

**A.F.R.**  
**Reserved**

**Case :-** CRIMINAL MISC. BAIL APPLICATION No.4432 of 2019

**Applicant :-** Govind

**Opposite Party :-** State of U.P.

**Counsel for Applicant :-** Bhola Singh Patel, Brij Mohan Sahai, Monika Singh, Pawan Kumar Singh, Pravin Kumar Verma

**Counsel for Opposite Party :-** G.A., Sudhir Kumar Srivastava

**Hon'ble Rajesh Singh Chauhan, J.**

1. Heard Sri B.M. Sahai, assisted by Sri Pawan Kumar Singh, learned counsel for the applicant, Sri Rajeev Kumar Verma, learned AGA and Sri Sudhir Kumar Srivastava, learned counsel for the complainant.

2. Learned counsel for the applicant has submitted that the present applicant is in jail since 01.09.2017 in Case Crime No.410 of 2017, under Section 376 IPC and Sections 3/4 POCSO Act, Police Station Vikas Nagar, District Lucknow. He has further submitted that the present applicant has been falsely implicated in the case as he has not committed any offence as alleged. As per the prosecution story so narrated in the FIR, the present applicant has made oral sex with the daughter of the complainant/informant, who is aged about eight years. As per the FIR, when the daughter of the complainant was vomiting after meal, the complainant asked about the reason for vomiting, then she told that the present applicant has made oral sex with her.

3. Sri Sahai has submitted that the entire prosecution story is false and concocted inasmuch as the family of the complainant was tenant of the present applicant and when the present applicant had told the complainant to vacate his house, this false story was created.

4. Sri Sahai has drawn attention of this Court towards Annexure No.RA-1 of the Rejoinder Affidavit, which is a typed statement of PW-2, mother of the victim, wherein she has stated that her husband along with her daughter went to the police station to lodge the FIR but what has been written in the FIR was not known to her as she was not informed about the narration of the FIR. He has also drawn attention of this Court towards Annexure No.RA-2 of the Rejoinder Affidavit, which is an order dated

18.11.2021 passed by this Court in Criminal Appeal No.5415 of 2018, Sonu Kushwaha Vs. State of U.P., relying upon paras 17 & 21 thereof, which reads as under:-

*“17. From the perusal of the provisions of P.O.C.S.O. Act, it is clear that offence committed by appellant neither falls under Section 5/6 of P.O.C.S.O Act nor under Section 9(M) of P.O.C.S.O. Act because there is penetrative sexual assault in the present case as appellant has put his penis into mouth of victim. Putting penis into mouth does not fall in the category of aggravated sexual assault or sexual assault. It comes into category of penetrative sexual assault which is punishable under Section 4 of P.O.C.S.O. Act.*

*21. The court below has awarded the appellant to undergo 10 years rigorous imprisonment and fine of Rs. 5000/- under Section 6 of P.O.C.S.O. Act and under Section 6 of P.O.C.S.O. Act, minimum sentence is 10 years which may extend to imprisonment for life whereas under Section 4 of P.O.C.S.O. Act minimum sentence is 7 years but which may extend to imprisonment for life also. Learned court below has awarded minimum sentence provided under Section 6 of P.O.C.S.O. Act and accordingly, it would be appropriate to award the sentence to appellant under Section 4 of P.O.C.S.O. Act, seven years of rigorous imprisonment which is minimum provided in that Section and fine of Rs. Rs. 5,000/-, in default, three months additional simple imprisonment.”*

5. On the basis of aforesaid paras, Sri Sahai has tried to submit that in the present case, maximum sentence for the alleged offence committed may be seven years and the present applicant has already served about four years and seven months in jail, therefore, considering the period of incarceration, the present applicant may be released on bail.

6. Learned AGA has opposed the aforesaid prayer of Sri Sahai and has submitted that the offence in question is so heinous in nature, therefore, the present applicant may not be released on bail. He has drawn attention of this Court towards para-15 F, i.e. details regarding sexual violence, of the medical examination report, which provides that penis was penetrated in the mouth of the victim. Learned AGA has submitted that since this is a case of oral sex so there might not be any other injury on the body of the victim.

7. Learned AGA and learned counsel for the complainant have further submitted that the statement of the victim/prosecutrix has been recorded under Section 164 Cr.P.C. wherein she has categorically stated that she is a

girl of eight years. Her father is Chhotelal Kashyap. She studies in Class-1. The applicant used to call her in his house and show porn movies (gandi-gandi picture). In that picture, both the male and female were naked. Thereafter, he brought her to the roof and asked to take his penis in her mouth. She explained that the penis is the part which is used for urination. Therefore, both the counsels for the opposite parties have submitted that this case shall fall within Section 3 (a) and Section 4 (2) of the POCSO Act, which provides maximum punishment for life also. Therefore, the present bail application may be rejected.

8. Heard learned counsel for the parties and perused the material available on record.

9. At the very outset, it would be apt to reproduce the relevant part of Section 375 IPC, Sections 3 (a) and 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act"), which reads as under:-

**“375. Rape.--** *A man is said to commit "rape" if he--*

*(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*

*(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*

*(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*

*(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, .....*”

10. Sections 3 (a) & 4 of the POCSO Act are 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”*

**“4. Punishment for penetrative sexual assault. –**  
*[(1)] Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than [ten years] but which may extend to imprisonment for life, and shall also be liable to fine.*

*[(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with 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 natural life of that person, and shall also be liable to fine.*

*[(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.]”*

**11.** Therefore, it is clear that a man is said to have committed rape if he penetrates his penis into the mouth of a woman. Section 376 IPC provides punishment for rape, which would be not less than ten years but may extend to the imprisonment for life and shall also be liable to fine.

**12.** Further, in view of Section 3 (a) of POCSO Act, the applicant has committed penetrative sexual assault with the prosecutrix and as per Section 4 (2) of POCSO Act, if any person commits penetrative sexual assault on a child below sixteen years of age shall be punishable with imprisonment for a term which shall not be less than twenty years, but may extend to imprisonment for life. Therefore, in view of the aforesaid provision of law, the maximum punishment in the given circumstances may be awarded upto life. For the offence of rape, the punishment may extend to the imprisonment for life also.

**13.** The victim/prosecutrix in her statement recorded under Section 164 Cr.P.C. has categorically informed that the present applicant committed oral sex with her. The victim/prosecutrix was about 8 years at the time of incident, therefore, at the stage of bail, it cannot be presumed that she has given such statement under the influence of her parents. Besides, the medical examination report supports her allegation wherein it has been verified that the penis was penetrated in the mouth of the victim/prosecutrix.

**14.** To me, mere long detention in jail does not entitle an accused for bail. Further, it all depends on the facts and circumstances of each case as

there is no straight jacket formula for granting bail. Therefore, period of long incarceration may be considered as one of the grounds for granting bail, but it depends upon facts and circumstances of the particular case. The Hon'ble Apex Court in re; **Rajesh Ranjan Yadav v. CBI through its Director, (2007) 1 SCC 70**, has observed as under:-

*“..... None of the decisions cited can be said to have laid down any absolute and unconditional rule about when bail should be granted by the Court and when it should not. It all depends on the facts and circumstances of each case and it cannot be said there is any absolute rule that the mere fact that the accused has undergone a long period of incarceration by itself would entitle him to be enlarged on bail.”*

15. Considering the totality of the facts and circumstances of the issue in question, medical examination report, statement of the prosecutrix recorded under Section 164 Cr.P.C. and the provisions of law i.e. Section 375 IPC, Section 3 (a) and Section 4 of POCSO Act, I do not find any substance in the arguments of learned counsel for the applicant, looking to the peculiar facts and circumstance of the present case, that the applicant has already served about four years and seven months' period in jail, so he may be enlarged on bail considering his period of incarceration. I am conscious about the fact that the guilt of any person can be established before the learned trial court and no observation should be given affecting the trial, but on the basis of aforesaid material available on record, *prima facie*, I am not inclined to grant bail to the present applicant.

16. Accordingly, the bail application is **rejected** on merits.

17. Before parting with, it is expected that the trial shall be concluded with expedition. Further, the learned trial court may take all coercive measures as per law if either of the parties do not co-operate in the trial properly. The learned trial court shall fix short dates to ensure that trial is concluded at the earliest.

18. Let the copy of this order be provided to the learned trial court through District & Sessions Judge, Lucknow by the Registry of this Court within a week for its compliance.

**[Rajesh Singh Chauhan,J.]**

**Order Date :- 12.04.2022**  
RBS/-