

Court No. - 70

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 26229 of 2021

Applicant :- Akash Kumar

Opposite Party :- State of U.P.

Counsel for Applicant :- Abhay Krishna Singh, Amir Khan, Mohd. Samiuzzaman Khan, Sanjeev Kumar Yadav, Tanveer Zafar Khan, Vimal Kumar Pandey

Counsel for Opposite Party :- Rajesh Kumar Singh

Hon'ble Sameer Jain, J.

1. Shri Shyam Kishore Tripathi, learned counsel for the informant submits that he has filed his power on behalf of the informant in the office of this Court on 21.9.2022 but *in spite of* that, his name has not been shown in the cause list.

2. Heard Sri Tanveer Zafar Khan, learned counsel for the applicant, Sri Shyam Kishore Tripathi, learned counsel for the informant and Shri Shatrughan Yadav, learned AGA for the State.

3. The instant bail application has been filed by the applicant seeking release on bail in Case Crime No. 12 of 2021 under sections 363, 376-D IPC and 5/6 POCSO Act, Police Station Kotwali, District Kushinagar during pendency of trial.

4. The FIR of the present case was lodged against the applicant and co-accused Sampatti Devi and according to the FIR, on the instigation of co-accused Sampatti Devi, applicant tried to outrage the modesty of the daughter of the informant and on 05.01.2021, on instigation of co-accused Sampatti Devi, the applicant enticed away the daughter of the informant.

5. Learned counsel for the applicant submits that the entire allegations made against the applicant is totally false and actually, victim and the applicant were having love affair and father of the victim, who is the informant of the case did not like their relationship and, therefore, only due to this reason, he lodged the FIR of the present case against the applicant.

6. He further submitted although victim in her statement recorded under sections 161 Cr.P.C. and 164 Cr.P.C. made allegations of

rape against the applicant and co-accused Golu but her statements appear to be improbable. He further submits that as per the statement of the victim, on the basis of her obscene video, the applicant and co-accused Golu sexually exploited her. But, during investigation, no such video could be recovered and this fact clearly suggests that totally on the basis of false allegations, the applicant has been made accused in the present case.

7. It is further submitted that although as per transfer certificate of the school of the victim, at the time of the incident the victim was about 14 years of age, but in fact, she was around 18 years old and this fact is evident from her ossification test report, which shows that at the time of the incident, she was around 17 years old

8. He further submits in view of the judgement of the Apex Court in the case of '**P. Yuvaprakash vs. State Rep. by Inspector of Police (Criminal Appeal No.(s) 1898 of 2023) dated 18.07.2023**', the age of the child defined under the provisions of POCSO Act cannot be ascertained on the basis of transfer certificate issued by the school and, therefore, at this stage, merely on the basis of the school transfer certificate of the victim, it cannot be said that she was around 14 years of age and on the basis of her ossification test report, it appears that she may be more than 18 years old, as there may be variation of two years of either side.

9. He next argued, applicant is not having any criminal history and is in jail since 18.01.2021 i.e. more than two and half years. It is further submitted that victim of the case has already been examined by the trial court and, therefore, there is no chance of tampering with the prosecution evidence. He further submits in the chargesheet, there are as many as seven witnesses but till date only three prosecution witnesses could be examined and, therefore, there is no hope of early disposal of the trial in near future.

10. *Per contra*, learned A.G.A. as well as learned counsel for the informant opposed the prayer for bail and submit that it is a case of gang rape and in the statements recorded under sections 161 and 164 Cr.PC, victim has stated that applicant and other accused committed rape with her. Both counsels further submit that from the school record, victim, at the time of the incident, was 14 years old but neither learned AGA nor learned counsel for the informant could dispute the fact that except the transfer certificate, in this regard, there is no other evidence on record.

11. Further, they also could not dispute that as per ossification test report, victim was around 17 years of age. It is also not disputed

that applicant is not having any criminal history and he is languishing in jail since 18.02.2021.

12. I have heard all sides and perused the record.

13. Although, as per transfer certificate of the school, the victim appears to be 14 years old but, in view of the observations made by the Apex Court in the case of **P. Yuvaprakash** (supra), the age of the victim cannot be ascertained on the basis of transfer certificate of the victim and apart from the transfer certificate, the only evidence is her ossification test report to determine her age and according to the said report, she was around 17 years of age and, therefore, possibility at this stage cannot not be ruled out that at the time of the incident, victim was more than 18 years of age.

14. Further, however, victim in her statements recorded under section 161 and 164 Cr.P.C., made allegations of rape against the applicant and co-accused Golu but the story narrated by her appears to be quite unconvincing.

15. Further, as per the victim, on the basis of her obscene video, the applicant and co-accused Golu sexually exploited her as they threatened to viral her obscene videograph and, therefore, she consented to make physical relationship with them but the alleged videograph of the victim could not be recovered during investigation.

16. Further, the applicant is not having any previous criminal history and he is languishing in jail for the last more than two and a half years.

17. Further, from the chargesheet, it is reflected that there are as many as 7 prosecution witnesses but out of them only three prosecution witnesses could be examined till date. Further, the victim of the case has already been examined therefore, there is no chance of any tampering with the prosecution evidence.

18. Law is settled that bail application should not be dismissed for either preventive or punitive purposes.

19. Therefore, considering the facts and circumstances of the case as discussed above, in my considered view, the applicant is entitled to be released on bail.

20. Let the applicant **Akash Kumar** be released on bail in the aforesaid case on furnishing a personal bond and two sureties each

in the like amount to the satisfaction of the court concerned with the following conditions:-

(i) The applicant shall appear before the trial court on the dates fixed, unless his personal presence is exempted.

(ii) The applicant shall not directly or indirectly, make inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or any police officer or tamper with the evidence.

(iii) The applicant shall not indulge in any criminal and anti-social activity.

21. In case of breach of any of the above conditions, the prosecution will be at liberty to move an application before this Court for cancellation of bail of the applicant.

22. However, considering the fact that present matter relates to the provisions of POCSO Act, the trial court is directed to conclude the trial of the present case as expeditiously as possible preferably within a period of seven months from the date of production of a certified copy of this order strictly as per the provisions of section 35 of POCSO Act and section 309 IPC without granting any unnecessary adjournments to either of the parties on a day-to-day basis, if there is no legal impediment.

23. It is clarified that observations made herein are limited to the facts brought in by the parties pertaining to disposal of the bail application and the said observations shall have no bearing on the merits of the case during trial.

Order Date :- 13.10.2023

Madhurima