***via* Video-conferencing**

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

Date of decision: 22nd September 2020

\+ BAIL APPL. 1559/2020

DHARMANDER SINGH @ SAHEB .....Petitioner/Applicant.
Through : Ms. Vagisha Kochar, Advocate.

versus

THE STATE (GOVT. OF NCT, DELHI) ..... Respondent
Through : Mr. Neelam Sharma, APP for State.
Complainant/Prosecutrix in-person
along with I.O./W/S.I. Anil Sharma.

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI, J.

The applicant, who is stated to be about 24 years of age, is an accused in case FIR No. 471/2018 dated 14.10.2018 registered under sections 323/343/363/366A/376/506 IPC read with sections 6/21 of the Protection of Children from Sexual Offences Act 2012 ('POCSO Act', for short) at PS: Hari Nagar ; and has been in judicial custody since 17.11.2018.

2. By way of the present application under section 439 of the Code of Criminal Procedure, 1973 ('Cr. P.C.', for short), the applicant seeks regular bail.

3. Briefly, the factual backdrop that has led to filing of the subject FIR is that the applicant and the complainant/prosecutrix became friends through Facebook about 02 years back in 2016, which friendship, it is alleged, culminated in physical intimacy between the two.

4. The FIR recites that the applicant made physical relations with the complainant at his residence and also made a video of the act; whereafter, the allegation goes, the applicant started calling the complainant to his house time-and-again to engage in physical relations. It is further alleged that on 25.04.2018, when the complainant was visiting her village, the applicant called her back threatening that if she did not return, he would share the video made on social media and upload it on the internet. The complainant says that thereupon she boarded the train back from her village on 09.05.2018 and returned to the applicant on 10.05.2018. She further says that the applicant forced the complainant to live with him in a certain house; and when the complainant called her family members to come and meet her, the applicant started pressurising the complainant for marriage.

5. It is further alleged that on 15.05.2018, the applicant married the complainant in his own house in the presence of his mother; and thereafter, forcibly kept the complainant there for about a month-and-a-half. Thereafter, the complainant alleges that she called her parents to the applicant's house and returned with them to her maternal home on 25.06.2018. It is further the complainant's case that again on 27.06.2018, the applicant threatened the complainant to return to him, whereupon she came back and stayed with him for about 05 days until

03.07.2018, when her mother and aunt came to the applicant's place and the applicant sent her off.

6. The FIR records other allegations as well, the essence of which is that the applicant threatened the complainant to return to him from time-to-time; and that, when she refused, he uploaded the complainant's photograph as his display-picture on WhatsApp and threatened to embarrass her.

7. There is also an allegation in the FIR that on 13.10.2018 the applicant took the complainant on his 'scooty'; and thereafter diverted towards a flyover, stopped the 'scooty' and asked the complainant to disrobe, at which point he also hit her.

8. On these allegations, the FIR was registered on 14.10.2018; whereupon the applicant was arrested on 17.11.2018.

9. Notice in this application was issued on 06.07.2020.

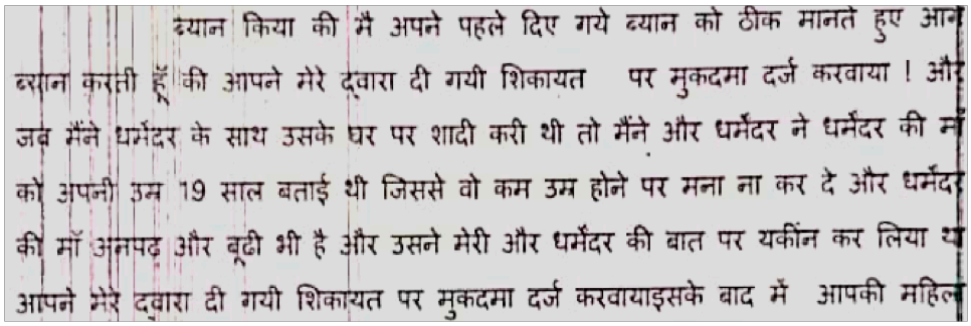
10. Status report dated 21.07.2020 has been filed by the State.

11. Nominal roll dated 21.07.2020 has also been received from the Jail Superintendent.

12. Since the matter concerned an allegation under section 376 IPC read with sections 6/21 of the POCSO Act, intimation under section 439(1A) Cr.P.C. and Delhi High Court Practice Directions dated 24.09.2019 was sent to the complainant; in response to which the complainant appeared along with Investigating Officer/W/S.I. Anil Sharma and was heard on the bail application.

13. In her statement dated 16.10.2018 recorded under section 164 Cr.P.C., the complainant has, in substance, supported the allegations made in

the FIR while giving some additional details. What is noteworthy however is that in her supplementary statement dated 14.10.2018 recorded under section 161 Cr.P.C., the complainant says that at the time she was getting married to the applicant at his house, both the complainant and the applicant had told the applicant's mother that *her* age was 19 years, so that the mother would not disallow them to get married; and she further states that the applicant's mother believed them since she is old and uneducated. An extract of the relevant portion of supplementary statement dated 14.10.2018 is as under :

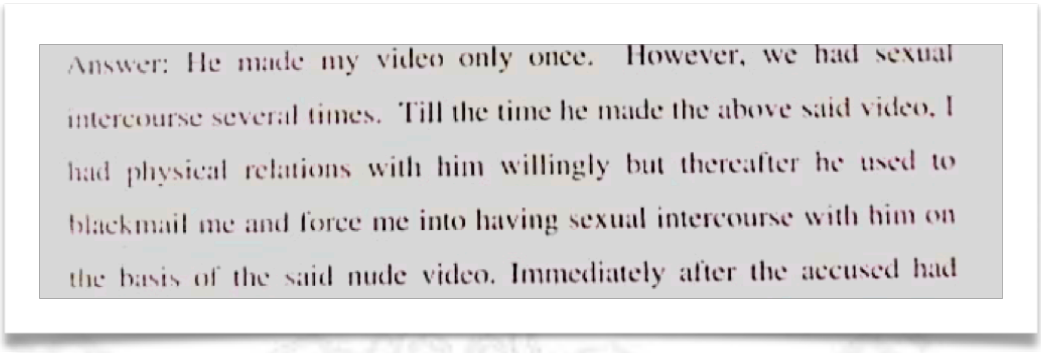

ब्यान किया की मैं अपने पहले दिए गये ब्यान को ठीक मानते हुए आज
ब्यान करती हूँ की आपने मेरे द्वारा दी गयी शिकायत पर मुकदमा दर्ज करवाया ! और
जब मैंने धर्मेंदर के साथ उसके घर पर शादी करी थी तो मैंने और धर्मेंदर ने धर्मेंदर की माँ
को अपनी उम्र 19 साल बताई थी जिससे वो कम उम्र होने पर मना ना कर दे और धर्मेंदर
की माँ अनपढ़ और बूढ़ी भी है और उसने मेरी और धर्मेंदर की बात पर यकींन कर लिया था
आपने मेरे द्वारा दी गयी शिकायत पर मुकदमा दर्ज करवायाइसके बाद में आपकी महिला

14. In MLC dated 14.10.2018 however, the complainant's age is recorded as 17 years.

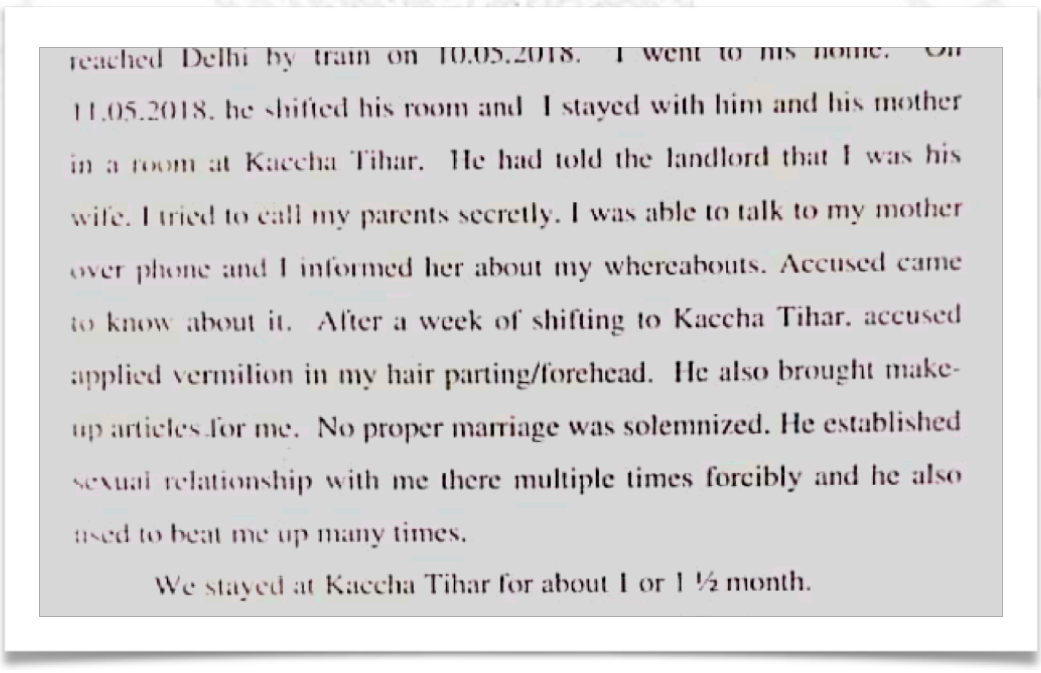
15. Subsequently, charge-sheet dated 15.12.2018 was filed in the matter and charges were framed on 06.04.2019. Although initially a co-accused, the applicant's mother was discharged in the matter at that stage.

16. The complainant's examination-in-chief was recorded in-part on 11.10.2019, in which the complainant has disclosed her age as 18 years as on 26.07.2019.

17. Some parts of the complainant's deposition that are relevant for purposes of deciding the present bail application are as under :



Answer: He made my video only once. However, we had sexual intercourse several times. Till the time he made the above said video, I had physical relations with him willingly but thereafter he used to blackmail me and force me into having sexual intercourse with him on the basis of the said nude video. Immediately after the accused had



reached Delhi by train on 10.05.2018. I went to his home. On 11.05.2018, he shifted his room and I stayed with him and his mother in a room at Kaccha Tihar. He had told the landlord that I was his wife. I tried to call my parents secretly. I was able to talk to my mother over phone and I informed her about my whereabouts. Accused came to know about it. After a week of shifting to Kaccha Tihar, accused applied vermilion in my hair parting/forehead. He also brought make-up articles for me. No proper marriage was solemnized. He established sexual relationship with me there multiple times forcibly and he also used to beat me up many times.

We stayed at Kaccha Tihar for about 1 or 1 ½ month.

18. The examination-in-chief was deferred *inter alia* because the applicant's mobile phone, which is alleged to contain the complainant's objectionable photos and videos, was to be produced; but was pending forensic examination by the Forensic Science Laboratory. This court is informed that subsequently a supplementary charge sheet has also been filed based on the FSL report.

19. Ms. Vagisha Kochar, learned counsel appearing for the applicant has essentially submitted that the allegations in the FIR, and subsequently in the charge-sheet, show that the applicant and the complainant were in a consensual relationship for a prolonged period of time; that the complainant was fully and voluntarily involved in such relationship inasmuch as she even lied to the applicant's mother as regards her age at the time when the applicant married her at his house; that on the applicant's beckoning, the complainant readily returned to him several times and stayed with him for several days; that it is accordingly evident that the relationship was voluntary even on the complainant's part and there was no culpable coercion in the relationship.

20. Counsel further submits, that in any case, since the investigation is complete and the charge-sheet in the matter has been filed way-back in December 2018 and a supplementary charge-sheet has also now been filed, nothing further remains to be done in the matter that would justify keeping the applicant in judicial custody any longer.

21. Ms. Kochar has also argued that in fact a major portion of the complaint's examination-in-chief also stands recorded; and that her remaining deposition including cross-examination, would have been complete by now, had it not been for the truncated functioning of courts by reason of the prevailing coronavirus pandemic. It is submitted that especially in the present times, when evidence is still not being recorded in courts by reason of the pandemic, there is no likelihood that trial will be completed anytime soon and therefore the applicant's detention in custody is unwarranted and unfair.

22. Opposing the grant of bail, Ms. Neelam Sharma, learned APP appearing for the State has contended that, as the record clearly shows, the complainant was minor and that therefore the question of the physical relationship being consensual does not arise. She contends that it is admitted by the applicant that he repeatedly engaged in sexual intercourse with the complainant which only makes the position worse; and that the story that the parties married each other in the presence of the applicant's mother is again of no legal consequence, since the complainant was minor.

23. Ms. Sharma submits that in the supplementary charge-sheet filed in the matter, based on the FSL report on the contents of the applicant's cell phone, it has also been alleged that the applicant had taken objectionable photographs and videos of the complainant, which was obviously against her consent or will.

24. Ms. Sharma invites attention to the complainant's deposition recorded on 11.10.2019 again, in which she emphasises that the complainant has stated the following :

Answer: He made my video only once. However, we had sexual intercourse several times. Till the time he made the above said video, I had physical relations with him willingly but thereafter he used to blackmail me and force me into having sexual intercourse with him on the basis of the said nude video. Immediately after the accused had made the said video, he had deleted it in my presence. But in fact the video did not get deleted and it must have got saved somewhere or in some folder in his mobile phone as my nude photograph was screen-

25. Ms. Sharma also stresses the point that since charges have already been framed in the matter, section 29 of the POCSO Act will apply with full vigour, whereby the court *must presume* the applicant to be guilty of the offences charged till he *proves* otherwise; and bail must not be given.

26. In the course of the video-conference hearing, the court has interacted with the complainant, to elicit her stand in the matter; and, in gist, the complainant has supported her stand taken in her deposition before the trial court and has opposed grant of bail.

27. Counsel for the applicant as also for the State have also been heard at length on the law, especially on the scope and application of sections 29, 30 and 31 of the POCSO Act. Their submissions have been included and considered in the discussion that appears below.

28. At this point a quick recapitulation of the basic tenets and principles of bail would be useful.

29. While the precept '*bail is the rule and jail is the exception*' was originally crafted as a *mantra*, this court notes with consternation that this phrase has, more often than not, been reduced to mere empty platitude, which is repeated often but almost never applied.

30. In ***Jeetendra vs. State of Madhya Pradesh & Anr.[1],*** the Supreme Court has reiterated this *mantra* in the following words :

> *"7. Having heard learned counsel for the parties as well as the counsel representing the complainant, we are satisfied that the appellant deserves to be enlarged on bail. The High Court ought to have kept in view that 'Bail is rule and jail is exception'. There is no gainsaying that bail should*

[1] 2020 SCC OnLine SC 334

not be granted or rejected in a mechanical manner as it concerns the liberty of a person. In peculiar circumstances of this case where closure report was filed twice, the High Court ought not to have declined bail only because the trial court was yet to accept the said report. Further, the examination of witnesses would depend upon the fate of 2nd closure report. Considering the nature of allegations attributed to the appellant and the period he has already spent in custody, we are satisfied that he deserves to be released on bail forthwith."

(emphasis supplied)

31. The legal dispensation relating to bail in the Cr.P.C. is contained essentially in sections 437 and 439. While in section 437 Cr.P.C. the Legislature has imposed certain qualifications and conditions on the grant of bail by 'a Court other than a High Court or Court of Session', under section 439 Cr.P.C. the power of the High Court or the Sessions Court to grant bail is wider.

32. Discussing the powers under sections 437 and 439 Cr. P.C. in ***Gurcharan Singh & Ors vs. State (Delhi Administration)***[2], the Supreme Court had this to say :

"24. Section 439(1) Cr. P.C. of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), Cr. P.C. against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of

[2] (1978) 1 SCC 118

*bail under Section 439(1) Cr. P.C. of the new Code. The **overriding considerations** in granting bail to which we adverted to earlier and **which are common both in the case of Section 437(1) and Section 439(1), Cr. P.C.** of the new Code are the **nature and gravity of the circumstances** in which the offence is committed; the position and the **status of the accused with reference to the victim and the witnesses**; the **likelihood, of the accused fleeing** from justice; of **repeating the offence**; of **jeopardising his own life** being faced with a grim prospect of possible conviction in the case; of **tampering with witnesses**; the **history of the case** as well as **of its investigation** and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out."*

(emphasis supplied)

33. In ***Sundeep Kumar Bafna vs. State of Maharashtra & Anr.***[3], the Supreme Court has clarified:

*"8. .... Cr.P.C. severely curtails the powers of the Magistrate **while leaving that of the Court of Session and the High Court untouched and unfettered**. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 Cr.P.C. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. .... "*

(emphasis supplied)

34. While the amplitude and power under section 439 Cr.P.C. is wide, it would be trite to say that the wider the power and discretion, the more the need for its judicious and non-arbitrary exercise. Observing that the power to grant bail must be exercised in a judicious manner and

[3] (2014) 16 SCC 623

not as a matter of course, in ***Mahipal vs. Rajesh Kumar & Anr.***[4], the Supreme Court observes thus :

> *"12. The determination of whether a case is fit for the grant of bail involves the **balancing of numerous factors**, among which the **nature of the offence**, the **severity of the punishment** and a **prima facie view of the involvement** of the accused are important. No straitjacket formula exists for courts to assess an application for the grant or rejection of bail. At the stage of assessing whether a case is fit for the grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the accused. That is a matter for trial. However, the Court is required to examine whether there is a **prima facie or reasonable ground to believe** that the accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused **subserves the purpose of the criminal justice system**. Where bail has been granted by a lower court, an appellate court must be slow to interfere and ought to be guided by the principles set out for the exercise of the power to set aside bail.*
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> * * * * * *
>
> *"14. The provision for an accused to be released on bail touches upon the liberty of an individual. It is for this reason that this Court does not ordinarily interfere with an order of the High Court granting bail. However, where the discretion of the High Court to grant bail has been exercised without the due application of mind or in contravention of the directions of this Court, such an order granting bail is liable to be set aside. The Court is required to factor, amongst other things, a prima facie view that the accused had committed the offence, the nature and gravity of the offence and the likelihood of the accused obstructing the proceedings of the trial in any manner or evading the course of justice. The provision for being released on bail draws an appropriate balance between public interest in the administration of justice and the protection of individual liberty pending adjudication of the case. However, the grant of bail is to*

[4] (2020) 2 SCC 118

be secured within the bounds of the law and in compliance with the conditions laid down by this Court. It is for this reason that a court must balance numerous factors that guide the exercise of the discretionary power to grant bail on a case-by-case basis. Inherent in this determination is whether, on an analysis of the record, it appears that there is a prima facie or reasonable cause to believe that the accused had committed the crime. It is not relevant at this stage for the court to examine in detail the evidence on record to come to a conclusive finding."

(emphasis supplied)

35. However, when the offences alleged are *inter alia* under the POCSO Act, as in the present case, another very significant factor requires to be factored in and addressed.

36. While ordinarily there is a 'presumption of innocence' *vis-a-vis* an accused, section 29 of the POCSO Act reverses this position. Section 29 of the POCSO Act creates a 'presumption of guilt' on the part of the accused if he is prosecuted for committing, abetting or attempting certain offences. Section 29 reads as under :

*"29. Presumption as to certain offences.—Where a person is **prosecuted** for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the **Special Court shall presume**, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary **is proved**."*

(emphasis supplied)

37. In the context of section 29, two other provisions of the POCSO Act which also need attention are sections 30 and 31 of that statute, which are extracted hereinbelow for ease of reference :

*"30. Presumption of culpable mental state.—(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the **Special Court shall presume the existence of***

> ***such mental state*** *but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*
>
> *(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.*
>
> *Explanation.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.*
>
> *"31. Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court.—Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor."*

(emphasis supplied)

38. Section 30 therefore stipulates that in a prosecution under the POCSO Act, where the offence requires the existence of a culpable mental state, the court is to *presume* the existence of such culpable mental state on the part of the accused, while of course giving to the accused the right to rebut it beyond reasonable doubt. Again therefore, there is a presumption of culpability *coupled with* the right of the accused to rebut such presumption.

39. Insofar as section 31 is concerned, it brings into play the provisions of the Cr.P.C *provided* there is no specific provision otherwise with regard to a procedural matter in the POCSO Act. Section 31 is of special significance since *there is no specific provision relating to bail*

in the POCSO Act, unlike say, section 37 in the Narcotic Drugs & Psychotropic Substances Act 1985 ('NDPS Act' for short). Section 31 accordingly provides that if the POCSO Act is silent in respect of a procedural matter, the proceeding before a Special Court dealing with offences under the POCSO Act shall be governed by the Cr.P.C. Ergo, the provisions relating to bail contained in the Cr.P.C. apply squarely to proceedings under the POCSO Act. Furthermore, since section 31 says that a Special Court appointed under the POCSO Act is deemed to be a Court of Sessions under the Cr.P.C., the provisions of section 439 Cr.P.C. for grant of bail, as briefly discussed above, would govern such proceedings before the Special Court.

40. Now, the POCSO Act was enacted to specifically address sexual offences against children and to establish Special Courts for trial of such offences. In this connection, the Parliamentary Standing Committee on Human Resource Development of the Rajya Sabha rendered its 240th Report on the Protection of Children from Sexual Offences Bill 2011, which report gives an insight into the thought process, rationale and reasoning that went into incorporation of various provisions in that statute. For purposes of the present discussion, apropos the reason for incorporating a reverse burden provision in section 29 of the POCSO Act, the Parliamentary Standing Committee had the following to say in para 1.12 of its report :

> *"1.12 ……Secondly, keeping in view the low conviction rate of sexual offences against children, a presumption has been provided in the Bill that the accused in case of sexual assault has committed the offence unless proved contrary. It was mentioned that such a provision already existed in our law. Sections 113A and 114A of the Indian Evidence Act already create*

> *presumptions in two situations, cruelty for dowry and for rape. Vulnerability of the victims and the difficulty in collecting the evidence were the two factors leading to such a provision being incorporated in the Bill. Misuse of such a provision had also been taken care of by including a safeguard therein."*
>
> (emphasis supplied)

41. In view of the above prefatory discussion, the questions that arise for consideration are :

    i. Since section 29 says "*(w)here a person is **prosecuted**"* for committing an offence *inter alia* under sections 3, 5, 7 and 9, the special court "*shall presume"* an accused to be guilty, when can a person be said to be prosecuted ?

    ii. Since section 29 says "*unless the contrary **is proved"***, when does a person get the chance to disprove his presumptive guilt ?

    iii. *When* and *at what stage* does the 'presumption of guilt' as engrafted in section 29 get triggered ? and

    iv. Does the presumption apply only at the stage of trial or does it also apply when a bail plea is being considered ?

    v. Does the applicability or rigour of section 29 depend on whether a bail plea is being considered before or after charges have been framed ?

42. The term 'prosecution' is defined in the ***Oxford Advanced Learner's Dictionary*** as follows :

> *"prosecution (noun) - the **process of trying to prove** in court that somebody is guilty of a crime; the process of being officially charged with a crime in court."*
>
> (emphasis supplied)

43. 'Prosecution' in its legal connotation is defined in the ***Black's Law Dictionary 8th Ed.*** as follows :

> *"prosecution. 1. The commencement and carrying out of any action or scheme <the prosecution of a long, bloody war>.2. A* ***criminal proceeding in which an accused person is tried*** *<the conspiracy trial involved the prosecution of seven defendants>. —Also termed criminal prosecution."*
>
> (emphasis supplied)

44. Notably, the terms 'prosecution' or 'prosecuted' have neither been defined in the POCSO Act nor in the Cr.P.C. As explained later in this judgment, the phrase "person is prosecuted" appearing in section 29 actually refers to the stage when trial commences. To that extent the word "prosecuted" has been used in the sense of "tried". But when does 'trial' commence ?

45. Now, in ***Hardeep Singh vs. State of Punjab & Ors.***[5], the Supreme Court overruled an earlier view that trial commences on cognizance being taken and held that trial commences only once charges are framed. The following observation of the Supreme Court in *Hardeep Singh* (supra) is important :

> *"38. In view of the above, the law can be summarised to the effect that as* ***"trial" means determination of issues adjudging the guilt or the innocence*** *of a person, the person has to be aware of what is the case against him and it is only at the stage of framing of the charges that the court informs him of the same, the* ***"trial" commences only on charges being framed****. Thus, we do not approve the view taken by the courts that in a criminal case, trial commences on cognizance being taken."*
>
> (emphasis supplied)

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[5] (2014) 3 SCC 92

46. It is important to recall that cognizance is taken of the 'offence' and not of the 'offender'; and it has been consistently so held by the Supreme Court. A brief reference on this point may be made to ***Prasad Shrikant Purohit vs. State of Maharashtra & Anr.***[6], in which the Supreme Court refers to an earlier decision in the following words:

> *"71. Reliance was then placed upon the decision in Fakhruddin Ahmad, in particular para 17. The said para 17 reads as under: (SCC p. 163)*
>
> > *"17. Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence.* ***Cognizance is in regard to the offence and not the offender.****"*
>
> *(emphasis supplied)*
>
> *Even here this Court has stated in uncontroverted terms that once the Magistrate applies his mind to the offence alleged and decides to initiate proceedings against the alleged offender, it can be stated that he has taken cognizance of the offence and by way of reiteration, it is further stated that cognizance is in regard to the offence and not the offender. This decision, therefore, reinforces the position that cognizance is mainly of the offence and not the offender."*
>
> (emphasis supplied)

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[6] (2015) 7 SCC 440

47. At the stage of taking cognizance, a court may take cognizance of the offence *vis-a-vis* one accused but not against another. Since upto the stage of cognizance, it is the *offence* and *not the offender* that is subject matter of proceedings before court, *it cannot be said that upto the stage of cognizance, an accused is being prosecuted*. As a sequitur therefore, a *person must be deemed to be prosecuted only when trial commences* against the accused, which, as the Supreme Court has held in *Hardeep Singh* (supra), happens *only after charges are framed*.

48. This aspect has also been usefully discussed by the Gauhati High Court in ***Bhupen Kalita vs. State of Assam***[7] where the Gauhati High Court has this is to say :

> *"60. Several views, however, have been taken by various courts as to when a prosecution can be said to commence. The following are the some of the views.*
>
> *(i) Prosecution starts with registration of FIR or complaint before the Magistrate.*
>
> *(ii) Prosecution is initiated when the Magistrate/Court takes cognizance of the offence.*
>
> *(iii) Prosecution commences with filing of charge sheet/challan/ investigation report by the police.*
>
> *(iv) Prosecution commences with framing of charges by the court.*
>
> * * * * *
>
> *"64. As to the meaning of trial, when an accused prosecuted, the Hon'ble Supreme Court explained the same elaborately in Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86. The Hon'ble*

[7] 2020 SCC OnLine Gau 2230

Supreme Court in the said case overruled the view that trial commences on cognizance being taken.

"65. It was held that "trial" means determination of issues for adjudging the guilt or the innocence of a person after making the person aware of what is the case against him, and it is only at the stage of framing of the charges that the court informs him of the same. Thus, "trial" commences only on charges being framed.

* * * * * *

*"67. It is to be noted that neither the POCSO Act nor the CrPC defines as to the meaning of the words "prosecuted" and when a prosecution can be said to commence. Under the circumstances, as to when a person is prosecuted or when the prosecution commences has to be understood in the context of the Act and the provisions of the CrPC. As discussed above, it can be said that that a trial commences not from the date of filing of FIR or the charge-sheet or taking of cognizance by the court but from the stage of framing of charge. Prosecution can thus be said to commence from that stage when the **court starts applying its mind regarding the culpability of the accused**, that is, when the proper judicial consideration of the guilt or otherwise of the accused begins."*

(emphasis supplied)

49. The question of when the presumption of guilt gets triggered has been addressed by the Supreme Court in the context of the NDPS Act and by various other High Courts in POCSO cases, holding that such presumption comes into play only when the *prosecution has established facts that form the basis of the presumption*. Relevant extracts of the opinion of the Supreme Court and the view taken by the High Courts on this point are :

    a. In ***Noor Aga vs. State of Punjab & Anr.***[8], while dealing with a case under the NDPS Act, the Supreme Court has held :

[8] (2008) 16 SCC 417

"57. It is also necessary to bear in mind that ***superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court*** *but it is well settled that* ***suspicion, however high it may be, can under no circumstances, be held to be a substitute for legal evidence****.*

"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate ***in the trial*** *of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.*

"59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.

"60. Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of the doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a

legal burden. The trial must be fair. The accused must be provided with opportunities to effectively defend himself. In Sheldrake v. Director of Public Prosecutions[9]*it was stated in the following terms: (WLR pp. 988-89, para 21)*

> *"21. From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to States to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of* ***any presumption adverse*** *to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member States from their duty to observe basic standards of fairness. The* ***justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case****."*
>
> *(emphasis added)"*

(emphasis supplied)

[9] (2005) 1 AC 264

b. In ***Sahid Hossain Biswas vs. State of West Bengal***[10], the Calcutta High Court has held as under:

> *"23. A conjoint reading of the statutory provision in the light of the definitions, as aforesaid, would show that in a prosecution under the POCSO Act an accused is to prove 'the contrary', that is, he has to prove that he has not committed the offence and he is innocent.* ***It is trite law that negative cannot be proved*** *[see Sait Tarajee Khimchand v. Yelamarti Satyam[11]].* ***In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first****. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case* ***must be established by leading evidence*** *before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary.*
>
> *"24. Once the foundation of the prosecution case is laid* ***by leading legally admissible evidence****, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross-examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version is to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyse the evidence on record in the light of the special features of a particular case, eg. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the*

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10 2017 SCC OnLine Cal 5023

11 (1972) 4 SCC 562, Para-15

prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to mechanically accept the mere ipse dixit of the prosecution and give a stamp of judicial approval to every prosecution, howsoever, patently absurd or inherently improbable it may be."

(emphasis supplied)

c. In ***Navin Dhaniram Baraiye vs. The State of Maharashtra***[12], the Bombay High Court has held as under:

"18. A perusal of the above quoted provision does show that it is for the accused to prove the contrary and in case he fails to do so, the presumption would operate against him leading to his conviction under the provisions of the POCSO Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation ***only when the prosecution is first able to establish facts that would form the foundation for the presumption*** *under Section 29 of the POCSO Act to operate. Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and then claim that the evidence of the prosecution witnesses would have to be accepted as gospel truth and further that the entire burden would be on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under Section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by law."*

* * * * * *

"24. The above quoted views of the Courts elucidate the position of law insofar as presumption under Section 29 of the POCSO Act is concerned. It becomes clear that although the provision states that the Court shall presume that the accused has committed the offence

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[12] 2018 SCC OnLine Bom 1281

for which he is charged under the POCSO Act, unless the contrary is proved, the presumption would operate only upon the prosecution first proving foundational facts against the accused, ***beyond reasonable doubt****. Unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under the POCSO Act, the presumption under Section 29 of the said Act would not operate against the accused. Even if the prosecution establishes such facts and the presumption is raised against the accused, he can* ***rebut the same either by discrediting prosecution witnesses through cross-examination demonstrating that the prosecution case is improbable or absurd or the accused could lead evidence to prove his defence****, in order to rebut the presumption. In either case, the accused is required to rebut the presumption on the touchstone of preponderance of probability."*

(emphasis supplied)

d. In ***Joy V.S. vs. State of Kerala***[13], the Kerala High Court has observed as under:

"10. This court is not oblivious to Section 29 of the Act which contains a legislative mandate that the court shall presume commission of the offences by the accused unless the contrary is proved. Section 29 of the Act states that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. The court shall take into consideration the presumption under Section 29 of the Act while dealing with an application for bail filed by a person who is accused of the aforesaid offences under the Act (See State of Bihar v. Rajballav Prasad, (2017) 2 SCC 178 : AIR 2017 SC 630).

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[13] 2019 SCC OnLine Ker 783

*"11. However, the statutory presumption under Section 29 of the Act does not mean that the prosecution version has to be accepted as gospel truth in every case. The presumption does not mean that the court cannot take into consideration the special features of a particular case. Patent absurdities or inherent infirmities or improbabilities in the prosecution version may lead to an irresistible inference of falsehood in the prosecution case. The presumption would come into play only when the prosecution is able to bring on record facts that would form the foundation for the presumption. Otherwise, all that the prosecution would be required to do is to raise some allegations against the accused and to claim that the case projected by it is true. The courts must be on guard to see that the application of the presumption, without adverting to essential facts, shall not lead to any injustice. The presumption under Section 29 of the Act is not absolute. The statutory presumption would get activated or triggered only if the prosecution proves the essential basic facts. If the accused is able to create serious doubt on the veracity of the prosecution case or the accused brings on record materials which would render the prosecution version highly improbable, the presumption would get weakened. As held by the Apex Court in Siddharam Satlingappa Mhetre v. State of Maharashtra[14], **frivolity in prosecution should always be considered** and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of anticipatory bail. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. It should necessarily depend on facts and circumstances of each case in consonance with the legislative intention."*

(emphasis supplied)

50. Drawing from the verdict of the Supreme Court and the views taken by the various High Courts in the above cases, in essence, the position

[14] (2011) 1 SCC 694

is that to rebut a presumption, *first*, the *presumptive proposition* must itself be formulated *based on relevant and credible material* ; and *second*, the accused must know what presumption he has to rebut. It is not enough to say that the accused has been *implicated by the police* on charges under sections 3, 5, 7, and/or 9 of the POSCO Act. At the very least, the *charges should have been framed by court* against the accused under one or more of those sections for the presumption to arise; and *mere implication by the police is not enough*.

51. Only when the trial court frames charges, does it form a *prima facie* opinion that there is a case for the accused to answer and defend. At the stage of framing charges, the trial court may decide not to frame charges against an accused under any of the sections mentioned in section 29 but under some other provision; or, it may not frame charges against all accused persons under those sections. So, the presumption under section 29 cannot arise before charges are framed.

52. If the presumption of guilt is taken to arise even before charges are framed, say when a court is considering a bail application, then the court will have to afford to the accused an opportunity to *prove* that he has *not committed* the offence; which would require the court to conduct a mini-trial, even when it is only considering a bail plea. What then would remain to be done during the trial itself ? In the opinion of this court it is *not* the purport of section 29 that a mini-trial should be conducted at the stage of deciding a bail application. No such concept is known to law. Requiring production and analysis of evidence to form an opinion on the merits of the allegations; and to

express a view on such evidence, is certainly not within the remit of a court considering a bail plea.

53. Since reasoning is the soul of every adjudicatory process, if a court were to give reasons and express an opinion as to whether an accused had succeeded or failed to rebut the presumption of guilt when hearing a bail plea, even if on a *prima facie* consideration, it would prejudice the trial itself.

54. Let us consider section 29 from another perspective. Let us assume that the presumption of guilt contained in section 29 applies from the stage of registration of the FIR itself. Let us assume that an accused is told that the moment an FIR under the specific provisions indicated in section 29 is registered, he is presumed to be guilty; and then let us tell him that he, of course, has a right to rebut the presumption. Would the court then allow the accused to marshal defence evidence even before charges are framed at the stage of considering his bail plea ? To demand that an accused lead defence evidence even before charges are framed and even before prosecution evidence is led, would be anathema to fundamental criminal jurisprudence. It would be anathema to his right of silence. It would also be anathema to the principle that the prosecution must first establish the foundational facts constituting the charge, as held by the Supreme Court and the High Courts in the decisions cited above. Besides, by invoking the presumption of guilt under section 29 before charges are framed, we would be enforcing only a half-portion of section 29, *viz.* the presumption of guilt, while ignoring the remaining half, *viz.* by not affording to the accused the opportunity to rebut the presumption.

Would such interpretation or application of section 29 pass constitutional muster ?

55. In a long line of decisions after ***Maneka Gandhi vs. Union of India & Anr.***[15]**,** the Supreme Court has consistently held that 'law' as interpreted under Article 21 of the Constitution is more than mere 'lex'; and that it *implies due process, both procedural and substantive*. It has been held that unless the law depriving a person of his life or personal liberty is *reasonable, just and fair*, it would not pass constitutional muster ; and that it is not enough for the law to provide *any procedure* or *only a semblance of procedure*.

56. Following this sacrosanct constitutional principle, in its recent decision in ***Nikesh Tarachand Shah vs. Union of India & Anr.***[16], while striking down section 45 of the Prevention of Money Laundering Act 2002 as being unconstitutional since it *inter alia* imposed a condition that before granting bail the court must be satisfied that there are reasonable grounds for believing that the accused is *not* guilty of the offence, our Supreme Court had this to say:

> *"24. Article 21 is the Ark of the Covenant so far as the Fundamental Rights Chapter of the Constitution is concerned. It deals with nothing less sacrosanct than the rights of life and personal liberty of the citizens of India and other persons. It is the only article in the Fundamental Rights Chapter (along with Article 20) that cannot be suspended even in an emergency [see Article 359(1) of the Constitution]. At present, Article 21 is the repository of a vast number of substantive and procedural rights*

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15 (1978) 1 SCC 248

16 (2018) 11 SCC 1

post Maneka Gandhi v. Union of India. Thus, in Rajesh Kumar[17] at pp. 724-26, this Court held: (SCC paras 56-63)

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58. This epoch-making decision in Maneka Gandhi has substantially infused the concept of due process in our constitutional jurisprudence whenever the court has to deal with a question affecting life and liberty of citizens or even a person. Krishna Iyer, J. giving a concurring opinion in Maneka Gandhi elaborated, in his inimitable style, the transition from the phase of the rule of law to due process of law. The relevant statement of law given by the learned Judge is quoted below: (SCC p. 337, para 81)

'81. ... "Procedure established by law", with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not ex necessitate import into those weighty words an adjectival rule of law, civilised in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head. Can the sacred essence of the human right to secure which the struggle for liberation, with "do or die" patriotism, was launched be sapped by formalistic and pharisaic prescriptions, regardless of essential standards? An enacted apparition is a constitutional illusion. ***Processual justice is writ patently on Article 21. It is too grave to be circumvented by a black letter ritual processed through the legislature****.'*

* * * * *

62. Until the decision was rendered in Maneka Gandhi, Article 21 was viewed by this Court as rarely embodying the Diceyian concept of the rule of law that no one can be deprived of his personal liberty by an executive action unsupported by law. If there was a law which provided some sort of a procedure it was enough to deprive a person of his life or personal liberty. In this connection, if we refer to the example given by S.R. Das, J. in his judgment in A.K. Gopalan[18] that

[17] (2011) 13 SCC 706

[18] AIR 1950 SC 27 : (1950) 51 Cri LJ 1383

if the law provided the Bishop of Rochester "be boiled in oil" it would be valid under Article 21. ***But after the decision in Maneka Gandhi which marks a watershed in the development of constitutional law in our country, this Court, for the first time, took the view that Article 21 affords protection not only against the executive action but also against the legislation which deprives a person of his life and personal liberty unless the law for deprivation is reasonable, just and fair****. And it was held that the concept of reasonableness runs like a golden thread through the entire fabric of the Constitution and it is not enough for the law to provide some semblance of a procedure.* ***The procedure for depriving a person of his life and personal liberty must be eminently just, reasonable and fair and if challenged before the court it is for the court to determine whether such procedure is reasonable, just and fair and if the court finds that it is not so, the court will strike down the same****.*

63. Therefore, ***"law" as interpreted under Article 21 by this Court is more than mere "lex". It implies a due process, both procedurally and substantively****."*

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"43. ..... ***In fact, the presumption of innocence, which is attached to any person being prosecuted of an offence, is inverted by the conditions specified in Section 45, whereas for grant of ordinary bail the presumption of innocence attaches****, after which the various factors set out in para 18 of the judgment are to be looked at. Under Section 45, the Court must be satisfied that there are reasonable grounds to believe that the person is not guilty of such offence and that he is not likely to commit any offence while on bail."*

* * * * *

"46. We must not forget that Section 45 is a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of any offence. Before application of a section which makes drastic inroads into the fundamental right of personal liberty guaranteed by Article 21 of the Constitution of India, we must be doubly sure that such provision furthers a compelling State interest for tackling serious crime.

*Absent any such compelling State interest, the **indiscriminate application** of the provisions of Section 45 will certainly violate Article 21 of the Constitution. Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature."*

(emphasis supplied)

57. Furthermore, looking at the issue from the supervening perspective of the right to a fair trial, as guaranteed by the Constitution, the Supreme Court has said in ***Moti Ram & Ors. vs. State of M.P.***[19], that a very important consideration for grant of bail is to allow an accused the liberty to prepare his defence, so that this right guaranteed under Article 21 is real and not merely chimerical. Commenting on the consequences of pre-trial detention, in *Moti Ram* (supra) the Supreme Court has said:

"14. The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family."

(emphasis supplied)

58. Again, in ***Babu Singh & Ors. vs. State of U.P.***[20] the Supreme Court observed :

"18. We must weigh the contrary factors to answer the test of reasonableness, subject to the need for securing the presence of the bail applicant. It makes sense to assume that a man on bail has a better chance

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[19] (1978) 4 SCC 47

[20] (1978) 1 SCC 579

> *to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted. ..... The considerable public expense in keeping in custody where no danger of disappearance or disturbance can arise, is not a negligible consideration. Equally important is the deplorable condition, verging on the inhuman, of our sub-jails, that the unrewarding cruelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly sensible."*
>
> (emphasis supplied)

59. However, if at the stage of considering a bail plea even *before charges are framed*, a court is to form an opinion on the merits of the evidence, what then would be the purpose of granting bail to an accused to prepare his defence for a fair trial ? It must also be pointed-out here that the Supreme Court has clearly said in ***Ash Mohammad vs. Shiv Raj Singh & Anr.***[21] that when deciding a bail plea, the court ought *only* to be *prima facie* satisfied as regards the charge, meaning thereby that at the stage of considering bail, the court is to see if there is *evidence* in support of the allegations, and *not proof of evidence*. In *Ash Mohammad* (supra), the Supreme Court says this :

> *"8. In Ram Govind Upadhyay v. Sudarshan Singh*[22]*, it has been opined that the grant of bail though involves exercise of discretionary power of the Court, such exercise of discretion has to be made in a judicious manner and not as a matter of course. The heinous nature of the crime warrants more caution and there is greater chance of rejection of bail, though, however dependent on the factual matrix of the matter. In the said*

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21 (2012) 9 SCC 446

[22] (2002) 3 SCC 598

case the learned Judges referred to the decision in Prahlad Singh Bhati v. NCT, Delhi[23] and stated as follows: (Ram Govind case, SCC p. 602, para 4)

> *"(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.*
>
> *(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.*
>
> *(c) **While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge**.*
>
> *(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."*

(emphasis supplied)

60. Furthermore, in ***CBI vs. V. Vijay Sai Reddy[24]*** the Supreme Court has held as under :

> *"34. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/ State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the legislature has used the words*

[23] (2001) 4 SCC 280

[24] (2013) 7 SCC 452

> *"reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge.* ***It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.****"*
>
> (emphasis supplied)

61. Having discussed the application of section 29 at the pre-charge stage above, this court must now examine as to what is the position of application of section 29 to a stage *after charges are framed.*

62. On this point, reference may be made to the decision of the Supreme Court in ***State of Bihar vs. Rajballav Prasad***[25], in which case while dealing with a post-charge stage, the Supreme Court has said that when deciding the question of bail under the POCSO Act, the paramount consideration should be the reasonable apprehension as to whether the accused would *tamper with evidence* or *interfere in trial* or *flee from justice* but the Supreme Court goes on to say that section 29 *should also be considered,* in the following words:

> *"**Dr A.K. Sikri, J.**— The respondent herein is facing trial in Mahila Police Station Case No. 15 of 2016, wherein he is charged for committing offences under Sections 376, 420/34, 366-A, 370, 370-A, 212, 120-B of the Penal Code, 1860, Sections 4, 6 and 8 of the Protection of Children from Sexual Offences Act, 2012 ("the Pocso Act", for short) as well as Sections 4, 5 and 6 of the Immoral Traffic (Prevention) Act, 1956. He is one of the co-accused in the said trial. ..... During investigation, the respondent was identified as the main accused having committed the rape on the said minor. ..... After conclusion of the investigation,* ***charge-sheet in the case was filed on 20-4-2016 and the charges were framed on 6-8-2016****."*

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[25] (2017) 2 SCC 178

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"20. It has also come on record that the prosecutrix and her family members made representations claiming that the respondent is threatening the family members of the prosecutrix. So much so, having regard to several complaints of intimidation of the witnesses made on behalf of the prosecutrix and her family members, the State administration has deputed a force of 1 + 4 for the safety and security of the prosecutrix and her family.

"21. In spite of the aforesaid material on record, the High Court has made casual and cryptic remarks that there is no material showing that the accused had interfered with the trial by tampering evidence. On the other hand, it has discussed the merits of the case/evidence which was not called for at this stage. No doubt, in a particular case if it appears to the court that the case foisted against the accused is totally false, that may become a relevant factor while considering the bail application. However, it can (sic, cannot) be said at this stage that the present case falls in this category. That would be a matter of trial. Therefore, the paramount consideration should have been as is pointed out above, whether there are any chances of the accused person ***fleeing from justice*** *or* ***reasonable apprehension that the accused person would tamper with the evidence/ trial*** *if released on bail. These aspects are not dealt with by the High Court appropriately and with the seriousness they deserved. This constitutes a sufficient reason for interfering with the exercise of discretion by the High Court.*

"22. The High Court also ignored another vital aspect, namely, while rejecting the bail application of the co-accused, the High Court had ordered expeditious, nay, day-to-day trial to ensure that the trial comes to an end most expeditiously. When order had already been passed to fast track the trial, and the application for bail by the co-accused Sandeep Suman alias Pushpanjay was also rejected, the High Court, while considering the bail application of the respondent, was supposed to take into consideration this material fact as well. Further, ***while making a general statement of law that the accused is innocent, till proved guilty,***

> ***the provisions of Section 29 of the POCSO Act have not been taken into consideration, which reads follows****:*
>
> * * * * * ”
>
> *“23. Keeping in view* ***all the aforesaid considerations*** *in mind, we are of the opinion that it was not a fit case for grant of bail to the respondent at this stage and grave error is committed by the High Court in this behalf. .....”*
>
> (emphasis supplied)

63. It is pertinent to notice therefore, that in *Rajballav Prasad* (supra) since charges had already been framed, the Supreme Court took section 29 into account.

Conclusions & decision :

64. As held by the Supreme Court in *Hardeep Singh* (supra), since ‘trial’ commences when charges are framed against an accused and not before that, it is clear that only at the stage when charges are framed does the court apply its judicial mind to whether there is enough evidence on record to frame a precise allegation, which the accused must answer. Therefore, it is only once charges are framed that the accused knows exactly what he is alleged to be guilty of; and therefore, what guilt he is required to rebut.

65. Since a negative cannot be proved, an accused cannot be asked to *disprove* his guilt even before the foundational allegations *with supporting evidence* that suggest guilt are placed by the prosecution before the court. To be sure, at the stage of framing charges, what is seen is *if there is evidence* (documentary, electronic, oral) on record, *not proof of such evidence*.

66. That section 29 has been engrafted in the POCSO Act does not mean that the presumption of innocence, which is a foundational tenet of criminal jurisprudence, is to be thrown to the winds. If section 29 is so interpreted as to apply it to the stage even before charges are framed, it would not pass constitutional muster since Article 21 of our Constitution requires that all substantive as well as procedural provisions must be *reasonable, just and fair*, as held *inter alia* in *Maneka Gandhi* (supra). Such interpretation of section 29 would also render the right of the accused to a fair trial nugatory and dead letter, which would again do violence to the constitutional guarantee contained in Article 21.

67. Applying section 29 to bail proceedings at a stage before charges are framed, would in effect mean that the accused must prove that he has *not committed the offence even before he is told the precise offence he is charged with*, which would do violence to all legal rationality.

68. In view of the above discussion and after considering the opinion of the Supreme Court and the views taken by the other High Courts, this court is persuaded to hold that the presumption of guilt engrafted in ***section 29 gets triggered and applies only once trial begins, that is after charges are framed*** against the accused ***but not before that***. The significance of the opening words of section 29 "where a person is prosecuted" is that until charges are framed, the person is not being prosecuted but is being investigated or is in the process of being charged. Accordingly, if a bail plea is considered at any stage *prior* to framing of charges, section 29 has no application since upto that stage an accused is not being prosecuted.

69. Therefore, if a bail plea is being considered *before* charges have been framed, *section 29 has no application* ; and the grant or refusal of bail is to be decided on the usual and ordinary settled principles.

70. Now coming to a scenario where a bail plea is being considered at a stage *after* charges have been framed, in keeping with the observations of the Supreme Court in *Rajballav Prasad* (supra), the presumption of guilt contained in ***section 29 would get triggered and will have to be "taken into consideration"***.

71. However, the dilemma would remain as to how the presumption of guilt contained in section 29 is to be applied even after charges have been framed, when the accused has not been given the opportunity to rebut such presumption. When section 29 engrafts the presumption of guilt against the accused, it also affords an opportunity to the accused to rebut the presumption by proving to the contrary. It cannot possibly be that the court should invoke *half* the provision of section 29 while ignoring the *other half*, much less to the detriment of the accused. But even after charges are framed, the accused *does not* get the opportunity to rebut the presumption or to prove the contrary by leading defence evidence, until prosecution evidence is concluded. It would be anathema to fundamental criminal jurisprudence to ask the accused to disclose his defence; or, worse still, to adduce evidence in his defence even before the prosecution has marshalled its evidence. Again therefore, even for a stage after charges have been framed, section 29 *cannot be applied in absolute terms* to a bail plea without doing violence to the 'due process' and 'fair trial' tenets read into Article 21 of our Constitution.

72. It is a settled constitutional principle that, if there are two possible interpretations or applications, a statutory provision must be interpreted or applied in a way that preserves its constitutional validity rather than one that renders it unconstitutional (*cf.* ***Kedar Nath Singh vs. State of Bihar***[26]).

73. Another significant legal principle which we must not omit to consider, is that if a penal provision, whether substantive or procedural, is susceptible to two interpretations, it must be construed strictly, narrowly and in a manner that is favourable to the accused (*cf.* ***Bijaya Kumar Agarwala vs. State of Orissa***[27]).

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.

75. If the court finds that the evidence adduced by the prosecution is admissible and *ex facie* credible, and proving it during trial is more a

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[26] 1962 Supp (2) SCR 769: para 26 ; Constitution Bench

[27] (1996) 5 SCC 1: paras 17, 18

matter of legal formality, it may decide not to grant bail. If, on the other hand, the court finds that the evidence before it, is either inadmissible or, is such that even if proved, it will not bring home guilt upon the accused, it would grant bail.

76. In a given case, the accused may, of his own volition, be willing to disclose his defence even while arguing for bail, to prevail upon the court; in which case, the task of the court would become easier. If however, the accused decides not to disclose his evidence at that stage, he would suffer the consequences of the presumption of guilt engrafted in section 29.

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.

The above factors are some cardinal considerations, though far from exhaustive, that would guide the court in assessing the egregiousness of the offence alleged ; and in deciding which way the balance would tilt. At the end of the day however, considering the myriad facets and nuances of real-life situations, it is impossible to cast in stone all considerations for grant or refusal of bail in light of section 29. The grant or denial of bail will remain, as always, in the subjective satisfaction of a court; except that in view of section 29, when a bail plea is being considered *after* charges have been framed, the above additional factors should be considered.

78. It goes without saying that while considering a bail plea at any stage, whether before or after framing of charges, the court would of course apply all the other well settled principles and parameters for grant or denial of bail.

79. It is important to state here that the aforesaid considerations are only to be applied while deciding a bail plea and may not have a bearing on the merits of the case.

80. Since in the matter under consideration, charges have already been framed, section 29 of the POCSO Act will apply. Accordingly it is necessary to evaluate how the illustrative considerations indicated above apply in this case.

81. In the facts of the present case, what weighs with the court is that:

    i. *for one*, the age difference between the complainant and the applicant is about 4-5 years. But more importantly, both were at an age when a reciprocal physical relationship

between two not so young, though not fully mature, persons cannot be ruled-out;

ii. *next,* there appears to be very little to support any allegation of serious violence or injury, that would betray brutality in the offence alleged ;

iii. *next*, the complainant appears to have returned to the applicant time-and-again and to have lived with the applicant for periods of time at his house along with his mother, which again betrays *approval-in-fact*, if not *consent-in-law,* on her part for the acts alleged;

iv. *next*, charges have already been framed and complainant's deposition is well underway. But due to the restricted functioning of courts by reason of the prevailing coronavirus pandemic, it is unlikely that trial will be completed anytime soon;

v. *next*, there is no allegation that the offence alleged was committed along with any other persons acting in a group or otherwise ;

vi. *next*, the complainant, though minor, was not of an age that she did not understand the act involved. In fact she speaks of a marriage of sorts having been conducted between the two in the presence of the applicant's mother;

vii. *next*, the applicant is not a repeat offender nor does he have any prior or other criminal involvement; and

viii. *lastly*, there is no allegation of any threat having been extended by or on the applicant's behalf between the registration of the FIR on 14.10.2018 and the date of his arrest on 17.11.2018.

82. Upon a conspectus of the foregoing facts and circumstances, applying the above principles and the opinion of this court as to the applicability of section 29 of the POCSO Act, this court is persuaded to admit the applicant to *regular bail*, on the following conditions :

a. The applicant shall furnish a personal bond in the sum of Rs. 30,000/- (Rupees Thirty Thousand) with 01 surety in the like amount from the applicant's mother, to the satisfaction of the trial court ;

b. The applicant shall furnish to the Investigating Officer/S.H.O. a cell phone number on which the applicant may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;

c. If the applicant has a passport, he shall also surrender the same to the trial court ;

d. The applicant shall not contact, nor visit, nor offer any inducement threat or promise to the first informant/ complainant or to any of the prosecution witnesses. The applicant 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.

83. Nothing in this judgment shall be construed as an expression on the merits of the evidence in the pending trial.

84. The bail application is disposed of in the above terms.

85. Other pending applications, if any, also stand disposed of.

86. A copy of this judgment be sent to the concerned Jail Superintendent.

ANUP JAIRAM BHAMBHANI, J.

22nd SEPTEMBER 2020
j/Ne/*uj*