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IN THE HIGH COURT OF DELHI AT NEW DELHI

Order reserved on: 28.07.2022

Order delivered on :05.08.2022

+ **BAIL APPLN. 565/2022**

‘V’ (Identity masked)

..... Petitioner

Through: Mr. Manoj D. Taneja and Dhruv
Bhagat, Advocates with the petitioner
in person.

versus

STATE NCT OF DELHI & ANR.

..... Respondents

Through: Mr. Aman Usman, APP for State with
SI Deepali Chhabra, P.S. Janak Puri
and complainant in person.

CORAM:

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

ORDER

ANOOP KUMAR MENDIRATTA, J.

1. Petitioner has preferred an application under section 438 Cr.P.C. read with Section 482/483 Cr.P.C. for grant of anticipatory bail in FIR No. 619/2021 dated 24.12.2021, under Section 377 IPC and Section 6 of POCSO Act registered at P.S. Janakpuri, New Delhi. During the course of investigation, Section 376AB IPC has also been invoked in the proceedings.

2. In brief, as per the case of the prosecution, on 23.12.2021, PCR call vide DD no. 67A was received at PS Janakpuri, New Delhi wherein it was recorded “*caller lady ke husband aur saas maarpeet kar rahe hain aur inki beti ke saath bhi galat kam karne kii koshish ki hain*”. The call was marked

to SI Rohtash who reached the spot, wherein it was revealed that complainant along with her daughter had gone to P.S. Janakpuri. The complainant (wife of the petitioner) alongwith her daughter aged 5 years (victim) reached the police station and filed a written complaint against the petitioner alleging that her husband had touched his penis with her daughter's vagina and had asked her daughter to taste his penis. It is further the case of the complainant that petitioner forcefully made the victim taste his penis but victim did not like the taste of the penis. By aforesaid time, complainant reached, on which the petitioner started fighting with the complainant. Further, the petitioner threatened the victim not to disclose the incident to the complainant. The complainant also alleged that the incident took place on 21st, 22nd & 23rd December, 2021.

3. The medical examination of the victim was conducted on the night intervening 23rd/24th December 2021 and the present FIR was accordingly registered.

4. During the course of investigation, the statement of victim "K" was recorded under section 164 Cr.P.C. The clothes and mask of the victim "K" were taken into police possession and sent to FSL for expert opinion. However, the blood sample of the victim which was required for examination as per the communication received from FSL, has not been provided till date by the complainant, despite information being received by her.

5. Vide impugned order dated 27.01.2022, the application for anticipatory bail filed on behalf of the petitioner, was declined in view of bar under sub-Section (4) of Section 438 of Code of Criminal Procedure, 1973.

6. Learned counsel for the petitioner contended that petitioner is a young

Mechanical Engineer aged 34 years and got married to the complainant on 02.12.2014. Further, both were living separately since May, 2015 due to matrimonial differences. A complaint was lodged by wife of the petitioner with DCP, CAW Cell, Nanakpura on 11.01.2016 which culminated into registration of FIR No.107/2017, under section 498A/406/323/34 IPC and Section 3 & 4 of Dowry Prohibition Act on 17.02.2017 at PS: Ambedkar Nagar. A girl child (victim) was born out of the said wedlock on 22.01.2016. Petition for divorce was further filed by the petitioner on 09.09.2016 and proceedings under Domestic Violence Act were initiated on behalf of the wife of the petitioner on 06.05.2016. In FIR No. 107/2017, the charges were framed under sections 498A/406/323/34 IPC and Section 3 & 4 of Dowry Prohibition Act against the petitioner and his parents. The aforesaid proceedings finally culminated into a compromise in November 2020. In the meantime, the wife of the petitioner got enrolled as an Advocate in August 2019. In view of the aforementioned settlement between the parties, proceedings under the D.V. Act were withdrawn. The proceedings under section 498A/406 IPC in respect of FIR no. 107/2017 are still pending before the learned Trial Court. The parties thereafter started living together w.e.f. 25.12.2020 in tenanted premises.

The aforesaid factual position has been detailed to reflect that the parties had multiple litigations prior to lodging of the present FIR.

7. Learned counsel for the petitioner further pressed for anticipatory bail on the following grounds:-

- (i) That Section 376AB was wrongly invoked by the Investigating Agency during the course of trial at the behest of learned Additional Sessions Judge and it is contended that no such directions could have

been made during investigation;

- (ii) That vide impugned order, the learned Additional Sessions Judge incorrectly inferred that the present application for anticipatory bail was barred under Section 438 of Cr.P.C. To buttress the arguments, reference was further made to Section 42 of POCSO Act, Section 376, 376AB IPC. It was further submitted that the aforesaid amendment incorporating sub-Section (4) of Section 438 Cr.P.C., did not intentionally incorporate Section 6 of POCSO Act within its ambit and as such application for anticipatory bail is not barred under Section 438 Cr.P.C. It was pointed out that all the amendments had been brought into effect simultaneously in 2018.
- (iii) That in the FIR, the incident is stated to have occurred between 4.00 - 5.00 pm on 23.12.2021 and the information was received at 5.00 pm (1700 hours) as recorded in the FIR. However, subsequently, the stand has been modified by the complainant after it was pointed out to the Investigating Agency that no such incident had occurred as the petitioner was present at his parental home at the relevant time and is duly supported by the CCTV footage.

It is further urged that the timings provided by the complainant are discrepant since at 2.30 pm on 23.12.2021, the victim was left with the mother of the petitioner and thereafter, the petitioner had left for DDU Hospital for medical treatment of the complainant. Further, they returned back to the parental home, wherein the victim was picked up and proceeded to their tenanted premises. The CCTV footage provided to the investigating agency depicts that around 5.30 pm, the petitioner alongwith the complainant and victim were leaving for their

tenanted premises. As such, it is claimed that entire incident has been framed and fabricated by the complainant to settle the scores and the child has been used as a tool in the litigation.

- (iv) That the occurrence is alleged to have taken place in the tenanted premises of the petitioner and the complainant, on 21st, 22nd & 23rd December, 2021 but the matter was never reported to the police on 21st and 22nd December, 2021 and neither any timings of the incident have been reflected in the FIR.

In the aforesaid context, it is also urged that the present FIR is in retaliation to another incident between the parties on 21.12.2021 which was reported by the petitioner to the police (i.e. two days prior to the present complaint).

- (v) Reliance is further placed upon following judgments in support of the contentions:-

1. *D. Venkatasubramaniam & Ors. v. M.K. Mohan Krishnamachari & Ors.*, 2009 (10) SCC 488;
2. *Rajiv Gupta Vs. State & Ors.*, 87 (2000) DLT 411 (DB);
3. *Suneet Vaish Vs. State (NCT of Delhi)*, 2000 II AD (Crl.) DHC 593;
4. *Hemant Dhasmana Vs. CBI*, 2001 (2) JCC (SC) 109;
5. *Mr. Ajay Raj Sharma Vs. State*, 2001 (1) JCC (Delhi) 16 (DB);
6. *Syed Nusrat Ali Vs. State & Anr.*, 2010 (4) JCC 2574;
7. *R Sarla Vs. T.S. Velu & Ors.*, (2000) 4 SCC 459;
8. *Gurbax Singh Vs. State*, 2012 SCC OnLine Del 1287;
9. *Bhadresh Bipinbhai Sheth Vs. State of Gujarat & Anr.*, 2015 (4) JCC 2603 (SC);

- 10.Prithvi Raj Chauhan Vs UOI & Ors., (2020) 4 SCC 727;*
- 11.Rahana Jalal Vs. State of Kerala & Anr., 2021 (2) Crimes 136 (SC);*
- 12.Jaseer Aboobacker Vs. State of Kerala, 2018 (3) KLT 945;*
- 13.Lata Vs. State of Delhi, MANU/DE/1382/2021;*
- 14.Joy Dev Nath Vs. State (NCT of Delhi), in Bail Application No.4511/2021 decided on 28.01.2022;*
- 15.M.C. Abraham & Anr. Vs. State of Maharashtra, (2003) 2 SCC 649;*
- 16.Commissioner of Police & Ors. Vs. Manoj Sharma & Anr., 2007(4) JCC 2886(DHC);*
- 17.Ghanshyam Sharma Vs. Surender Kumar Sharma & Ors., (2014) 13 SCC 401;*
- 18.Ashik Muhammad Mohyudheen Vs. State of Kerala, in Bail Application No. 2150/2018 decided on 29.05.2018;*
- 19.Saurabh Aggarwal & Anr. Vs. State & Anr., Crl. M.C. No. 163/2022 decided on 12.01.2022;*
- 20.N. Chandramohan Vs. State & Anr., 2019 SCC Online Mad 3666;*
- 21.Sanjay Singh Vs. Govt. of NCT of Delhi, in Bail Application No. 766/2021 decided on 26.10.2022;*
- 22.Ali Quazim Vs. State of NCT of Delhi, in Bail Application No. 774/2022 decided on 21.04.2022;*
- 23.Ashish Vs. CBI, in Bail Application No. 143/2022 decided on 13.05.2022;*

24.XXX Vs. State of Kerala & Anr., in Bail Application No. 5271/2022, decided on 25.07.2022

25.The State of Maharashtra & Anr. Vs. Sayyed Hassan Sayyed Subhan & Ors., in Criminal Appeal No.1195/2018 decided on 20.09.2018;

26.State of UP Vs. Aman Mittal & Anr., (2019) 19 SCC 740.

8. On the other hand, the application has been vehemently opposed by learned APP for the State alongwith learned counsel for the complainant. It is submitted that though the incident was initially reported to have been committed between 4:00-5:00 pm as recorded in the FIR but a supplementary statement of the complainant was recorded wherein the incident was clarified to have occurred between 4:00-6:00 pm on 23.12.2021. It is further fairly admitted by learned APP after instructions from IO that the stand taken by the petitioner that he was not present at the premises in question, but had visited his parents and returned at 5.34 pm, was found to be correct but subject to correction of timings by about 10 minutes as supported by CCTV footage.

During the course of hearing, learned APP also referred to the statement of victim recorded on 24.12.2021 by the learned MM. However, on a query raised by this Court in the aforesaid context regarding the statement of victim that “*papa ne kal ye nahi kiya tha, usse pehlewale tin din kiya tha*”, it was submitted by the learned APP that possibly the victim/child being of tender age had not been able to differentiate the dates. It was further contended that the petition under section 438 Cr.P.C. is not

maintainable in view of amendment brought out in section 438 Cr.P.C. in 2018.

9. I have given considered thought to the contentions raised.

(i) Learned counsel for the petitioner relying upon the authorities as referred to above, contended that Section 376AB IPC could not have been directed to be invoked by the learned Additional Sessions Judge during the pendency of bail application as the said section had not been invoked by the investigating agency and the FIR was initially registered only under Section 377 IPC read with Section 6 of POCSO Act.

(ii) The observations of the learned Trial Court in para 9 & 10 of order dated 27.01.2022 in aforesaid context are relevant to be noticed:-

“9. Ld. Additional Prosecutor for the State, Ld. Counsel for the complainant and Ld. Counsel for the applicant sought sometime to revert on this issue. During the subsequent hearing on the application, Ld. Counsel for the applicant ambitiously put forth her stance that in the present FIR, offence u/s 377 IPC and Section 6 of POCSO Act have been invoked where as the prohibition introduced by the legislature is in respect of Section 376 IPC. On the contrary, Ld. Additional Prosecutor for the state countered this submission that the contents of the FIR reveals the commission of offence u/s 376AB IPC and even if the same has not been specifically invoked, the court is not precluded from considering the same. Upon this submission, a report was called from the

investigating officer and SHO concerned. SHO, P.S. Janak Puri, interalia, replied as under:-

“In this regard, it is humbly submitted that the investigation of the case has been handed over to W/SI Pramila on 21.01.2022 and section 376(AB) IPC has been invoked without further delay in this case. Further, it is stated that inadvertently the section 376(AB) IPC was not invoked at the time of registration of FIR and no malafide intention was there for not invoking this section at the initial stage.

I, the undersigned, tender my unconditional apologies to the court for the inconvenience caused due to above said human error. I assure the court that such type of mistake will not be repeated in future and I will remain more careful in the court matters. It is, therefore, requested that the explanation called from undersigned may please be filed in view of above submission.”

10. The factual position which emerged therein is that Section 376AB IPC has been added in the FIR and even if we assume the present application has been filed under the relevant section which have been invoked in the FIR coupled with recently added section 376AB IPC, the statutory provision introduced by the legislature by way of the proviso u/s 438 Cr.P.C. proscribes this court to entertain and dispose of the present application on merits.....”

(iii) It is well settled that there is statutory right of police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities. As such, it is the bounden duty of the police to investigate into an offence and bring the offender to book by invoking the

correct sections in law. However, if an error in not invoking the correct section comes to the notice of the Trial Court/MM at the stage of investigation, it cannot be deemed that the concerned judicial officer oversteps his jurisdiction in pointing out the error/deficiency though the power to invoke the relevant sections of law rests with the Investigating Agency. However, the learned Additional Sessions Judge could not have specified the rank of the officer by whom the investigation is to be conducted. There is no dispute as to the proposition that Section 41 of the Code of Criminal Procedure gives discretion to the police officer who may without any order from a Magistrate and even without a warrant arrest any person in the situations enumerated in that section and further at the stage of investigation, the Court has no role to play in this regard. The directions by the learned Additional Sessions Judge pointing out the invocation of Section 376AB, cannot be deemed to be an unwarranted interference with investigation or exercise of statutory power by the Investigating Agency.

I am further of the considered opinion that the offence could not have been diluted by the prosecution out of sheer ignorance, as on the face of record the offence under Section 376AB IPC is manifestly attracted in the facts and circumstances of the case.

The proposition of law as referred in the authorities cited by the learned counsel for the petitioner is not disputed but the same does not specifically cover the proposition involved in the present case. The invocation of correct section by the Investigating Agency on pointing out by the learned Additional Sessions Judge during the stage of investigation is not barred.

10. The learned counsel for the petitioner next challenges the finding of the learned Trial Court that the Court is proscribed to deal with application under Section 438 Cr.P.C. for grant of anticipatory bail in view of Criminal Law Amendment Act, 2018.

It may be noticed that Criminal Law Amendment Act, 2018 was brought for the protection of girls from heinous crime of rape and to save the woman from the horrifying state of sexual assault. Correspondingly, the amendment was also brought in other sections relating to Indian Penal Code, Code of Criminal Procedure, Indian Evidence Act, 1872, Section 438 and Section 439 of Cr.P.C. alongwith changes in Section 42 of POCSO Act dealing with the alternative punishment. The changes in the penal laws were provided specifically for the welfare of the women and children, keeping in view the rising crime rate and to provide for a deterrent punishment.

Sub-section (4) of Section 438 Cr.P.C. was inserted vide Criminal Amendment Act, 2018 w.e.f. 21.04.2018 and provides that nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub section (3) of Section 376 or Section 376AB or Section 376DA or Section 376DB of the Indian Penal Code, 1860.

It may further be noticed that Section 376AB IPC was also introduced vide aforesaid amendment and provides that whoever commits rape on a woman under twelve years of age, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death.

Also, Section 5 of POCSO Act, 2012 defines aggravated penetrative sexual assault and Section 6 provides punishment for the same with rigorous imprisonment for a term which shall not be less than 20 years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with both.

A bare perusal of Section 6 and Section 376AB IPC reflects that punishment provided under Section 376AB IPC and Section 6 of POCSO Act, 2012 is same and the offence in the present case is covered, both under Section 6 of POCSO Act as well as Section 376AB IPC.

It may further be observed that Section 42 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) was also amended w.e.f. 21.04.2018 and provides that where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, [376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], [376E, section 509 of the Indian Penal Code (45 of 1860) or section 67B of the Information Technology Act, 2000 (21 of 2000)], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

It is pertinent to note that Section 42A of POCSO Act provides that the provision of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any

inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

In view of aforesaid legal position, by virtue of Section 42 of POCSO Act, if the offence is punishable under POCSO Act as well as Section 376AB IPC and if the offender is found guilty of such offence, he shall be liable to punishment either under POCSO Act or under the IPC, whichever provides for punishment greater in degree. It cannot be inferred that the rigor of sub-Section (4) of Section 438 Cr.P.C. stands obliterated at the stage of bail since offender stands charged with both Section 376AB IPC as well as Section 6 of POCSO Act and may be punished on conviction under Section 6 of POCSO Act instead of Section 376AB IPC. The purpose of Section 42 is to ensure that an act constituting offence under two different enactments does not lead to double punishment for the same act constituting an offence.

I am accordingly of the opinion that in view of sub-Section (4) of Section 438 Cr.P.C., the application for anticipatory bail is not maintainable before the learned Trial Court and the observations to this extent cannot be faulted with. The legislative intention is clear and implicit in placing embargo for grant of anticipatory bail in cases referred under sub-Section (4) of Section 438 Cr.P.C.

11. Considering the background of series of litigations between the petitioner and the complainant, who is the mother of victim and a lawyer, the possibility of false allegations for purpose of achieving ulterior motives through tutoring of a minor child cannot be ruled out as the consequences of prosecuting a father of a victim under rape are very serious, since the person

comes down in the eyes of society and is virtually shunned from the main stream of life.

However, at the same time, in case of allegations of offences against a minor victim, the Courts have to be sensitive to their plight when faced with a situation wherein allegations have been lodged by mother of the victim against her own husband of having sexual contact with his own daughter and that too in her presence in the house.

12. Since the learned counsel for the petitioner has disputed the occurrence of any such alleged incident in the light of discrepancy in timings as well as past history of the matrimonial disputes between the parties, the matter needs to be *prima facie* examined to ascertain if a case under Section 376AB IPC is made out as the frivolity in prosecution should always be considered and assessed, if the accusations have been made only with the object of injuring or humiliating the petitioner by ensuring his arrest.

I am of the considered opinion, after perusing the statement of the victim under Section 164 Cr.P.C., that it may be far too stretched at this stage to assume that the statement may have been made by the victim aged about 5 years at the behest of complainant or that the statement was being used for settling the scores. It cannot be ignored that the future of the victim child also gets impacted, at least in close circles and any mother would normally desist from taking the issues which may adversely affect her own child in social circles. The legal presumption as to the commission of offence and culpable mental state as legislated under POCSO Act has also to be kept in perspective while dealing with offences under POCSO Act.

For the foregoing reasons, after considering the totality of the facts and circumstances, grave nature of allegations and statutory bar placed under sub-Section (4) of Section 438 Cr.P.C., no grounds for anticipatory bail are made out.

The application is accordingly dismissed.

(ANOOP KUMAR MENDIRATTA)
JUDGE

AUGUST 05, 2022/SD

