

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 24476 of 2023

Applicant :- Deepak Kumar

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

Counsel for Applicant :- Karuna Nand Tiwari, Mohd. Samiuzzaman Khan, Tanveer Zafar Khan

Counsel for Opposite Party :- G.A., Pradip Kumar Rai, Sanjay Pathak

Hon'ble Rajeev Misra, J.

1. Heard Mr. Samiuzzaman Khan Advocate assisted by Mr. Tanveer Zafar Khan, the learned counsel for applicant, the learned A.G.A. for State and Mr. Pradip Kumar Rai, the learned counsel for first informant/opposite party-2.

2. Perused the record.

3. Instant application for bail has been filed by applicant-Deepak Kumar seeking his enlargement on bail in Case Crime No. 426 of 2023 under Sections 363, 366, 376, 342, 506 I.P.C. and Sections 5/6 POCSO Act, Police Station-Ramkola, District-Kushinagar, during the pendency of trial.

4. Present application came up for orders on 21.09.2023 and this Court passed the following order:

"1. Heard Mr. Mohd. Samiuzzaman Khan, the learned counsel for applicant and the learned A.G.A. for State. No one appears on behalf of first informant/opposite party 2 even in revised list though the names of Mr. Pradip Kumar and Mr. Sanjay Pathak are duly published in the cause list.

2. Perused the record.

3. This application for bail has been filed by the applicant Deepak Kumar seeking his enlargement on bail in Case Crime No. 426 of 2022, under Sections 363, 366, 376, 342, 506 IPC and Section 5/6 POCSO Act, Police Station Ramkola, District Kushinagar, during the pendency of trial.

4. After some argument, it transpires that the date of birth of the prosecutrix as reported in the Transfer Certificate of the prosecutrix, copy of which is on record at page 22 of the supplementary affidavit filed by the learned counsel for applicant as well as the statement of the Principal of the Institution from where the said Transfer Certificate was issued is shown to be 1.1.2007. The occurrence giving rise to the present criminal proceedings is alleged to have occurred on 15.12.2022. As such the prosecutrix was aged about 15 years, 11 months and few days on the date of occurrence. However no medical examination of the prosecutrix has been conducted to determine her age. However the prosecutrix refused her internal medical examination.

5. As per the prosecution contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, the date of birth of the prosecutrix relied upon by the prosecution for determine her age is not worthy of consideration. As such the determination of age of the prosecutrix on basis thereof is not legally sustainable.

6. Considering the above and also the fact that there is no document on record which may be in consonance with the provisions of the Section 94 of the Act of 2015, therefore, the exact age of the prosecutrix as per her date of birth recorded in the educational or other records could not be ascertained.

7. Accordingly, the Chief Medical Officer, Kushinagar is directed to conduct ossification test/radio-logical test of the prosecutrix and determine her age. The necessary exercise shall be completed with a period of three weeks from today. The age determination report shall be transmitted to this Court directly in a sealed cover on or before the next date fixed.

8. Since the charge sheet has also been submitted against the applicant, the Investigating Officer is directed to file an application under Section 173(8)Cr.P.C. before court below and seek permission of the court for

further investigation. Therefore the Investigating Officer shall endeavour to find out the date of birth of the prosecutrix recorded in the Institution first attended by her. This exercise shall be completed by the Investigating Officer within a period of three weeks. The supplementary case diary shall therefore be transmitted to this Court by the Investigating Officer through the learned A.G.A. before the next date fixed.

9. Matter shall accordingly reappear as fresh on 12.10.2023.

Order Date :- 21.9.2023 "

5. Pursuant to above order dated 21.09.2023, an affidavit of compliance has been filed by learned A.G.A. in court today, which is taken on record.

6. Record shows that in respect of an incident which is alleged to have occurred on 15.12.2022, a delayed F.I.R dated 23.12.2023 was lodged by first informant Umesh Yadav (father of the prosecutrix) and was registered as Case Crime No.426 of 2023 under Section 363 Police Station-Ramkola, District-Kushinagar. In the aforesaid F.I.R. applicant Deepak has been nominated as solitary named accused.

7. The gravamen of the allegations made in the F.I.R. is to the effect that named accused enticed away the minor daughter of first informant i.e. prosecutrix namely X aged about 15 years on 15.12.2022.

8. After aforementioned F.I.R. was registered, Investigating Officer proceeded with statutory investigation of aforesaid case crime number in terms of Chapter XII Cr.P.C. The prosecutrix was recovered on 16.12.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 Cr.P.C., which is on record at page 21 of the paper book. The prosecutrix in her

aforesaid statement has supported the F.I.R. and has alleged that applicant forcibly took the prosecutrix to his home and thereafter deliberately and forcefully dislodged her modesty in his house. Thereafter, the prosecutrix was requested for her internal medical examination, which was refused by her. However, upon external examination no such injury was found on the body of the prosecutrix so as to denote commission of deliberate or forceful sexual assault. Ultimately, the statement of prosecutrix was recorded under Section 164 Cr.P.C., which is on record at page 26 of the paper book. The prosecutrix in her aforesaid statement has supported the F.I.R. but has departed from her earlier statement under section 161 CrP.C. inasmuch as a new story has been added in her aforesaid statement.

9. During course of investigation, Investigating Officer obtained certificate issued by the Principal of the institution which was last attended by the prosecutrix wherein the date of birth of the prosecutrix has been mentioned as 01.01.2007. The occurrence giving rise to present criminal proceedings is alleged to have occurred on 15.01.2022. As such she was aged about 15 years, 11 months and 14 days on the date of occurrence. Investigating Officer further examined the first informant and other witnesses under Section 161 Cr.P.C., who have substantially supported the F.I.R.. On the basis of above and other material collected by Investigating Officer during the course of investigation, he came to the conclusion that complicity of applicant and other two persons namely Vijay Gautam and Surya Narayan is established in the crime in question. Accordingly, Investigating Officer, submitted the charge sheet dated 14.03.2023 whereby applicant- Deepak has been charge sheeted under Sections 363, 366, 376, 342, 506 I.P.C.

and Sections 5/6 POCSO Act whereas above named co-accused have been charge sheeted under Section 323 and 506 I.P.C.

10. Learned counsel for applicant contends that though the applicant is a named as well as charge-sheeted accused yet he is liable to be enlarged on bail. With reference to the material on record, the learned counsel for applicant contends that by virtue of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, no reliance can be placed on the certificate issued by the Principal of the Institution which was last attended by the prosecution for determining her age as per the date of birth recorded therein. To buttress his submission, he has relied upon the judgement of Apex Court in **P. Yuva Prakash Vs. State 2023 SC OnLine SC 846**. In the submission of learned counsel for applicant that since there is no document inconsonance with the provisions of Section 94 (2) (i) and Section 94(2) (ii) of the Act 2015 with regard to the date of birth of the prosecutrix therefore of necessity the age of the prosecutrix has to be determined as per medical evidence. According to medical opinion, prosecutrix is said to be aged more than 18 years. He therefore submits that prosecutrix is major as such no proceeding under the provision of POCSO Act can be maintained against applicant. Attention of the court was then invited to the statement of the prosecutrix recorded under Section 164 Cr.P.C. and on the basis thereof he submits prosecutrix herself accompanied the applicant to his house. As such, prosecutrix is a willing and a consenting party. With reference to the statement of the prosecutrix as recorded under Section 164 Cr.P.C., the learned counsel for applicant submits that the prosecutrix in her aforesaid statement has departed from her earlier statement recorded under Section 161 Cr.P.C. Referring to the judgement of apex Court in **Phool Singh**

Vs. State of Madhya Pradesh, (2022) 2 SCC 74 he submits that prosecution of an accused for an offence of rape or sexual assault can be maintained even in the absence of medical evidence and on the solitary statement of the prosecutrix. However, in such a circumstance, the statement of the prosecutrix must be clear, categorical, consistent and unambiguous. When the aforesaid test is applied to the statements of prosecutrix, referred to above, it cannot be said that the statements of prosecutrix when examined as a whole, fall in the category of impeccable evidence. As such, prosecution of applicant under Sections 363, 366, 376, 342, 506 I.P.C. and Sections 5/6 POCSO cannot be maintained..

11. 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 custody since 16.01.2023. As such he has undergone more than almost 10 months of incarceration. Police report (charge-sheet) in terms of Section 173 (2) Cr.P.C. has already been submitted. Therefore the entire evidence sought to relied upon by the prosecution against applicant stands crystallised. Upto this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. Referring to the judgement of Apex Court in **Sumit Subhashchandra Gangwal Vs. State of Maharashtra, 2023 LiveLaw (SC) 373** (Paragraph 5), the learned counsel for applicant submits 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.

12. Per contra, the learned A.G.A. and the learned counsel for first informant have opposed the prayer for bail. They submit that since the applicant is a named as well as charge-sheet accused, therefore he does not deserve any indulgence by this Court. He further

submits that the prosecutrix is a young girl aged about below 18 years on the date of occurrence, whose modesty has been dislodged by applicant. However, they could not dislodge the factual and legal submissions urged by the learned counsel for applicant with reference to the record at this stage.

13. Having heard the learned counsel for applicant, the learned A.G.A., the learned counsel for 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 there is no document in consonance with the provision of Section 94 (2) (i) and Section 94(2) (ii) of the Act 2015 with regard to the date of birth of the prosecutrix therefore of necessity the age of the prosecutrix has to be determined as per medical evidence. According to medical opinion, prosecutrix is said to be aged about more than 18 years, as such the prosecutrix is major, therefore, no proceeding under the provision of POCSO Act can be maintained against applicant, the prosecutrix in her statement under Section 164 Cr.P.C. has departed from her earlier statement under Section 161 Cr.P.C., no explanation has been offered with regard to the embellishment made by the prosecutrix in her statement under Section 164 Cr.P.C., as such the same remain unexplained, the prosecutrix herself accompanied the applicant to his house. as such, prosecutrix is a willing and a consenting party, police report (charge-sheet) in terms of Section 173 (2) Cr.P.C. has already been submitted therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystallised, yet in spite of above no such circumstance could be pointed out by the learned A.G.A. necessitating the custodial arrest of applicant during the pendency of trial, the judgement of apex court in **Phool Singh (Supra)** referred to above, the clean

antecedents of applicant, the period of incarceration undergone by applicant, therefore irrespective of the objections raised by the learned A.G.A and the learned counsel for first informant in opposition to the present application for bail but without expressing any opinion on the merits of the case, applicant has made out a case for bail.

14. Accordingly, present application for bail is **allowed**.

15. Let the applicant-**Deepak Kumar** involved in aforesaid case crime number be released on bail on his 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) Applicant will not tamper with prosecution evidence.

(ii) Applicant will abide the orders of court, will attend the court on every date and will not delay the disposal of trial in any manner whatsoever.

(iii) Applicant will not indulge in any unlawful activities.

(iv) Applicant will not misuse the liberty of bail in any manner whatsoever.

16. The identity, status and residential proof of sureties will be verified by court concerned and in case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail of applicant and send him to prison

Order Date :- 19.10.2023

YK