

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 33808 of 2023

Applicant :- Dharmendra

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

Counsel for Applicant :- Ashvni Mishra

Counsel for Opposite Party :- G.A., Vipin Chandra Lal

Hon'ble Rajeev Misra,J.

1. Heard Mr. Ashvni Mishra, the learned counsel for applicant, the learned A.G.A. for State and Mr. Rishabh Tiwari, Advocate, holding brief of Mr. Vipin Chandra Lal, the learned counsel representing first informant-opposite party 4.

2. Perused the record.

3. This application for bail has been filed by applicant-Dharmendra seeking his enlargement on bail in Case Crime No. 108 of 2023, under Sections 363, 366, 368, 376(3) IPC and Sections 3/4 POCSO Act, Police Station-Pashim Sharira, District-Kaushambi during the pendency of trial.

4. Record shows that in respect of an incident, which is alleged to have occurred on 27.04.2023, a delayed FIR dated 15.05.2023 was lodged by first informant-Roshan Lal (father of the prosecutrix) and was registered as Case Crime No. 108 of 2023, under Sections 363, 366, 368, Police Station-Pashim Sharira, District-Kaushambi . In the aforesaid FIR, 4 persons namely (1) Dharmendra (2) Chhedilal, (3) Heeralal and (4) Pooja Devi have been nominated as named accused.

5. The gravamen of the allegations made in the FIR is to the effect that named accused enticed away the daughter of the first informant i.e. the prosecutrix namely X aged about 13 years.

6. After above-mentioned FIR was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter-XII Cr.P.C. It is apposite to mention here that that the prosecutrix was recovered on 15.05.2023 i.e. prior to the lodging of the FIR. The Investigating Officer recorded the statement of the prosecutrix under Section 161 Cr.P.C. Same is

on record as Annexure-1 to the supplementary affidavit filed by the learned counsel for applicant. The prosecutrix in her aforesaid statement has not supported the FIR. As per the said statement, the prosecutrix appears to be a willing and consenting party. Thereafter, the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor, who medically examined her, has departed from her previous statement under Section 161 Cr.P.C. and has now supported the FIR. However, the Doctor, who medically examined the prosecutrix, did not find any signs on her body so as to denote commission of deliberate or forceful sexual assault. With regard to the private part of the prosecutrix, the Doctor has opined that no injury was detected on the same. Certain samples were taken from the body of the prosecutrix for pathological examination. However, according to the learned A.G.A., the results of the same are in negative. As per the medical opinion, the prosecutrix is said to be aged about 16 to 17 years. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. Same is on record at page 23 of the paper book. The prosecutrix in her aforesaid statement has departed from her previous statement under Section 161 Cr.P.C. and has now come up with a new story alleging human trafficking.

7. During course of investigation, Investigating Officer examined first informant and other witnesses under Section 161 Cr.P.C. 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 alone is fully established in the crime in question. He, accordingly, submitted the charge sheet dated 11.07.2020 whereby applicant has been charge sheeted under sections 363, 366, 368, 376(3) IPC and Sections 3/4 POCSO Act whereas the other named accused have been exculpated.

8. Learned counsel for applicant contends that though applicant is a named as well as charge sheeted accused yet he is liable to be enlarged on bail. According to the learned counsel for applicant, the medical evidence does not support the charge sheet. It is then contended that the prosecutrix in her statements under Sections 161/164 Cr.P.C. has not remained clear, categorical and consistent. To the contrary, the prosecutrix in her subsequent statement under Section 164 Cr.P.C. has departed from her previous statement under Section 161 Cr.P.C. and has come up with a new story which is totally alien to the FIR as well as the statement under Section 161 Cr.P.C. However, the departure so made remains unexplained up to this stage. On the above premise, it is thus urged that when

the statements of the prosecutrix referred to above were taken as a whole suffer from the vice of exaggeration, embellishment and contradiction for which, no explanation has come forward from the prosecutrix herself, therefore, the same are unworthy of credit and therefore, not worthy of reliance.

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 jail since 16.05.2023. As such, he has undergone more than 6 months of incarceration. The police report in terms of Section 173(2) Cr.P.C. has already been submitted. As such, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized. However, up to this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. On the above premise, he 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. and the learned counsel representing first informant have opposed the prayer for bail. They submit that the occurrence giving rise to present criminal proceedings occurred on 27.04.2023. As per the date of birth of the prosecutrix recorded in the institution first attended by her i.e. 10.07.2007, the prosecutrix was aged about 15 years, 9 months and 17 days on the date of occurrence. Since the prosecutrix was below 16 years of age, therefore, her consent, if any, is wholly immaterial. Considering the tender age of the prosecutrix, the applicant does not deserve any sympathy by this Court.

11. When confronted with above, the learned counsel for applicant could not overcome the same.

12. Having heard, the learned counsel for applicant, the learned A.G.A. for State, the learned counsel representing first informant, upon perusal of record, evidence, nature and gravity of offence, complicity of applicant, accusations made coupled with the fact that since the prosecutrix was below 16 years of age on the date of occurrence, therefore, her consent, if any, is wholly immaterial, the law laid down by the Apex Court in **X (Minor) Vs. The State of Jharkhand and Another 2022 LiveLaw (SC) 194**, therefore, irrespective of the varied submissions urged by the learned counsel for applicant in support of the present application for bail, but without making any comments on the merits of the case, this Court does not find any good or sufficient ground to enlarge the applicant on bail.

13. As a result, present application for bail fails and is liable to be rejected.

14. It is accordingly **rejected**.

Order Date :- 16.11.2023

Vinay