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* **IN THE HIGH COURT OF DELHI AT NEW DELHI****Date of decision: 01 June, 2023**

+ BAIL APPLN. 3722/2022

VICKY @ KAPIL

..... Petitioner

Through: Mr. Amit Chadha, Mr. Atin Chadha
and Mr. Sanjog Singh, Advocates.

versus

THE STATE

..... Respondent

Through: Mr. Shoaib Haider, APP for the State
with Mr. Mohd Zaid, Advocate with
SI Isha, P.S.: K.N. Katju Marg.
Mr. Nitin Saluja, Mr. Ankur Sinha
and Mr. Saahil Mongia, Advocates.**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 under section 439 read with section 482 of the Code of Criminal Procedure 1973, ('Cr.P.C.' for short), the petitioner seeks regular bail in case FIR No.292/2021 dated 15.07.2021 registered under sections 376/506 of Indian Penal Code ('IPC' for short) and section 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act' for short) at P.S.: K.N. Katju Marg. Investigation in the matter is complete. Chargesheet has been filed in the matter, in which the offence under section 328 IPC has also been added against the petitioner.



2. Notice on this bail petition was issued on 13.12.2022; consequent whereupon status report dated 12.01.2023 has been filed.
3. Nominal Roll dated 13.03.2023 has been received from the Jail Superintendent.
4. Pursuant to intimation sent to the prosecutrix as required under section 439(1-A) Cr.P.C., she has also been heard in the matter through counsel appointed by the Delhi High Court Legal Services Committee.
5. Briefly, the allegation against the petitioner is that in two separate incidents on 27.06.2021 and 13.07.2021, the petitioner committed the offences alleged in the FIR against the prosecutrix, as detailed hereinafter.
6. The petitioner was about 22 years of age as on the date of the incidents alleged, and the prosecutrix was about 14/15 years old. The petitioner is distantly related to the prosecutrix; and is stated to have met the prosecutrix on 14.03.2021 at the cremation of her uncle, which was attended by the prosecutrix's family members including the petitioner; whereafter a relationship is stated to have commenced between the petitioner and the prosecutrix.
7. It is alleged that on 27.06.2021, the petitioner called the prosecutrix to meet him at Bansi Wala Sweets, Sector 15, Rohini, Delhi; consequent whereupon the prosecutrix met him at about 04:00 p.m., and the petitioner took her to an OYO Hotel in Pitampura, Delhi, where the petitioner is stated to have made physical relations with the prosecutrix, allegedly on the promise that he would marry her.



8. The second incident is stated to have occurred on 13.07.2021, on which date it is alleged, that the petitioner called the prosecutrix at about 03:00 p.m.; and thereafter went to where the prosecutrix was attending tuition; and when the prosecutrix was in the car with the petitioner, he is stated to have administered to her a stupefying drink; and to have thereafter taken the prosecutrix to the same hotel, where he is alleged to have made bodily relations with her for a second time, this time allegedly without her consent. It is also alleged that after doing so, the petitioner left the prosecutrix at her house at about 06:30 p.m., and also threatened her with dire consequences if she revealed anything to her family.
9. After the second incident, the prosecutrix is stated to have narrated the episode to her parents, whereupon at about 07:30 p.m., the parents reached P.S.: K.N. Katju Marg and at their instance GD Entry No.0096A dated 13.07.2021 was recorded at the police station. The GD Entry records that the mother has informed the police that a boy has attempted to do *jabardasti* with her daughter, who she said was about 13 years of age. It is observed that the petitioner was *not named* in the said GD Entry; nor was there any reference to any sexual intercourse having been committed upon the prosecutrix.
10. Subsequently, on 14.07.2021 another GD Entry No.0004A dated 14.07.2021 came to be recorded at the same police station, again at the mother's instance, in which, based on her statement recorded under section 161 Cr.P.C., the mother *contradicted* the earlier GD Entry and stated that *no offence had been committed* against her



daughter, who (latter) had lied to her by saying that she had gone for tuition but had instead gone roaming with her friends. The second GD Entry further records, that the prosecutrix's mother says, that she had got the earlier GD Entry recorded only out of suspicion and anger.

11. MLCs were conducted upon the prosecutrix on two dates. On 13.07.2021, her MLC was conducted at the Dr. Baba Saheb Ambedkar Hospital, Rohini, in which the MLC doctor recorded the history narrated by the prosecutrix. In that, she had referred to the petitioner as her 'boyfriend'. In this MLC, the doctor records, that the prosecutrix narrated that she had left home at about 03:00 p.m. and had gone to Haldiram Restaurant with her boyfriend Kapil *i.e.*, the petitioner, and had returned home at about 06:00 p.m. The doctor further records that the *prosecutrix did not narrate any history of physical or verbal abuse nor of any sexual assault*. The prosecutrix had also declined internal medical examination.
12. The second MLC was conducted on 15.07.2021. In this MLC the doctor records, that the prosecutrix narrated that her boyfriend Kapil *i.e.*, the petitioner, had called to meet her, and when she was in his car, he offered her a drink, upon consuming which she felt dizzy. The doctor also records that the prosecutrix further narrated, that the petitioner thereafter took her to an OYO Hotel in Pitampura, Delhi and had sexual intercourse with her without her consent; and that he had also has taken some '*wrong photos of her*'. She however stated, that there was no physical assault; and further that she was already sexually active and in a sexual relationship with the petitioner. In this



instance, the prosecutrix's mother refused to have the prosecutrix's internal medical examination conducted.

13. The statement of the prosecutrix was recorded under section 164 Cr.P.C. on 16.07.2021, in which she *inter-alia* narrated that the friendship between the petitioner and her had turned into love, and that the petitioner had said that he would marry her. She further narrated the second episode of 13.07.2021, when she said that having met her at her tuition class, the petitioner took the prosecutrix to the OYO Hotel in Pitampura and had physical relations with her without her consent. To be sure, insofar as the first alleged incident of 27.06.2021 is concerned, the prosecutrix described the act as “*Physical relation बनाए*”; and in the second alleged incident of 13.07.2021, she describes it as “*उसके बाद without my consent वो मेरे साथ Physical हुआ और मेरे साथ misbehave किया*”.
14. Consequent to the aforesaid, the petitioner was arrested on 27.07.2021 and has been in judicial custody since 29.07.2021. As per nominal roll dated 13.03.2023, the petitioner has suffered judicial custody as an under-trial for about 01 year 07 months as of 11.03.2023.
15. Trial is underway. Prosecution evidence is being recorded. The testimony of the prosecutrix was completed on 31.08.2022; and that of the prosecutrix's mother was completed on 23.11.2022. The testimony of an employee from OYO Hotel, Pitampura was also recorded on 23.11.2022. There are a total of 13 prosecution witnesses, of which 05 witnesses are stated to have already been examined,



cross-examined and discharged. The remaining 08 witnesses are all stated to be official/formal witness.

16. The court has heard Mr. Amit Chadha, learned counsel for the petitioner and Mr. Shoaib Haider, learned APP for the State.
17. Mr. Nitin Saluja, learned counsel has also made submissions on behalf of the prosecutrix.
18. It is the petitioner's submission that the very fact that the prosecutrix refers to the petitioner as her 'boyfriend' indicates a relationship of a consensual nature. Besides, it is contended that GD Entry dated 13.07.2021 does not mention any forcible sexual act but only refers to '*jabardasti*' having been done on the prosecutrix, which is an ambiguous word. It is further submitted, that as is seen from the two MLCs conducted, there is no medical evidence of any sexual act, muchless of any sexual assault.
19. Furthermore, it is contended that in the second GD Entry recorded on 14.07.2021, the prosecutrix's mother has clearly stated that during the counselling conducted by an NGO the prosecutrix had said that '*nothing wrong has happened with her*', after which the prosecutrix was medically examined; and that the prosecutrix's mother did not want to take any legal action; and that she had called the police out of suspicion and anger. It is further pointed-out, that even the first GD Entry dated 13.07.2021 only records that the mother had narrated that an attempt was made to do '*jabardasti*' with her daughter, without any specifics or particulars.



20. Counsel also submits, that the petitioner is a young man, presently about 24 years of age, and has already been in judicial custody for about 02 years; and the testimony of all material witnesses has already been recorded by the learned trial court.
21. Upon being queried, it is also confirmed that the petitioner does not reside in the same locality as the prosecutrix.
22. Opposing the grant of bail however, the learned APP submits that since the prosecutrix is a minor, her consent is immaterial in law; and that it is irrelevant even if the prosecutrix has described the petitioner as her 'boyfriend' in the MLC. It is further submitted, that several prosecution witnesses still remain to be examined, and the petitioner's bail plea has been dismissed on no less than 05 occasions.
23. Learned counsel appearing for the prosecutrix has also opposed the grant of bail, arguing that since the prosecutrix is a minor, the whole narration of the relationship being consensual, or there being consent for the act, is wholly immaterial; that there are no material contradictions in the statements of prosecution witnesses recorded so far; and that, in any case, even the sole testimony of the prosecutrix is sufficient to convict the petitioner for the charge of rape.
24. It is also argued that the deposition of the prosecutrix and her mother are consistent and corroborate each other; that the prosecutrix has named the hotel as also the car in which she was taken to the hotel by the petitioner; that an employee of the hotel who has been examined as PW-3, has also testified that the petitioner was present at the hotel on 13.07.2021 and that it was the petitioner who had booked the room



for that date, which corroborates the statement of the prosecutrix; and that there is no reason why the prosecutrix would falsely implicate the petitioner, who is a relative.

25. More specifically, it is submitted that since charges have been framed and trial is going-on, the presumption under section 29 of the POCSO Act will also apply, in terms of what has been delineated by the judgment of this court in *Dharmander Singh vs. State (Govt. of NCT of Delhi)*¹. In that context, counsel also submits, that since the petitioner is a relative, he has misused his position of trust *vis-a-vis* the prosecutrix, which aggravates the nature of the offence.
26. The court has given its careful consideration to the factual matrix obtaining in the case, as also to the submissions made by learned counsel for the petitioner, for the State, and for the prosecutrix.
27. The court is conscious that while dealing with a bail petition, it is necessary for the court *not* to delve minutely into, or evaluate, the evidence in the matter, lest it prejudice the on-going trial. The court is also conscious of its decision in *Dharmander Singh* (supra) in which it has held that while deciding a bail plea in a matter under the POCSO Act at the post-charge stage, the rigours of section 29 of the POCSO Act would get triggered; and as a result, the threshold of satisfaction required for a court to grant bail would be raised. The relevant paras of *Dharmander Singh* (supra) may be extracted hereinbelow for ease of reference :

¹ 2020 SCC OnLine Del 1267



“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.

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“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.”

(emphasis in original)

28. Applying the legal position as enunciated in *Dharmander Singh* (supra), though it is true that the rigours of section 29 of the POCSO Act would apply in the present case, in the opinion of this court the ‘real life considerations’ (referred to in the above decision, which are only illustrative and not exhaustive) that would arise in the present case are the following:

28.1. The fact that the prosecutrix was a teenager of about 14/15 years of age and the petitioner was just past his teens, being about 22 years old, and the fact that they had an on-going relationship, is discernible from the prosecutrix having met-up and accompanied the petitioner to a hotel. In fact, it is the prosecutrix’s own case that she made physical relations with



the petitioner, though she says, on the false promise of marriage at least on one occasion;

- 28.2. The completely contradictory GD entries recorded by the prosecutrix's mother – from alleging that *jabardasti* had been committed upon her daughter to saying that no offence had been committed against her and that she had only recorded the earlier GD entry out of suspicion and anger – must also enure to the benefit of the petitioner, at least at this stage;
 - 28.3. Furthermore, there is no allegation that the alleged offence involved threat, intimidation, violence and/or any brutality;
 - 28.4. Though it may be arguable whether both parties were at an 'age of innocence', the age-gap between the two was also not so wide that the alleged act could be termed as 'vile'. This also does not foreclose the possibility that the two were in an innocent, though unholy, physical alliance, which deserves to be looked at with less severity.
29. Upon a conspectus of the foregoing, in the present case, the court is persuaded by the following factors :
- 29.1. There is no gainsaying that since the prosecutrix is a minor, her 'consent' to the sexual act alleged to have been committed by the petitioner is irrelevant. That being said however, the court also cannot ignore the fact that on both occasions on which the offence is alleged to have been committed, the prosecutrix met with and accompanied the petitioner of her own volition, without any physical threat, coercion or compulsion, and



therefore, *to that limited extent*, she consented to *being in the company* of the petitioner;

- 29.2. The narrative does not disclose the use of any violence, force or threat for the sexual act alleged. It is observed that there is also no medical evidence that supports the offence of rape.
- 29.3. The mother's *ex-facie* contradictory narration in the two GD entries, also cannot be ignored.
- 29.4. But most importantly, what prevails with the court is that the deposition of all material witnesses has already been recorded at the trial; that the petitioner is a young man, about 24 years of age; that he is not implicated in any other criminal offence; that he has already suffered judicial custody for about 02 years; and that there is no material to suggest that he is either a flight risk or that he is likely to intimidate any witnesses or tamper with evidence.
30. In the circumstances, this court is persuaded to admit the petitioner/Vicky @ Kapil son of Raj Kumar to *regular bail* pending trial, subject to the following conditions :
- 30.1. The petitioner shall furnish a personal bond in the sum of Rs.25,000/- (Rs. Twenty-five Thousand Only) with 01 surety in the like amount from a family member, to the satisfaction of the learned trial court;
- 30.2. The petitioner shall furnish to the Investigating Officer/S.H.O a cellphone number on which the petitioner may be contacted at



- any time and shall ensure that the number is kept active and switched-on at all times;
- 30.3. If the petitioner has a passport, he shall surrender the same to the learned trial court and shall not travel out of the country without prior permission of the learned trial court;
- 30.4. The petitioner shall not contact, nor visit, nor offer any inducement, threat or promise to any of the prosecution witnesses or other persons acquainted with the facts of case. The petitioner shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial; and
- 30.5. More specifically, the petitioner shall neither contact nor interact, whether directly or indirectly, with the prosecutrix or her family, in any manner whatsoever. The petitioner shall also not visit the locality in which the prosecutrix ordinarily resides.
31. Nothing in this order shall be construed as an expression of opinion on the merits of the pending matter.
32. A copy of this judgment be sent to the concerned Jail Superintendent *forthwith*.
33. The petition stands disposed-of in the above terms.
34. Other pending applications, if any, are also disposed-of.

ANUP JAIRAM BHAMBHANI, J

JUNE 01, 2023

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