

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 11TH DAY OF OCTOBER 2023

BEFORE

THE HON'BLE MR. JUSTICE S.VISHWAJITH SHETTY

CRL.P.No.3701/2023

BETWEEN:

INFORMANT

...PETITIONER

(BY SRI TEJAS N., ADV.)

AND:

1. STATE OF KARNATAKA BY
MADDUR POLICE
MANDYA DISTRICT - 571 428.

(REP BY THE LEARNED
STATE PUBLIC PROSECUTOR
HCK, BANGALORE - 01)

2. SRI SATHISHA B.K

...RESPONDENTS

(BY SMT. N.ANITHA GIRISH, HCGP FOR R-1;
SRI LAKSHMIKANTH.K., ADV. FOR R-2)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 439(2) OF CR.PC. PRAYING TO CANCEL THE BAIL GRANTED TO RESPONDENT NO.2 (ACCUSED NO.1) BY THE ADDL. SESSIONS JUDGE FTSC-II, MANDYA IN SPL.C.NO.223/2022,

ARISING OUT OF CR.NO.120/2022 OF MADDUR P.S., FOR THE OFFENCE P/U/S 354(D), 376(3), 376(2)(n), 450, 366, 506, 420, 504 OF IPC AND SEC.4, 6 AND 12 OF POCSO ACT AND CONSEQUENTLY DIRECT THE RESPONDENT NO.2 (ACCUSED NO.1) TO BE TAKEN IN TO CUSTODY FORTHWITH.

THIS PETITION HAVING BEEN HEARD AND RESERVED, COMING ON FOR PRONOUNCEMENT OF ORDER, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

1. This petition under Section 439(2) of Cr.PC is filed by the informant/victim with a prayer to cancel the bail granted to respondent no.2 on 30.12.2022 by the Court of Additional District & Sessions Judge, FTSC-II, Mandya, in Spl. Case No.223/2022 arising out of Crime No.120/2022 registered by Maddur Police Station, Mandya District, for the offences punishable under Sections 354D, 376(3), 376(2)(n), 450, 366, 506, 420 of IPC and Sections 4, 6 & 12 of the Protection of Children From Sexual Offences Act, 2012 (for short, 'POCSO Act').
2. Heard the learned Counsel for the parties.
3. On 18.05.2022, the victim girl aged about 21 years had submitted a written information, based on which FIR in Crime No.120/2022 was registered by Maddur Police Station, Mandya District, against respondent no.2 and

three others for the offences punishable under Sections 376, 506, 420 of IPC and Sections 4, 6 & 12 of POCSO Act.

4. In the written information, it is averred that in the year 2014, when the informant was studying in 9th Standard, she got acquainted with respondent no.2 who was working as a Warden in Social Welfare Department. He used to often visit the informant's house and he also allegedly informed her that he was in love with her. But since the informant was a minor, she had not agreed for his proposal. The informant has further averred that respondent no.2 had taken her to an isolated place near Arathipura Betta and Ramadevara Betta and had sexually misbehaved with her and also threatened her with dire consequences if she informs the same to her parents. In the year 2017, informant's parents had gone to her grandmother's house at Bengaluru and at that time, respondent no.2 came to the house of the informant at about 11.00 p.m. and took her to a room inside her house and sexually assaulted her against her wishes. At that time, she was allegedly aged 17 years. Respondent

no.2 after committing the act of sexual assault on the informant, had promised to marry her and had informed her not to reveal about the incident to anybody. Thereafter, allegedly respondent no.2 repeated the said act number of times in the house of the informant, whenever her parents were not there in the house.

5. In the year 2020, informant got pregnant and when this was informed by her to respondent no.2, he took her to Archana Hospital at Mandya and caused miscarriage. Thereafter, on 10.12.2020, the parents of informant and respondent no.2 had performed their marriage engagement ceremony. Subsequently, respondent no.2 allegedly informed the informant that his mother was not happy with the engagement. The informant allegedly informed the same to her family members. On 17.09.2021, respondent no.2 and his friends Puttaswamy and Lokesh allegedly came to the house of the informant and threatened the informant and her family members with dire consequences, if they approached the police and had left the place. Thereafter, the informant had approached the police on 18.05.2022 and submitted a

written information, based on which, FIR in Crime No.120/2022 was registered by Maddur police against the petitioner and three others.

6. Application seeking anticipatory bail filed by respondent no.2 under Section 438 of Cr.PC in the said case was rejected, and thereafter he had voluntarily surrendered before the Trial Court on 27.10.2022 and had filed bail application under Section 439 Cr.PC which was allowed by the Trial Court by order dated 30.12.2022. Being aggrieved by the same, the informant is before this Court under Section 439(2) Cr.PC.

7. Learned Counsel for the informant submits that the informant or any person authorized by the informant were not heard in the matter by the Trial Court before granting regular bail to respondent no.2. He submits that Section 439(1A) of Cr.PC has not been complied in this matter, and therefore, the bail granted to respondent no.2 is liable to be cancelled. He also submits that the Trial Court has not given valid reasons for granting bail to respondent no.2. In support of his contention, he has placed reliance on the order passed by the coordinate

bench of this Court in **CrI.P.No.7143/2021 (SMT. LALITHA VS THE STATE OF KARNATAKA & ANOTHER)** disposed of on 14.01.2022, and also on the order passed by the Division Bench of this Court in the case of **BIBI AYESHA KHANUM & OTHERS VS UNION OF INDIA & OTHERS - ILR 2022 KAR 3261.**

8. Per contra, learned Counsel appearing for respondent no.2 submits that having regard to the language found in Section 439(1A) of Cr.PC, there is no obligation on the accused to make the informant/victim as a party to the bail application. Compliance of Section 439(1A) of Cr.PC is required to be done by the court hearing the bail application or by the prosecution and not by the accused. In support of his contention, he has placed reliance on the judgment of the Delhi High Court in the case of **SALEEM VS THE STATE OF NCT OF DELHI & ANR. - 2023 DHC 2622.** He further submits that the mistake committed by the court has not caused any prejudice to the informant/victim and the irregularity is a curable defect, and therefore, the order granting bail to respondent no.2 calls no interference by this Court.

9. Learned Counsel for the informant/victim has principally assailed the order dated 30.12.2022 passed by the Trial Court in Spl. Case No.223/2022 granting regular bail to respondent no.2, on the ground that there is no compliance of Section 439(1A) of Cr.PC. Section 439(1A) of Cr.PC reads as under:

"439(1A) The presence of the informant or any person authorized by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of Section 376 or Section 376AB or Section 376DA or Section 376DB of the Indian Penal Code (45 of 1860)."

10. The Division Bench of this Court in Bibi Ayesha Khanum's case supra in a writ petition filed, to ensure effective implementation of the provisions of the POCSO Act and the POCSO Rules, 2020, had issued certain directions, which reads as under:

"17.1. The Investigation officer or the SJPU shall inform the Victim's parents/caregiver/guardian as also the legal counsel if appointed, about any application for bail or any other application having been filed by the accused or the prosecution in the said proceedings."

17.2. The public prosecutor shall serve a copy of any application or objections to be filed in the said proceedings on the filed in the said proceedings on the Victim's parents/caregiver/guardian as also the legal counsel if appointed and issue notice of hearing of such application on them, along with all relevant documents and records necessary for their effective participation in the proceedings, in this regard the prosecutor is entitled to take the assistance of the Investigating Officer or the SJPU and file necessary proof of service of copies and notice of hearing. In the unlikely event of service not being effected it shall be the duty of the Prosecutor to inform the reasons in writing to the relevant court.

17.3. The Accused or the counsel for the accused shall serve a copy of any application or objections to be filed in the said proceedings on the victim's parents/caregiver/guardian as also the legal counsel if appointed and issue notice of hearing of such application on them, along with all relevant documents and records necessary for their effective participation in the proceedings. The Accused or the Counsel for the Accused to file necessary proof of service of copies and notice of hearing. In the unlikely event of service not being effected it shall be the duty of the Accused or counsel for the accused to inform the reasons in writing to the relevant court.

17.4. In the event of the accused being a close family member or an acquaintance of the family, in addition to the above a copy of any application or objections to be filed in the said proceedings shall be served on the jurisdictional Child Welfare committee (CWC) and issue notice of hearing of such application on CEC, along with all relevant documents and records necessary for their effective participation in the proceedings;

17.5. The concerned Court, before proceedings to hear the application, shall ascertain the status of service of notice, and if it is found that notice has not been issued or though issued has not been served, the Court may make such reasoned order as it deems fit to secure the ends of justice, taking into account any emergent circumstances that warrant dealing with the application in the absence of the Victim's parents/caregiver/guardian or legal counsel.

17.6. Despite service of the above notice, if none were to appear, the Court may proceed further or issue a fresh notice, as the Court may deem fit and proper, considering the interest of justice.

17.7. When the proceedings under the POCSO Act also involve offences under Section 376(3), 376-AB, 376-DA or 376-DB of the Indian Penal Code, the notice to the victim shall be

issued under Section 439(1-A) read with Rule 4(13) and 4(15).

17.8. Whenever an accused who is charged under Sections 376(3), 376-AB, 376-DA or 376 DB of the IPC or the provisions of the POCSO Act, moves an application for bail be it regular, interim, transit or any other classification, notice shall be issued by the Accused to the Investigating officer, SJPU, Public Prosecutor as also any counsel on record for the victim/complainant/informant'

17.9. The victim/complainant/informant who appears before the Court may be represented by own counsel or by a counsel appointed by the Karnataka State Legal Service Authority or the concerned District Legal Services Authority/Taluka Legal Services Authority.

17.10. The state Government to provide for sufficient funds in order to make payments to the counsel so appointed.

17.11. On service of notice on the Victim's parents/caregiver/guardian as also the legal counsel, they are to be informed about the protection available under Witness Protection Scheme, 2018 and enquire if they require any such protection, if there is a request made for police protection, the same shall be considered and granted in terms of the Witness Protection Scheme 2018. In the event of information being

provided by a whistleblower necessary protection to be provided in terms of The Whistle Blowers Protection Act, 2014."

11. In the case of **JAGJEET SINGH & OTHERS VS ASHISH MISHRA ALIAS MONU & ANOTHER - (2022)9 SCC 321**, the Hon'ble Supreme Court has considered the right of the victim to participate in criminal proceedings at various stages including at the stage of bail proceedings, and in paragraphs 22 & 23 of the said judgment, the Hon'ble Supreme has observed as under:

"22. It cannot be gainsaid that the rights of a victim under the amended Cr.PC are substantive, enforceable, and are another facet of human rights. The victim's right, therefore, cannot be termed or construed restrictively like a brutum fulmen. The literal translation from the Latin approximates to "meaningless thunderbolt or lightning", and is used to convey the idea of an "empty threat" or something which is ineffective.]. We reiterate that these rights are totally independent, incomparable, and are not accessory or auxiliary to those of the State under the CrPC. The presence of "State" in the proceedings, therefore, does not tantamount to according a hearing to a "victim" of the crime.

23. A "victim" within the meaning of CrPC cannot be asked to await the commencement of trial for asserting his/her right to participate in the proceedings. He/She has a legally vested right to be heard at every step post the occurrence of an offence. Such a "victim" has unbridled participatory rights from the stage of investigation till the culmination of the proceedings in an appeal or revision. We may hasten to clarify that "victim" and "complainant/informant" are two distinct connotations in criminal jurisprudence. It is not always necessary that the complainant/informant is also a "victim", for even a stranger to the act of crime can be an "informant", and similarly, a "victim" need not be the complainant or informant of a felony."

12. In the said case, the Hon'ble Supreme Court at paragraph 41 has observed as under:

41. We are, thus, of the view that this Court on account of the factors like:

(i) irrelevant considerations having impacted the impugned order granting bail;

(ii) the High Court exceeding its jurisdiction by touching upon the merits of the case;

(iii) denial of victims' right to participate in the proceedings; and

(iv) the tearing hurry shown by the High Court in entertaining or granting bail to the respondent-accused;

can rightfully cancel the bail, without depriving the respondent-accused of his legitimate right to seek enlargement on bail on relevant considerations."

13. In almost similar circumstances, a coordinate bench of this Court in the case of **SMT. LALITHA VS THE STATE OF KARNATAKA & ANOTHER - 2022(2) KLJ 649**, has set aside the bail granted to the accused who was charged for the offences punishable under the provisions of the POCSO Act. The said order was confirmed by the Hon'ble Supreme Court in Special Leave to Appeal (Crl.) No.719/2022 disposed of on 08.02.2022.

14. The High Court of Delhi in Saleem's case supra, has considered the question whether the victim's right to be heard include the obligation to be impleaded as a party-respondent in criminal proceedings. In the said case, the High Court of Delhi after interpreting the language used in Section 439(1A) of Cr.PC and also after appreciating the judgment of the Hon'ble Supreme Court in Jagjeet

Singh's case supra, in paragraph 33 has observed as under:

"33. Upon a conspectus of the foregoing, this court is persuaded to draw the following conclusions, which it is made clear, are restricted to criminal matters relating to or arising from or concerning sexual offences:

33.1. There is no requirement in law to implead the victim, that is to say, to make the victim a party, to any criminal proceedings, whether instituted by the State or by the accused;

33.2. In accordance with the mandate of the Supreme Court in Jagjit Singh (supra), a victim now has unbridled participatory rights in all criminal proceedings in relation to which the person is a victim, but that in itself is no reason to implead a victim as a party to any such proceedings, unless otherwise specifically so provided in the statute; Section 439(1A) Cr.P.C. mandates that a victim be heard in proceedings relating to bail, without however requiring that the victim be impleaded as a party to bail petitions;

33.3. In light of the decision of the Supreme Court in Jagjit Singh (supra), section 439(1A) Cr.P.C. must now be expanded to include the victim's right to be heard even in petitions where an accused seeks anticipatory bail; a convict seeks suspension of sentence, parole, furlough, or other such interim relief;

33.4. To obviate any ambiguity, though section 439(1A) Cr.P.C. makes the "presence of the informant" obligatory at the time of hearing, what is clearly mandated thereby is the right of the victim, whether through the informant or other authorised representative, to be effectively heard in the matter. If necessary, legal-aid counsel may be appointed to assist in representing the victim; and the mere ornamental presence of the victim, or their representative, without affording them and effective right of hearing, would not suffice."

15. The Hon'ble Supreme Court in Jagajeet Singh's case supra has held that denial of victim's right to participate in the proceedings could be a factor for rightful cancellation of bail granted to the accused, before

hearing the bail application of an accused facing trial under the provisions of sub-section (3) of Section 376, 376-AB, 376-DA or 376DB of IPC. Based on the plain reading of Section 439(1A) of Cr.PC and taking into consideration the judgment in Saleem's case supra, even if it is held that there is no requirement in law to implead the informant/victim as a party-respondent to the criminal proceedings including hearing of a bail application of an accused, the unbridled right of the informant/victim to be heard in the matter at various stages including at the stage of bail proceedings cannot be lost sight of and this right of the informant/victim has been examined by the Hon'ble Supreme Court in Jagjeet Singh's case supra and it has been held that denial of such a right would be a factor for rightful cancellation of bail. Therefore, even if it is held that the obligation to keep the informant or his authorized representative present at the time of hearing the bail application is on the court and the prosecution, ultimately it would be the accused who would be affected by non-compliance of the requirement of Section 439(1A) of Cr.PC. It is under these circumstances, guidelines have been issued by

various High Courts for effective implementation of 2018 amendment to Cr.PC. and the provisions of the POCSO Act and the Rules framed thereunder.

16. In the present case, undisputedly the informant/victim was not notified about the bail application filed by respondent no.2 under Section 439 Cr.PC, and therefore, there is factually a denial of right to the informant/victim to participate in the proceedings which is recognized under Section 439(1A) of Cr.PC. The material on record would go to show that prior to filing the present bail application under Section 439 Cr.PC in Spl. Case No.223/2022 before the Trial Court, respondent no.2 had filed an application under Section 439 Cr.PC, for which objections were filed by the informant/victim. During the pendency of the said bail application, since charge sheet was filed, the said bail application was withdrawn by respondent no.2 and a fresh bail application was filed before the Trial Court in Spl. Case No.223/2022 which was allowed on 13.12.2022. In the said application, there was no notice to the informant/victim. Under the circumstances, the

order dated 30.12.2022 passed by the Additional District & Sessions Judge, FTSC-II, Mandya, in Spl. Case No.223/2022 granting regular bail to respondent no.2 gets vitiated and the same cannot be sustained in law.

17. Since it is now trite that the bail application of an accused for the offence punishable under Section 376(3), 376-AB, 376DA or 376-DB of IPC or for the offences punishable under the provisions of the POCSO Act cannot be heard and disposed of without giving opportunity of being heard to the informant/victim, the court and the prosecution are required to take into consideration the obligation on their part to keep the informant/victim informed about the stages of criminal proceedings including filing of applications seeking bail by the accused persons. Failure on the part of the court or the prosecution to take necessary steps in this regard will eventually cause hardship to the accused and thereby his right to liberty gets affected. Under the circumstances to ensure effective implementation of 2018 amendment to Cr.PC as well as the provisions of the POCSO Act and the Rules framed thereunder, the following directions are

being issued for compliance by the court and the prosecution.

(i) Whenever an accused who is charged under Section 376(3), 376-AB, 376-DA or 376-DB IPC or the provisions of the POCSO Act, moves an application for regular bail or anticipatory bail, the Registry of the Court shall inform the accused or the advocate for the accused about the requirement of notifying the informant/victim regarding filing of the bail application, though it is not obligatory on the part of the accused/advocate for the accused to implead the informant or the victim, as the case may be.

(ii) In the event the accused/advocate for the accused impleads the informant/victim as party-respondent to the proceedings, steps shall be taken by the court for service of notice on the informant/victim, as the case may be.

(iii) In the event the accused/advocate for the accused does not implead the informant/victim as party-respondent to the proceedings, the court hearing the application shall take necessary steps for effective service of notice of the bail application on the

informant/victim and also direct the prosecution to ensure service of notice of the bail application on the informant/victim and submit requisite acknowledgment to the said effect before the court.

(iv) It shall also be incumbent on the court and the prosecution to keep the informant/victim informed about the date of hearing of the bail application and also the right of the informant/victim to be represented and the legal assistance for which the informant/victim is entitled through the Legal Services Authority.

(v) If the prosecution is not in a position to trace the informant/victim, a status report shall be filed giving reasons for the same, which shall be taken into consideration by the concerned court and necessary orders be passed.

(vi) In the event the informant/victim does not appear before the court despite service of notice, the concerned court shall proceed to consider the bail application on its merits after having recorded that service of notice on the informant/victim is completed.

(vii) In cases where applications are filed seeking interim bail, the concerned court can pass suitable orders after recording reasons for the same awaiting service of notice on the informant/victim.

(viii) The Registry of the court shall ensure that in cases where the informant is a minor, notice shall be issued on the bail applications to the parents/guardians of the minor or to the person who is duly authorized to represent the minor victim.

(ix) Registry shall ensure that if the informant or victim is a minor, he/she shall not be made as a party to the proceedings and no notice shall be issued or served on the minor informant/victim.

18. In so far as the prayer made in the present petition is concerned, undisputedly regular bail has been granted to respondent no.2 by the Trial Court in Spl. Case No.223/2022 without complying with the requirement of Section 439(1A) of Cr.PC, and thereby the mandate of the legislature as well as the unbridled right to be heard in the matter by the informant/victim has been denied,

and consequently, the order granting bail to respondent no.2 cannot be sustained in law.

19. Petitioner who is a Government servant was in custody for a period of two months prior to he being released on regular bail by the Trial Court. The informant/victim is represented by an advocate in the present proceedings. Under the circumstances, I am of the view that if both the parties are directed to appear before the Trial Court for the purpose of hearing the regular bail application filed by respondent no.2 afresh and if the Trial Court is directed to dispose of the bail application on its merits, within a time frame, the same would serve the ends of justice. Accordingly, the following order:

(i) The petition filed under Section 439(2) of Cr.PC is **allowed**;

(ii) The order dated 30.12.2022 passed by the Court of Addl. District & Sessions Judge, FTSC-II, Mandya, in Spl. Case No.223/2022 is set aside and the matter is remitted for fresh consideration of the bail application on its merits;

(iii) Respondent no.2 shall surrender before the Trial Court on or before **26.10.2023**;

(iv) The petitioner/representative of the petitioner and respondent no.2/ representative of respondent no.2 shall appear before the Trial Court on **26.10.2023** without awaiting further notice from the said court and shall cooperate with the Trial Court in Spl. Case No.223/2022 for expeditious hearing and disposal of the bail application filed by respondent no.2 under Section 439 Cr.PC;

(v) The Trial Court is requested to consider and dispose of the regular bail application filed by respondent no.2 on its merits within a period of 15 days from the date of appearance of the petitioner/representative of the petitioner and respondent no.2/representative of respondent no.2. It is needless to state that the Trial shall not be influenced by any observations made by this Court during the course of this order and the bail application filed by respondent no.2 shall strictly be considered in accordance with law on its

merits and disposed of within the aforesaid time frame.

**Sd/-
JUDGE**

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