

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

Reserved on : 18.01.2022
% **Pronounced on : 26.04.2022**

+ **BAIL APPLN. 3468/2021**

AVINASH Petitioner

Through: Mr. Tushar Datta and Mr. Varun
Gupta, Advs.

versus

STATE OF N.C.T. OF DELHI Respondent

Through: Ms. Neelam Sharma, APP for the
State.

CORAM:
HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

ORDER

RAJNISH BHATNAGAR, J.

1. This is a petition filed by the petitioner under Section 439 Cr.P.C. seeking regular bail in FIR No. 326/2017 under Section 376 IPC and Section 6 of the POCSO Act registered at Police Station Govindpuri.

2. In brief the facts of the case are that on 18.08.2017, a PCR call vide DD No, 11A, regarding a neighborhood man sexually assaulting caller's 2.5 yrs old daughter was received at P.S. Govind Puri. The call was marked to SI Radhe Shyam, he alongwith Ct. Chuttan No. 3201/SE reached at the place of incidence i.e, C-34, Bhumiheen Camp, Govindpuri and met the complainant Dinesh Dev Nath Rai (Father of victim) and inquired about the

matter. The complainant also produced the accused Avinash (Petitioner herein). SI Radhe Shyam returned to P.S. along with the complainant Dinesh Dev Nath Rai, accused Avinash and Prosecutrix V. The call was then marked to SI Pooja who sent prosecutrix V alongwith W/Ct Sevarathi No. 1155/SE to AIIMS hospital for medical examination. The medical of prosecutrix V was conducted vide MLC No. 7273/17 in which Dr had stated “Alleged history of sexual assault by a neighbor friend of her father at 3:30 AM (18.08.17) history given by father complaining that the girl was taken by his friend upstairs, who was sleeping with him and removed her clothes and attempted fingering and physical violence. There is “3*2 CM hemtrauma over occipital region and C/o bleeding from Vagina”. After medical, prosecutrix alongwith W/Ct Sevarathi No. 1155/SE came to PS.

3. During course of investigation the statement of complainant Dinesh Dev Nath Rai was recorded in which he alleged that his friend Avinash physically assaulted his daughter who is only 2.5 yrs old in night when they were sleeping at his residence. Thereafter, a case u/s 376 IPC and 6 POCSO Act was registered at PS Govindpuri on the statement of complainant. The site plan was prepared by the IO and statement of victim and her father was recorded u/s 161 CrPC. The petitioner/accused Avinash S/o Abhi Ram Mistary R/O Gaon Mural Tikonia, Bangali Colony Gwalior, MP was arrested on 18.08.2017 and medical examination at AIIMS got conducted vide MLC No. 500042194/17.

4. I have heard the learned counsel for the petitioner, learned APP for the State and perused the status report filed by the state.

5. It is submitted by the learned counsel for the petitioner that petitioner is in judicial custody since 18.08.2017 and has undergone more than 4 years. It is further submitted that the petitioner has been falsely implicated in this case as the complainant has stated in his cross examination that the petitioner/accused knew that his wife had left him and she was having an affair with someone else and petitioner had made fun of complainant on the same pretext and thus, complainant got angry and slapped the petitioner. It is further submitted that the complainant has stated in his cross examination that petitioner has not done anything wrong with PW-2 (daughter of the complainant). It is further submitted that the MLC no.7273/2017 of the victim clearly mentioned that no active bleeding was found and even at the time of Examination-in-Chief conducted on 04.10.2018 before the court of Sh. Prem Kumar Barthwal, Ld. ASJ-01-SE, Special Court (POSCO), Saket Court, New Delhi of Dr. Anshu Yadav, Senior Resident, AIIMS Hospital, New Delhi as PW-1, it is clearly stated by the doctor that there is not any active bleeding in the private part of the victim. It is further submitted that the main witnesses have been examined as well as cross-examined and thus, no purpose will be served by keeping the petitioner in judicial custody.

6. On the other hand, learned APP vehemently opposed the bail application and has argued on the lines of the status report. It is submitted that the allegations are grave and serious in nature and the statement of victim under Section 164 Cr.P.C. was recorded wherein she has supported her case. It is further submitted that three PWs including the victim and the complainant have already been examined by the trial court and the victim

has also supported the version of prosecution in her examination-in- chief recorded on 12.03.2019, however, the victim in her cross-examination dated 23.10.2019 has not supported her case and the complainant (father of the victim) has turned hostile during the trial. It is further submitted that the allegations against the petitioner are grave and serious in nature and the victim was only 2.5 years old at the time of incident.

7. Even if the victim has not supported the case of prosecution in the cross-examination and the father of victim has turned hostile but the testimony of hostile witnesses cannot be disregarded in toto and even otherwise this is not the stage to analyse the testimony of the victim and her parents in depth, as it may prejudice the case of the prosecution.

8. At the time of deciding a bail application, in addition to the nature and quality of the evidence before it, the court shall also take into account certain real life considerations, mentioned hereunder, 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.; Reliance can be placed on ***Dharmander Singh @ Saheb vs. State (BAIL APPL. 1559/2020, Order dated 22.09.2020).***

9. PW-1, Dr. Anshu Yadav, Senior Resident, AIIMS Hospital, New Delhi, has clearly stated about the injury and has submitted that the injuries were present in the vaginal region of the child victim. Dr. Anshu Yadav has opined that “3x2 cm hematoma or occipital region of the victim and there was congestion in the hymen of the victim girl and there was no active bleeding in local examination and minimal bleeding (old) present in local region in vaginal area, however, there was no active bleeding.”

10. The victim in her examination-in-chief has fully supported the case of prosecution and has levelled serious allegations against the petitioner. Here, it is pertinent to note that the victim was barely 3 years old at the time of incident and though her examination-in-chief was conducted on 12.03.2019 but her cross-examination was conducted on 23.10.2019, which is after seven months of the recording of her examination-in-chief. No doubt the victim has given some answers in negative in the cross-examination but one cannot lose sight of the fact that the cross-examination was conducted after 7 months of recording of her examination-in-chief, so there are ought to be some inconsistencies and what is the effect of those cannot be analysed in depth at this stage. Although the complainant who is the father of victim has turned hostile in his cross-examination on 27.01.2021, however, it is to be borne in mind that he was also cross-examined much after recording of his examination-in-chief. Hence, all these factors would be considered and

scrupulously analysed during course of the trial as the detailed analysis of the evidence of the prosecution witnesses at this stage would prejudice the case of either of the parties.

11. Therefore, looking into the facts and circumstances of the case, the minority of child victim at the time of the alleged offence, the allegations against the petitioner which are grave and serious in nature coupled with the categorical statement made by the child victim in her examination-in-chief and the medical evidence on record, no ground for bail is made out at this stage and the bail application is, therefore, dismissed.

12. Nothing stated hereinabove shall tantamount to the expression of any opinion on the merits of the case.

RAJNISH BHATNAGAR, J

APRIL 26, 2022/AK

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