

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 17076 of 2023

Applicant :- Surya Prakash

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

Counsel for Applicant :- Rahul Pandey

Counsel for Opposite Party :- G.A., Shree Bhushan Shukla, Vashishtha Narayan Tripathi

Hon'ble Rajeev Misra, J.

Heard Mr. Rahul Pandey, the learned counsel for applicant and the learned A.G.A. for State.

This application came up for orders on 25.9.2023 and this Court passed the following order:

"Heard Mr. Rahul Pandey, the learned counsel for applicant and the learned A.G.A. for State.

In spite of the fact that names of Mr. V.N. Tripathi and Shree Bhushan Shukla, learned counsel for first informant are duly published in the cause list, neither they nor anyone on their behalf is present to oppose this application for bail.

This application for bail has been filed by applicant Surya Prakash, seeking his enlargement on bail in Case Crime No. 172 of 2022, under Sections 363, 366, 376 (3) I.P.C. and Section 4(2) POCSO Act, Police Station-Sultanpur Ghosh, District Fatehpur, during the pendency of trial.

After some arguments, it transpires that the age of prosecutrix has been determined as per the report card of the prosecution and the certificate of the Principal of the Institution where the prosecutrix had studied. By virtue of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 as well as the judgement of Apex Court in P. Yuva Prakash Vs. State 2023 SC OnLine SC 846, the said documents cannot be relied upon to conclude the age of the prosecutrix as per the date of birth of the prosecutrix recorded therein.

Learned A.G.A. submits that charge sheet has already been submitted against applicant on 21.1.2023.

In view of the fact that police report in terms of Section 173 (2) Cr.P.C. has been submitted on 21.1.2023, the Investigating Officer is directed to submit an application before court concerned in terms of Section 173 (8) Cr.P.C. seeking permission of the Court to conduct further investigation. After obtaining permission of the court, Investigating Officer shall conduct further investigation to find out the date of birth of the prosecutrix recorded

in the institution which was first attended by her. Copy of supplementary case diary shall also be transmitted to this Court through the learned A.G.A. before the next date fixed.

Matter shall accordingly reappear as fresh on 17.10.2023. "

Pursuant to above order, learned A.G.A. submits that Investigating Officer conducted further investigation of aforesaid case crime number. However, after investigation, the date of birth of the prosecutrix recorded in the institution first attended by her was discovered as 25.12.2007. As such the prosecutrix was aged about 14 years 10 months and 20 days, on the date of occurrence.

Perused the record.

This application for bail has been filed by applicant Surya Prakash seeking his enlargement on bail in Case Crime No. 172 of 2023, under section 363, 366, 376 (3) IPC and Section 4 (2) POCSO Act, Police Station- Sultanpur Ghosh, District- Fatehpur during the pendency of trial.

Record shows that in respect of an incident which is alleged to have occurred on 15.11.2022, a prompt F.I.R. dated 16.11.2022 was lodged by first informant Saraswati and was registered as Case Crime No. 172 of 2023, under section 363, 366, 376 (3) IPC and Section 4 (2) POCSO Act, Police Station- Sultanpur Ghosh, District- Fatehpur. In the aforesaid F.I.R., one person has been nominated as solitary naTheymed accused.

The gravamen of the allegations made in the F.I.R is to the effect that daughter of first informant namely, X aged about 15 years has gone missing.

After aforementioned F.I.R. was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms Chapter XII Cr.P.C. The prosecutrix was recovered on 21.11.2022. Thereafter, the statement of prosecutrix was recorded by the Investigating Officer under section 161 Cr.P.C. Same is on record at page 29 of the paper book. The prosecutrix in her aforesaid statement has supported the F.I.R. inasmuch as she has stated that she was deliberately and forcibly abducted by applicant. The prosecutrix has further stated that applicant forcibly maintained physical relations with her. Subsequent to above, the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor who medically examined her has departed from the previous statement inasmuch she has now stated that she

accompanied the applicant to Chatisgarh. However, the applicant forcibly maintained physical relationship with the prosecutrix. However, the doctor who examined the prosecutrix did not find any external or internal injury on the body of prosecutrix so as to demonstrate that prosecutrix was sexually assaulted or there was commission of sexual violence upon prosecutrix. With regard to private part of the prosecutrix, the Doctor opined as follows:
"old torn and healed"

Certain samples were taken from the body of the prosecutrix for pathological examination. However, the copy of supplementary medico legal report has not been brought on record. Ultimately, the statements of the prosecutrix was recorded under section 164 Cr.P.C. which is on record at page 51 of the paper book. The prosecutrix in her aforesaid statement has rejoined her previous statement recorded before the Doctor who medically examined her. However, the prosecutrix remained consistent to the effect that physical relations was maintained by applicant with prosecutrix without her consent. Investigating Officer examined the first informant and other witnesses under section 161 Cr.P.C who have also substantially supported the FIR. During the course of investigation, Investigating Officer recovered the mark sheet of the prosecutrix of Class VII, issued by institution which was last attended by her. As per aforesaid, the date of birth of the prosecutrix was revealed as 1.1.2009. On the basis of above and other material collected by the Investigating Officer, he came to the conclusion that complicity of applicant is established in the crime in question. Ultimately, Investigating Officer submitted the charge sheet dated 21.1.2022, whereby and whereunder, applicant has been charge sheeted under sections 363, 366, 376 (3) IPC and Section 4 (2) POCSO Act.

Learned counsel for applicant submits that though the applicant is a named as well as charge sheeted accused, yet he is liable to be enlarged on bail. Referring to the statement of the prosecutrix recorded under section 161 Cr.P.C., before the Doctor who medically examined her, and under section 164 Cr.P.C. he submits that prosecutrix is a willing and consenting party. Prosecutrix has remained with applicant for almost about four months.

Even otherwise, applicant is a man of clean antecedents inasmuch as he has no criminal history to his credit except the present one. Applicant is in jail since 25.11.2022. As such, he has undergone more than five months of incarceration. The police report in terms of Section 173 (2) Cr.P.C. has already been submitted against applicant, as such, the entire evidence sought to be relied upon by

prosecution against applicants stands crystalized. However, upto this stage no such incriminating circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. It is thus urged that applicant is liable to be enlarged on bail. In case the applicant is enlarged on bail, he shall not misuse the liberty of bail and shall co-operate with the trial.

Per contra, the learned A.G.A. has vehemently opposed the prayer for bail. He submits that since applicant is a named as well as charge sheeted accused, therefore he does not deserve any indulgence by this Court. In compliance of order dated 25.9.2023, passed by this Court, the date of birth of the prosecutrix recorded in the institution first attended by her was discovered by the Investigating Officer which is 25.12.2007. The occurrence giving rise to present criminal proceedings occurred on 15.11.2022 As such, prosecutrix was 14 years of age. Referring to the judgement of Suprme Court in **X(Minor) Vs/ State of Jharkhand and Anr., 2022 Live Law (SC) 194**, her consent, if any, is wholly immaterial. As such, no sympathy be shown by learned A.G.A. contends 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 State, the learned counsel representing first informant, upon consideration of material on record, evidence, gravity and nature of offence, accusations made as well as complicity of applicant, coupled with the fact that as per date of birth of prosecutrix, recorded in the institution first attended by her, the prosecutrix was aged about 14 years, 10 months and 20 days on the date of occurrence, in view of above, and the law laid down by Apex Court as mentioned herein above, the consent if any of the prosecution is immaterial therefore, irrespective of the objections submissions urged by the learned counsel for applicant in support of present application for bail, but without making any comment on the merits of the case, this Court does not find any good ground to enlarge the applicant on bail.

In view of above, the application fails and is liable to be rejected.

It is accordingly rejected.

Order Date :- 17.10.2023/Arshad