between 01.05.2021 and 24.06.2022 the prosecutrix made 1510 calls to the petitioner, which would not have been so if it was a case of coercion, threat or forcible sexual intercourse. It is also argued that the first act is stated to have occurred in April 2021, which is most unlikely since Delhi was in lockdown at that time due to the then prevailing COVID-19 pandemic.



12. On point of law, senior counsel submits, that charges have not yet been framed and therefore the rigours of section 29 of the POCSO Act would not apply.
13. Senior counsel states that the petitioner has been in judicial custody since 27.06.2022 and has clean antecedents, with no prior criminal involvement. She submits that no purpose would be served by keeping the petitioner in judicial custody, especially since the petitioner is also willing to stay away from Delhi if granted bail, which dispels any possibility of influencing any witness; and with the supplementary chargesheet having been filed, there is no scope of tampering with evidence.
14. Senior counsel has placed reliance on the following judgments in support of her submissions : *Sanjay Chandra vs. Central Bureau of Investigation*¹, *Nikesh Tarachand Shah vs. Union of India and Anr.*², *Satender Kumar Antil vs. Central Bureau of Investigation & Anr.*³, *Javed vs. State of Uttar Pradesh*⁴, *Dharmander Singh vs. The State (Govt. of NCT, Delhi)*⁵, *Pratap vs. State of Himachal Pradesh*⁶ and *Faizan Wahid Baig vs. State of Maharashtra*⁷.

¹ (2012) 1 SCC 40 at paras 21-23, 27, 40, 46

² (2018) 11 SCC 1 at paras 19, 27, 28

³ 2022 SCC OnLine SC 825 at paras 5-13, 17, 18, 67, 68

⁴ SLP CrI No 7643/2021, Order dated 25.10.2021 (Supreme Court)

⁵ MANU/DE/1775/2020 at paras 69, 75, 78, 79

⁶ CrI Misc Petition (Main) No 1437/2022, Order dated 10.08.2022 (High Court of Himachal Pradesh)

⁷ Bail Application No. 3372/2021, Order dated 15.11.2022 (High Court of Judicature at Bombay) at para



Submissions on behalf of the State

15. On the other hand, opposing grant of bail, Mr. Sahni, learned APP submits that the prosecutrix's statement recorded under section 164 Cr.P.C. corroborates what has been recorded in the FIR, though with some minor discrepancies but no glaring inconsistencies. It is submitted that there is consistency in what is alleged both in the FIR and in the prosecutrix's statement recorded under section 164 Cr.P.C., in relation to the allegations of forcible sexual intercourse committed by the petitioner upon the prosecutrix.

16. Learned APP further submits, that as narrated in the supplementary chargesheet, FSL Report dated 01.09.2022 shows that the DNA of the petitioner matches the DNA found on the vulval swabs and underwear of the victim; and that therefore there is medical evidence in support of the last incident of 24.06.2022. It is further submitted, that there is also CCTV footage which shows that after making payment for the hotel room, the petitioner produced his ID and the ID of one Mannu Rana, only to conceal the identity and thereby the age of the prosecutrix, since it would not have been possible for the petitioner to take along a minor to the hotel. Learned APP submits, that this is corroborated by the statement of Mannu Rana recorded under section 161 Cr.P.C., who says that she did not know the petitioner; that she had never visited the hotel; and that in fact she had lost her Aadhaar Card. It is further submitted, that in the CCTV footage the prosecutrix's face is visible when she was taken there by the petitioner, entering the hotel from a separate entrance. It is also



pointed-out that the CDRs of the petitioner and the prosecutrix show that they were in the same location on multiple dates.

17. It is argued that the offending acts commenced April 2021, when the petitioner was the prosecutrix's geography teacher in class XII in the 2020/2021 academic session; and being her teacher, the petitioner abused his position of trust, which continued even after the prosecutrix graduated from school and till the last offending act, which was committed on 24.06.2022.

Submissions on behalf of the prosecutrix

18. Also opposing grant of bail, Mr. Dalal learned senior counsel appearing for the prosecutrix supports the case of the State. Learned senior counsel submits, that though the prosecutrix was 'major' as on the date of the last incident in June 2022, the prosecutrix's was about 17 years and 03 months old on the date of the first incident in April 2021 and was therefore 'minor' at that time. Senior counsel argues that *prima-facie* the case against the petitioner stands established by the prosecutrix's statement recorded under section 164 Cr.P.C.; by the FSL report; and by the entries in the hotel reception register; and that, in any case, even the sole testimony of the prosecutrix is sufficient for conviction, especially when it is corroborated by medical and other evidence in the present case, and cannot be denied on the basis of assumptions.
19. Mr. Dalal further submits, that the petitioner was more than double the age of the prosecutrix in April 2021, and had a daughter who was junior to the prosecutrix. Being her teacher, the petitioner was in a



position of trust *vis-a-vis* the prosecutrix, and the offence therefore falls within the ambit of section 376(2)(f) IPC and section 5(f) of the POCSO Act. It is argued that in fact the petitioner abused his position to manipulate and coerce the prosecutrix into the act, though the attempt now is to make the situation appear consensual. It is submitted that the offence alleged is very serious and the offence under POCSO attracts a minimum imprisonment of 20 years; and that granting bail to such accused before charges are framed would defeat the purpose of the POCSO Act.

20. Senior counsel relies on the following judgments in support of his contentions : *X (minor) vs. State of Jharkhand & Anr*⁸, *Eera through Manjula Krippendorf vs. State (Govt. of NCT of Delhi and Ors.*⁹, *Anil Kumar vs. State*¹⁰, *Phool Singh vs. State of Madhya Pradesh*¹¹, *Surya Prakash Pal vs. State of NCT of Delhi*¹², *State of Bihar vs. Rajballav Prasad*¹³, *Sumitha Pradeep vs. Arun Kumar CK & Anr*¹⁴ and *Sanjay Malik @ Sant Sevak Das vs. The State & Anr*¹⁵.

Discussion & Conclusions

⁸ CrI. Appeal No. 263/2022, Order dated 21.02.2022 (Supreme Court) at para 6

⁹ MANU/SC/0876/2017 at paras 18, 20, 22, 119

¹⁰ Bail Appln No. 3971/2021, Judgment dated 16.11.2021 (High Court of Delhi) at paras 7-11

¹¹ MANU/SC/1174/2021 at paras 5.1 to 5.4

¹² Bail Appln No. 163/2022, Judgment dated 12.04.2022 (High Court of Delhi)

¹³ MANU/SC/1525/2016

¹⁴ 2022 LAWPACK(SC) 67382 at paras 7-9, 12

¹⁵ Bail Appln No. 3051/2022, Judgment dated 14.03.2023 (High Court of Delhi)



21. Though several judicial precedents have been cited on both sides, in the opinion of this court, nothing said in those decisions dissuades the court from taking the view that it proposes to take in this matter.
22. Upon a conspectus of the record and the submissions made, purely on a *prima-facie* basis, what weighs with the court at this stage is the following :
 - 22.1. In her statement recorded under section 164 Cr.P.C., the prosecutrix has affirmed the allegations against the petitioner as contained in the FIR. It is settled law that *in a given case*, it is permissible to return a finding of conviction based even solely on the testimony of a prosecutrix, provided the prosecutrix is found to be trustworthy and her testimony credible. In the present case, since charges are yet to be framed and evidence is yet to commence, the court deposition of the prosecutrix is yet to be recorded. Be that as it may, the prosecutrix's statement recorded under section 164 Cr.P.C. supports the prosecution case, and this court sees no reason to disbelieve the statement so recorded;
 - 22.2. What the record also shows, is that at least during a certain phase when the offending acts are alleged to have been committed by the petitioner, the prosecutrix was 'minor'. The prosecution case is that the offences continued even after the prosecutrix attained majority. The prosecutrix's date of birth is sought to be proved by her Class-II School Leaving Certificate and her Class-X Mark Sheet filed along with the chargesheet.



Clearly therefore, at least with respect to the offences alleged to have been committed prior to the prosecutrix turning ‘major’, her so-called consent, as canvassed on behalf of the petitioner, is completely irrelevant;

- 22.3. There also appears to be forensic evidence that reads strongly against the petitioner, in that the forensic report says that the petitioner’s DNA matches the DNA found on certain exhibits relating to the prosecutrix collected during investigation. Considering that the interaction between the petitioner and the prosecutrix is supposed to have been only that between a teacher and a student, it remains to be explained as to why the DNA matches;
- 22.4. The prosecution has also collected CCTV footage which shows the petitioner and the prosecutrix together at a certain hotel, entering a room. Again, at least at this stage, there is no explanation that would belie what is seen in the CCTV footage. Again, it remains to be explained as to why, if the footage is genuine, did the petitioner and the prosecutrix go together to a hotel room and at whose instance;
- 22.5. It is also part of the record, though yet to be proved in evidence, that the petitioner paid for the hotel room and checked into the hotel alongwith the prosecutrix based on a false ID (Aadhaar Card) of one Mannu Rana. In her statement given to the Investigating Officer, Mannu Rana says that she had lost her Aadhaar Card. It is not the case that it was Mannu



Rana who accompanied the petitioner to the hotel. Why then was Mannu Rana's ID used by the petitioner to check some lady into a hotel room in Delhi, especially since he is ordinarily a resident of Delhi. This also needs to be addressed by leading evidence; and

- 22.6. The court cannot also ignore the fact that since the petitioner and the prosecutrix were interacting as teacher and student, the alleged offence, if it comes to be proved during trial, takes an egregious and aggravated form, particularly in view of the specific statutory mandate under section 376(2)(f) of the IPC and section 5(f) of the POCSO Act.
23. Suffice it to say, that at this stage, when the court is considering a bail petition, no final conclusions are sought to be drawn, one way or the other. What can be said with some certitude however, is that the allegations in the present case require cogent answers before they can be discarded.
24. Even more importantly, in the circumstances obtaining in the case, in particular the relative social standing of the petitioner *vis-a-vis* the prosecutrix and the societal milieu, this court is not sure that the petitioner would not influence witnesses or flee from justice or otherwise attempt to prejudice the trial of the case, if he is enlarged on bail.
25. In the above view of the matter, this court is not inclined to admit the petitioner to regular bail *at this stage*.
26. Accordingly, the bail petition is dismissed.



27. Nothing in this judgment shall be construed as an expression of opinion on the merits of the matter.
28. Other pending applications, if any, are also disposed-of.

ANUP JAIRAM BHAMBHANI, J

**Pronounced *via* video-conferencing on
JUNE 19, 2023**

HJ/uj