

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 33805 of 2023

Applicant :- Kahla Alias Kala Alias Vipin Yadav

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

Counsel for Applicant :- Radhey Shyam Yadav, Rahul Kumar Sharma

Counsel for Opposite Party :- G.A., Mayank Gaurav, Shailendra Singh Rathore

Connected with

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 27070 of 2023

Applicant :- Nilesh

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

Counsel for Applicant :- Radhey Shyam Yadav

Counsel for Opposite Party :- G.A., Mayank Gaurav, Prashant Kumar, Shailendra Singh Rathore

Hon'ble Rajeev Misra, J.

Heard Mr. Rahul Kumar Sharma, the learned counsel for applicant- Kahla Alias Kala Alias Vipin Yadav, Mr. Radhey Shyam Yadav, the learned counsel for applicant- Nilesh, the learned A.G.A. for State and Mr. Mayank Gaurav, the learned counsel for first informant/opposite party-2.

Present applications for bail came up for orders on 19.10.2023 and this Court passed the following order:

"Heard Mr. Radhey Shyam Yadav, the learned counsel for applicants Kahla Alias Kala Alias Vipin Yadav and Nilesh the learned A.G.A. for State and Mr. Mayank Gaurav and Mr. Shailendra Singh Rathore, the learned counsel representing first informant opposite party 2.

Perused the record.

These applications for bail have been filed by the applicants Kahla Alias Kala Alias Vipin Yadav and Nilesh seeking their enlargement on bail in Case Crime No. 32 of 2023, under Sections 363, 366, 323, 376D IPC and Sections 5/6 of PCOSO Act, P.S. Kampil, District Farrukhabad, during the pendency of trial.

After some arguments, it transpires that the age of prosecutrix has been

determined with reference to the date of birth of prosecutrix mentioned in the certificate issued by Principal of the institution, where the prosecutrix was studying. As per the said certificate, the date of birth of the prosecutrix is reported to be 10.3.2007. As such, the prosecutrix is said to be aged about 15 years, 11 months and 3 days on the date of occurrence.

By virtue of the provisions contained in Section 94 of Juvenile Justice (Care and Protection of Children) Act 2015, the age of the prosecutrix could not be determined with reference to her date of birth mentioned in any document recognized under Section 94 (ii) (i) (ii) of the Act 2015.

Therefore, the determination of age of the prosecutrix with reference to the certificate issued by the Principal is manifestly illegal. The learned A.G.A. submits that the charge sheet has already been submitted against applicants on 8.5.2023.

In view of above, the Investigating Officer is directed to submit an application under Section 173 (8) Cr. P. C. before the Court below seeking permission of the Court to conduct further investigation. After permission is granted by the Court below, the Investigating Officer shall proceed to discover the date of birth of the prosecutrix mentioned in institution first attended by the prosecutrix and any other document enumerated in Section 94 of the Act, 2015. The necessary exercise shall be completed within a period of three weeks from today. Copy of the supplementary case diary shall be transmitted by the Investigating Officer to this Court through the learned A.G.A. before the next date fixed.

Matter shall re-appear as fresh on 16.11.2023. "

Subsequent to above order, the learned A.G.A. has filed affidavits of compliance, in Court today which are taken on record. As per the said affidavit of compliance, the date of birth of the prosecutrix recorded in the institution first attended by her is 10.3.2007.

Record shows that in respect of an incident which is alleged to have occurred on 13.2.2023 a belated F.I.R. dated 15.2.2023 was lodged by first informant Mor Singh (father of the prosecutrix) and was registered as Case Crime No. 35 of 2023, under sections 363, 366, 323, 376D IPC and Section 5/6 POCSO Act, Police Station- Kampil, District- Farrukhabad. In the aforesaid F.I.R. applicant Nilesh has been nominated as solitary named accused.

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

After aforesaid F.I.R. 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 prior to lodging of the F.I.R. dated 15.2.2023, a missing person report dated 14.2.2023 was lodged. The prosecutrix was recorded on 15.2.2023. It is thereafter the F.I.R. was lodged. Thereafter the statement of the prosecutrix was recorded under section 161

Cr.P.C. Same is on record at page 46 of the paper book. The prosecutrix in her aforesaid statement has not supported the F.I.R. To the contrary the prosecutrix has stated that she is in relationship with named accused. Physical relationships were established between the parties upon the consent of the prosecutrix herself. 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 stated that named accused Nilesh has dislodged her modesty. However, the Doctor who medically examined her did not find any signs on her body so as to denote deliberate sexual assault. With regard to private part of the prosecutrix, the Doctor opined as follows:

"Hymen old healed torn"

Certain samples were taken from the body of deceased for pathological examination. However, the supplementary medico legal report of the prosecutrix has not been brought on record. As per 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., The same is on record at page 63 of the paper book. Prosecutrix in her aforesaid statement has implicated both the accused for deliberately and forcibly dislodging her modesty. During the Course of investigation, Investigating Officer examined the first informant and other witness under section 161 Cr.P.C. Witness so examined have also supported the F.I.R. On the basis of above and other material collected by Investigating Officer during course of investigation, he opined to submit charge sheet. Accordingly Investigating Officer submitted the charge sheet dated 1.9.2021. whereby applicants have been charge-sheeted under sections 363, 366, 323, 376D IPC and Section 5/6 POCSO Act.

Learned counsel for applicant submits that though the applicants are named as well as charge-sheeted accused, yet they are liable to be enlarged on bail. According to learned counsel for applicant-Kahla Alias Kala Alias Vipin Yadav, is not named in the F.I.R. The complicity of this aforesaid applicant is emerged in the crime in question in the statement of prosecutrix under section 164 Cr.P.C. Prosecutrix has not implicated the applicant in the crime in question in her previous statement under section 161 Cr.P.C. as well as in her statement before the Doctor who medically examined her. He, therefore contends that implication of applicant in the crime in question is an after thought for which no explanation has come forward. It is then contended by learned

counsel for applicant- Nilesh that prosecutrix was inconsequential relationship with the aforesaid applicant. Referring to the statement of the prosecutrix, as recorded under section 161 Cr.P.C., he submits that prosecutrix in her statement has clearly and categorically not supported the F.I.R. Prosecutrix willingly accompanied the applicant and therefore, no offence under section 363 and 366 IPC can be said to have been committed by applicant inasmuch the prosecutrix was neither abducted nor kidnapped by applicant. On the above premise, he therefore submits that since no act of deliberate or forceful sexual assault was committed by applicant, therefore, no offence under section 376D IPC and Section 5/6 POCSO Act can be said to have been committed by applicant- Nilesh.

Even otherwise, applicants are men of clean antecedents inasmuch as they have no criminal history to their credit except the present one. Applicants are in jail since 19.4.2023. As such, they have undergone more than six months of incarceration. The police report in terms of Section 173 (2) Cr.P.C. has already been submitted against applicant, as such, the entire evidence sought to be relied upon by prosecution against applicants stands crystalized. However, upto this stage, no such circumstance has emerged necessitating the custodial arrest of applicants during the pendency of trial. It is thus urged that applicants are liable to be enlarged on bail. In case the applicants are enlarged on bail, they shall not misuse the liberty of bail and shall co-operate with the trial.

Per contra, the learned A.G.A. and learned counsel for first informant have opposed the prayer for bail. They submit that since applicants are named as well as charge sheeted accused, therefore they do not deserve any indulgence by this Court. As per the material on record, the date of birth of the prosecutrix recorded in the institution first attained by her is 10.3.2007. The occurrence giving rise to present proceedings occurred on 13.2.2023. As such, the prosecutrix was young girl of tender age 15 years, 11 months and 13 days. On the above premise, it is thus urged that since prosecutrix is below 16 years of age therefore applicants do not deserve any indulgence by this Court.

Having heard the learned counsel for applicants, the learned A.G.A. for State, upon perusal of material brought on record, evidence, nature and gravity of offence as well as complicity of applicants, accusation made coupled with the fact that the Court finds that as per information gathered by Investigating Officer, the date of birth of the prosecutrix recorded in the institution first attended by her is 10.3.2007, the occurrence giving rise to present

proceedings occurred on 13.2.2023. as such, the prosecutrix was aged about 15 years, 11 months and 13 days i.e. below 16 years of age, therefore in view of above, even if the prosecutrix was inconsequential relationship with named accused Nilesh, yet no benefit can be granted in favour of applicant Nilesh. In view of the judgement of Supreme Court in **X(Minor) Vs/State of Jharkhand and Anr., 2022 Live Law (SC) 194**. However, with regard to applicant Kahla Alias Kala Alias Vipin Yadav, the Court finds that complicity of this applicant is neither alleged in the F.I.R. nor the prosecutrix has implicated this applicant in her statement under section 161 Cr.P.C or in her statement before the Doctor who medically examined her. The complicity of this applicant in the crime in question has emerged for the first time in subsequent statement of the prosecutrix under section 164 Cr.P.C., the prosecutrix has thus departed from her previous statement, as such, exaggeration, embellishment and contradiction has emerged in the aforesaid statement of prosecutrix, which remains unexplained upto this stage, the period of incarceration undergone, the clean antecedents of applicant, the Police Report 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- Kahla Alias Kala Alias Vipin Yadav stands crystalized yet 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, but without making any comment on the merits of the case, the applicant- Kahla Alias Kala Alias Vipin Yadav has made out a case for bail, whereas no good ground is made out to enlarge the applicant-Nilesh on bail. Accordingly the bail application of applicant- Kahla Alias Kala Alias Vipin Yadav is **allowed**, whereas the bail application of applicant- Nilesh is **rejected**.

Let the applicant **Kahla Alias Kala Alias Vipin Yadav** be released on bail in aforesaid case crime number 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) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT THAT HE/SHE SHALL NOT SEEK ANY ADJOURNMENT ON THE DATE FIXED FOR EVIDENCE WHEN THE WITNESSES ARE PRESENT IN COURT. IN CASE OF DEFAULT OF THIS CONDITION, IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT IT AS ABUSE OF LIBERTY OF BAIL AND PASS ORDERS IN ACCORDANCE WITH LAW.

(ii) THE APPLICANT SHALL REMAIN PRESENT BEFORE THE TRIAL COURT ON EACH DATE FIXED, EITHER PERSONALLY OR THROUGH

HIS/HER COUNSEL. IN CASE OF HIS/HER ABSENCE, WITHOUT SUFFICIENT CAUSE, THE TRIAL COURT MAY PROCEED AGAINST HIM/HER UNDER SECTION 229-A IPC.

(iii) IN CASE, THE APPLICANT MISUSES THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE HIS/HER PRESENCE PROCLAMATION UNDER SECTION 82 CR.P.C., MAY BE ISSUED AND IF APPLICANT FAILS TO APPEAR BEFORE THE COURT ON THE DATE FIXED IN SUCH PROCLAMATION, THEN, THE TRIAL COURT SHALL INITIATE PROCEEDINGS AGAINST HIM/HER, IN ACCORDANCE WITH LAW, UNDER SECTION 174-A IPC.

(iv) THE APPLICANT SHALL REMAIN PRESENT, IN PERSON, BEFORE THE TRIAL COURT ON DATES FIXED FOR (1) OPENING OF THE CASE, (2) FRAMING OF CHARGE AND (3) RECORDING OF STATEMENT UNDER SECTION 313 CR.P.C. IF IN THE OPINION OF THE TRIAL COURT ABSENCE OF THE APPLICANT IS DELIBERATE OR WITHOUT SUFFICIENT CAUSE, THEN IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT SUCH DEFAULT AS ABUSE OF LIBERTY OF BAIL AND PROCEED AGAINST THE HIM/HER IN ACCORDANCE WITH LAW.

(v) THE TRIAL COURT MAY MAKE ALL POSSIBLE EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANT.

However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his/her bail so granted by this court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

Order Date :- 16.11.2023

Arshad