

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 29194 of 2023

Applicant :- Mukesh @ Jhabbar

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

Counsel for Applicant :- Alok Kumar Rai

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Alok Kumar Rai, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. Instant application for bail has been filed by applicant-Mukesh @ Jhabbar seeking his enlargement on bail in Case Crime No. 52 of 2023 under Sections 363, 366,376, 504, 506 I.P.C. and Sections 3/4 POCSO Act, Police Station-Jhangha, District-Gorakhpur, during the pendency of trial.

4. At the very outset, the learned A.G.A. submits that notice of present bail application has been served upon first informant/opposite party-2 on 02.07.2023. However, in spite of service of notice, no one has put in appearance on behalf of first informant/opposite party-2 to oppose the present application for bail.

5. Record shows that in respect of an incident, which is alleged to have occurred on 18.02.2023 a prompt F.I.R. dated 18.02.2023 was lodged by first informant Sukha Devi (mother of the prosecutrix) and was registered as Case Crime No. 52 of 2023 under Sections 363, 504, 506 I.P.C., Police Station-Jhangha, District-Gorakhpur.

In the aforesaid F.I.R. applicant-Mukesh @ Jhabbar has been nominated as solitary named accused.

6. The gravamen of the allegations made in the F.I.R is to the effect that the named accused enticed away the minor grand daughter of first informant namely X, aged about 16 years.

7. 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 23.03.2023. Thereafter, statement of the prosecutrix was recorded under Section 161 Cr.P.C., which is on record at page 31 of the paper book. The prosecutrix in her aforesaid statement has not supported the F.I.R. To the contrary, the prosecutrix stated that she willingly went to the applicant and thereafter accompanied him to various places at Delhi and Gorakhpur where physical relation in between them were maintained upon the consent of the prosecutrix. Subsequently, the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the doctor, who medically examined her, has rejoined her previous statement recorded under Section 161 Cr.P.C. However, the Doctor, who medically examined the prosecutrix did not find any injury on her body so as to denote commission of deliberate and forceful penetrative sexual assault upon the prosecutrix. Certain samples were taken from the body of the prosecutrix for pathological examination. However, the result of the same is in negative. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C., which is on record at page 41 of the paper book. The prosecutrix in her aforesaid statement has rejoined her earlier statement recorded under Section 161 Cr.P.C.

8. During course of investigation, Investigating officer recovered marks sheet of the prosecutrix of Class IXth wherein the date of birth of the prosecutrix is recorded as 10.08.2007. The occurrence giving rise to the present application for bail occurred on 18.02.2023. As such the prosecutrix was aged about 15 years and 6 months. Investigating Officer further examined first informant and other witnesses under Section 161 Cr.P.C. Witnesses so examined have substantially supported the F.I.R. On the basis of above and other material collected by Investigating Officer during course of investigation, he came to the conclusion that complicity of applicant is fully established in the crime in question. Accordingly, Investigating Officer, submitted the charge sheet dated 13.04.2023 whereby applicant has been charge sheeted under Sections 363, 366, 376, 504, 506 I.P.C. and Sections 3/4 POCSO Act.

9. Present application came up for orders on 04.08.2023 and this Court passed the following order:

"1. Heard the learned counsel for applicant and the learned A.G.A. for State.

2. Since prima-faice, there is nothing on record to conclude the date of birth of the prosecutrix as per the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

3. Learned A.G.A. is directed to obtain further instructions in the matter with regard to the date of birth of the prosecutrix recorded in the institution where she first studied.

4. Matter shall accordingly, re-appear as fresh on 18.08.2023.

5. Learned A.G.A. shall ensure that the requisite instructions are positively received by him before the next date fixed.

Order Date :- 4.8.2023 "

10. In compliance of above order dated 04.08.2023, the learned A.G.A has filed an affidavit of compliance. As per medical determination of age of the prosecutrix is said to be aged about 17

years. However, the date of birth of the prosecutrix recorded in the institution which was first attended by prosecutrix could not be recovered by the Investigating Officer on the ground that the Principal of the Institution is unwell and undergoing treatment at New Delhi and secondly the institution in question is not in existence.

11. 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. Referring to the statements of the prosecutrix as recorded under section 161./164 Cr.P.C. he contends that prosecutrix has remained consistent and categorical. She is a willing and consenting party. Moreover, the prosecutrix herself went to the applicant and thereafter accompanied the applicant to various places. He therefore submits that in view of the aforesaid categorical statement of the prosecutrix, it cannot be said that applicant has abducted or kidnapped the prosecutrix. As such, no offence under Section 363, 366 can be said to have been committed by applicant. He further submits that physical relationship was maintained on the consent of prosecutrix. Since the prosecutrix is willing and consenting party therefore no offence under Section 376 I.P.C. or Section 3/4 POCSO Act can be said to have been committed by applicant as there was no deliberate act of applicant to dislodge the modesty of the prosecutrix. As per medical evidence the prosecutrix is aged about 17 years.

12. 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 23.03.2023. As such he has undergone more than six and a half 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. On the above premise, 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.

13. Per contra, the learned A.G.A. has opposed the prayer for bail. He submits that since the applicant is a named as well as charge-sheet accused, therefore he does not deserve any indulgence by this Court. The prosecutrix is below 18 years of age. As such, she is a child within the meaning of POCSO Act therefore her consent if any is immaterial. As such, no sympathy be shown by this court in favour of applicant. However he could not dislodge the factual and legal submissions urged by the learned counsel for applicant with reference to the record at this stage.

14. Having heard the learned counsel for applicant, the learned A.G.A. for State, 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 the statement of the prosecutrix recorded under Sections 161/164 Cr.P.C., the prosecutrix is a willing and consenting party, the prosecutrix has herself accompanied applicant, as such the prosecutrix was not abducted or kidnapped by the applicant for the purpose of marriage or to dislodge her modesty, as such prima facie no offence under Section 363, 366 I.P.C. is made out against applicant, since physical relations were maintained on the consent of prosecutrix, therefore, no offence under Section 376 I.P.C, Section 3/4 POCSO Ac can be said to have been committed by

applicant as there is no deliberate or forceful sexual assault, even though the prosecutrix was below 18 years of age on the date of occurrence but she is a consenting party, the police report (charge-sheet) in terms of Section 173 (2) Cr.P.C. has already been submitted against applicant, therefore, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallised, yet in spite of above, the learned A.G.A. could not point out any such circumstance from the record necessitating the custodial arrest of applicant during the pendency of trial, the judgement of apex Court in **Sumit Subhashchandra Gangwal Vs. State of Maharashtra, 2023 LiveLaw (SC) 373** (Paragraph 5) the clean antecedents of applicant, the period of incarceration undergone, therefore, irrespective of the objections raised by learned A.G.A. 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.

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

16. Let the applicant- **Mukesh @ Jhabbar** 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.

17. 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 :- 18.10.2023

YK