

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 13349 of 2023

Applicant :- Vishal

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Praveen Kumar Pal

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

Heard Mr. Paveen Kumar Pal, the learned counsel for applicant and the learned A.G.A. for State.

This repeat application for bail has been filed by applicant, Vishal, seeking his enlargement on bail in Case Crime No. 404 of 2021, under section 363, 366,m 376(3) I.P.C. and 3/4(2) POCSO Act, Police Station- Mangalpur, District Kanpur Dehat.

At the very outset, learned A.G.A. submits that notice of present application for bail has been served upon first informant/opposite party-2 on 18.8.2023. However, inspite of the service of notice, no one has put in appearance on behalf of first informant to oppose this application.

Present application for bail came up for orders on 10.10.2023 and this Court passed the following order:

"Heard Mr. Praveen Kumar Pal, the learned counsel for applicant and the learned A.G.A. for State.

This repeat application for bail has been filed by applicant- Vishal, seeking his enlargement on bail in Case Crime No. 404 of 2021, under sections 363, 366, 376 (3) IPC and 3/4 (2) POCSO Act, Police Station- Mangalpur, District Kanpur Dehat, during the pendency of trial.

The first bail application of applicant was rejected by this Court by a detailed order dated 3.11.2022. For ready reference, the same is reproduced herein under;

Heard Mr. Ankit Saran, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant Vishal seeking his enlargement on bail in Case Crime No. 404 of 2021, under Sections 363. 366, 376(3) IPC, and Section 3/4(2) of POCSO Act, 2012, P.S. Mangalpur, District Kanpur Dehat, during the pendency of trial.

Perused the record.

It transpires from the record that in respect of an incident, which is alleged to have occurred on 11.8.2021, a delayed F.I.R. dated 15.08.2021 was lodged by first informant Meenu Devi and was registered as Case Crime No. 404 of 2021, under Sections 363, 366, 376(3) IPC, and Section 3/4(2) of POCSO Act, 2012, P.S. Mangalpur, District Kanpur Dehat. In the aforesaid F.I.R., four persons namely Visdhal, Rajauna (maternal uncle of Vishal, (applicant herein) Anshu and Shakuntala have been nominated as named accused.

Gravamen of the allegations made in the F.I.R. is that named accused Vishal enticed away minor daughter of the first informant on 11.08.2021. First informant also alleged that the prosecutrix carried away cash and jewellery along with her.

After lodging of aforementioned F.I.R., Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter XII Cr. P. C. He examined first informant under Section 161 Cr. P. C., who has supported the prosecution story. Prosecutrix herself returned to her home on 27.11.2021. Thereafter, the statement of the prosecutrix was recorded under Section 161 Cr. P. C., wherein prosecutrix has not supported the prosecution story as unfolded in the F.I.R. To the contrary prosecutrix has stated that she was in love with applicant. She herself went with the applicant on 11.8.2021. Thereafter, the prosecutrix states that she solemnized married with applicant. Thereafter, prosecutrix was requested for her medical examination, but she denied her medical examination. Subsequently, statement of the prosecutrix was recorded under Section 164 Cr. P. C., wherein prosecutrix reiterated her earlier statement recorded under Section 161 Cr. P. C. During course of investigation, Investigating Officer recovered High School Certificate of the prosecutrix, wherein her date of birth is recorded as 1.5.2006. As such, on the date occurrence, i.e 11.8.2021, prosecutrix was aged about 15 years and few months. Ultimately, on the basis of above and other material collected by Investigating Officer, he submitted charge sheet dated 15.8.2021, whereby applicant has been charge sheeted under Section 363, 366, 376 (3) IPC and Sections 3/4 POCSO Act.

Learned counsel for applicant contends that applicant is innocent. He has been falsely implicated in aforementioned case crime number. Referring to the statements of the prosecutrix as recorded under Sections 161/164 Cr. P. C., he submits that the prosecutrix and applicant were in love affair. Prosecutrix is a consenting party. As such, no offence as alleged is made out against applicant. Applicant is in jail since 28.3.2022. As such, he has undergone more than 7 months of incarceration. Charge sheet has already been submitted, therefore, evidence sought to be relied upon by the prosecution against applicant stands crystallized. As such, custodial arrest of the applicant is not absolutely necessary during course of investigation.

Learned counsel for applicant vehemently contends that during course of investigation, Investigating Officer examined Bhupendra Veer Singh, Principal Kanya Purva Madhyamik Vidyalaya, Khamhaila, Kanpur Dehat. These witness in her statement stated that as per school record the date of birth of prosecutrix is 21.07.2002. On the aforesaid premise, it is sought to be contended that the prosecution is major. The date of birth of prosecutrix recorded in High School Certificate prima facie appears to be incorrect. As such, applicant is liable to be enlarged on bail.

Per contra, the learned A.G.A. has opposed the present application. Learned A.G.A. submits that prosecutrix was aged about 15 years three months on the date of occurrence. The dispute raised by learned counsel for applicant with regard to the date of birth mentioned in High School certificate is to be accepted primarily by virtue of Section 94 (1) A of Juvenile Justice (Care and Protection for Children) Act, 2015. Reliance is also placed upon judgement of Supreme Court X (Minor) Vs. State of Jharkhand, MANU/SCOR/26579/2022 On the basis of above, he submits that considering the date of birth of prosecutrix

recorded in the High School Certificate, no indulgence be granted by this Court in favour of applicant.

When confronted with above, the learned counsel for applicant could not overcome the same.

Having heard the learned counsel for applicant, the learned A.G.A. for the state, upon perusal of material brought on record, nature of offence, evidence, complicity of the accused and accusation made, and coupled with the fact that the date of birth of prosecutrix as recorded in the High School Certificate is 1.3.2006 and on the date of occurrence i.e. 11.08.2021, she was aged about 15 years 3 months and few days, but without expressing any opinion on merits of the case, this Court does not find any good ground to enlarge the applicant on bail.

Bail application fails and is liable to be rejected.

It is, accordingly, rejected. Learned counsel for applicant submits that the framing of charge order was passed by Court below on 30.5.2022. However, inspite of the fact that a period of more than one year and four months has rolled by from the date of framing of charge order, no prosecution witness has been examined by Court below as yet. He, therefore contends that there is delay in conclusion of trial. Referring to the judgment of Supreme Court in A.R. Antulay Vs. R.S. Nayak, 1992 (1) SCC 225, he submits that right to speedy trial is a fundamental right of an accused. Since aforesaid right of applicant stands infringed on account of lackadaisical approach of the prosecution in pursuing the trial, as such applicant is liable to be enlarged on bail. Reference has also been made to the provisions of Section 35 of the POCSO Act.

In view above, the Court concerned is directed to submit its report regarding above, within a period of two weeks from today.

Matter shall re-appear as fresh on 26.10.2023.

Office shall send the copy of this order to court concerned by means of FAX, today itself. "

Pursuant to above order, Court below has submitted its report dated 17.10.2023. As per said report, the cognizance was taken by Court concerned on 30.5.2023, thereafter the charges were framed against applicant on 23.4.2023. Since then, neither the first informant nor the prosecutrix has appeared before Court below.

In view of above and for the reasons recorded in the order dated 10.10.2023, the bail application is liable to be allowed.

It is accordingly allowed.

Let the applicant **Vishal**, be released on bail in the aforesaid case crime number on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

(i) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT

THAT HE/SHE SHALL NOT SEEK ANY ADJOURNMENT ON THE DATE FIXED FOR EVIDENCE WHEN THE WITNESSES ARE PRESENT IN COURT. IN CASE OF DEFAULT OF THIS CONDITION, IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT IT AS ABUSE OF LIBERTY OF BAIL AND PASS ORDERS IN ACCORDANCE WITH LAW.

(ii) THE APPLICANT SHALL REMAIN PRESENT BEFORE THE TRIAL COURT ON EACH DATE FIXED, EITHER PERSONALLY OR THROUGH HIS/HER COUNSEL. IN CASE OF HIS/HER ABSENCE, WITHOUT SUFFICIENT CAUSE, THE TRIAL COURT MAY PROCEED AGAINST HIM/HER UNDER SECTION 229-A IPC.

(iii) IN CASE, THE APPLICANT MISUSES THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE HIS/HER PRESENCE PROCLAMATION UNDER SECTION 82 CR.P.C., MAY BE ISSUED AND IF APPLICANT FAILS TO APPEAR BEFORE THE COURT ON THE DATE FIXED IN SUCH PROCLAMATION, THEN, THE TRIAL COURT SHALL INITIATE PROCEEDINGS AGAINST HIM/HER, IN ACCORDANCE WITH LAW, UNDER SECTION 174-A IPC.

(iv) THE APPLICANT SHALL REMAIN PRESENT, IN PERSON, BEFORE THE TRIAL COURT ON DATES FIXED FOR (1) OPENING OF THE CASE, (2) FRAMING OF CHARGE AND (3) RECORDING OF STATEMENT UNDER SECTION 313 CR.P.C. IF IN THE OPINION OF THE TRIAL COURT ABSENCE OF THE APPLICANT IS DELIBERATE OR WITHOUT SUFFICIENT CAUSE, THEN IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT SUCH DEFAULT AS ABUSE OF LIBERTY OF BAIL AND PROCEED AGAINST THE HIM/HER IN ACCORDANCE WITH LAW.

(v) THE TRIAL COURT MAY MAKE ALL POSSIBLE EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANT.

However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his/her bail so granted by this court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

Order Date :- 26.10.2023

Arshad