

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 34790 of 2023

Applicant :- Abhay @ Babu Gihar

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

Counsel for Applicant :- Ayank Mishra

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Ayank Mishra, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. This application for bail has been filed by applicant Abhay @ Babu Gihar seeking his enlargement on bail in Case Crime No.247 of 2022, under Sections 363, 366, 376 IPC and Section 3/4 Pocso Act, police station Kotwali Farrukhabad, district Farukhabad.

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

"Heard Mr. Ayank Mishra, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant Abhay @ Babu Gihar seeking his enlargement on bail in Case Crime No.247 of 2022, under Sections 363, 366, 376 IPC and Section 3/4 Pocso Act, police station Kotwali Farrukhabad, district Farukhabad.

After some arguments, it transpires from the record that the prosecutrix has refused for her internal medical examination. The age of the prosecutrix has been determined as per the date of birth recorded in the School Leaving Certificate of the prosecutrix of Class-VIII.

By virtue of the provisions contained in Section 94 of The

Juvenile Justice (Care and Protection of Children) Act, 2015, the said certificate cannot be relied upon for determining the date of birth of the prosecutrix recorded therein. Similar view has been taken by the Supreme Court in P. Yuvprakash Vs. State Represented by Inspector of Police 2023 LiveLaw (SC) 538.

Since the charge-sheet has been submitted against the applicant on 01.12.2022, Investigating Officer is directed to conduct further investigation in the matter after obtaining leave of the court in terms of Section 173(8) CrPC. Investigating Officer shall examine the record of the institution where the prosecutrix had first studied and shall endeavour to discover the date of birth of the prosecutrix as recorded in the said institution. The said exercise shall be completed within a period of three weeks from today. The copy of the supplementary case diary shall also be transmitted to this Court by Investigating Officer through the learned A.G.A. on or before the next date fixed.

The Chief Medical Officer, Farrukhabad is also directed to get ossification/radio-logical test of the prosecutrix conducted for determining her age. The said exercise shall be completed within a period of three weeks from today. The age determination report shall be sent directly to this Court in a sealed envelop on or before the next date fixed.

Put up again as fresh on 12.10.2023.

Order Date :- 21.9.2023. "

5. In compliance of above order dated 21.09.2023, the learned A.G.A. has filed two affidavits of compliance, which are already on record.

6. Record shows that in respect of an incident, which is alleged to have occurred on 01.02.2022, a delayed F.I.R. dated 02.05.2022 was lodged by first informant Smt. Baby (mother of the prosecutrix) and was registered as Case Crime No.247 of 2022, under Sections 363, 366 IPC, police station Kotwali Farrukhabad, District Farukhabad,. In the aforesaid F.I.R. three persons namely Abhay @ Babu (applicant herein), Aradhana and Shekhar have been nominated as 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 the first informant i.e. prosecutrix namely X aged about 17 years.

8. Learned counsel for applicant submits that though applicant is a named and charge-sheeted accused yet he is liable to be enlarged on bail. He submits that subsequent to above F.I.R. dated 02.05.2022, the prosecutrix was recovered on 23.11.2022. Thereafter, the statements of the prosecutrix were recorded under Sections 161/164 Cr.P.C. wherein the prosecutrix has not supported the F.I.R. Subsequent to order dated 21.09.2023, medical determination of the age of the prosecutrix was done. As per medical opinion, the prosecutrix is said to be aged about 18 years. He therefore contends that the prosecutrix is major, She is a willing and consenting party. As such, applicant is liable to be enlarged on bail.

9. 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 28.11.2022. As such he has undergone more than 11 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. The medical evidence does not support the charge-sheet. 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.

10. 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. 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.

11. 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 medical opinion the prosecutrix is said to be aged about 18 years, the prosecutrix in her statements under Sections 161/164 Cr.P.C. has not supported the F.I.R., prima facie the prosecutrix appears to be a willing and consenting party, the age of the prosecutrix was determined with reference to her date of birth recorded in the School Leaving Certificate/Transfer Certificate which is manifestly illegal in view of the provisions contained in Section 94 of the Juvenile Justice (care and Protection) Act, 2015, the judgement of Supreme Court in **P. Yuva Prakash Vs. State 2023 SC OnLine SC 846**, clean antecedents of applicant, period of incarceration undergone, 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 crystallized, 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, 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.

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

13. Let the applicant- **Abhay @ Babu Gihar** 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.

14. 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 :- 7.11.2023

YK