

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 34993 of 2023

Applicant :- Rajveer Kumar

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

Counsel for Applicant :- Jitendra Singh

Counsel for Opposite Party :- G.A.,Aarushi Khare

Hon'ble Rajeev Misra,J.

1. Heard Mr. Jitendra Singh, the learned counsel for applicant, the learned A.G.A. for State and Ms. Aarushi Khare, the learned counsel representing opposite party-3, High Court Legal Service Committee, Allahabad.

2. Perused the record.

3. Instant application for bail has been filed by applicant-Sachin seeking his enlargement on bail in Case Crime No. 182 of 2023 under Sections 363, 366, 376, 323, 506, 342 I.P.C. and Section 3/4 POCSO Act, Police Station-Tilhar, District-Shahjahanpur, 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 29.07.2023. However, in spite of service of notice, no one has put in appearance on behalf of first informant/opposite party-2 to oppose this application.

5. Present application came up for orders on 10.10.2023 and this Court passed the following orders:

"1. Heard Mr. Jitendra Singh, the learned counsel for applicant, the learned A.G.A. for State and Mrs. Aarushi Khare, the

learned counsel representing first informant/opposite party-2.

2. Perused the record.

3. Instant bail application has been filed by applicant-Rajveer Kumar seeking his enlargement on bail in Case Crime No. 182 of 2023 under Sections 363, 366, 376, 323, 506, 342 I.P.C. and 3/4 POCSO Act, Police Station-Tilhar, District-Shahjahanpur, during the pendency of trial i.e Sessions Trial No.1029 of 2023 (State Vs. Rajveer) now pending in Court of Special Judge (POCSO Act)/Additional Sessions Judge, Court No. 8, Shahjahanpur.

4. After some arguments, it transpires that age of the prosecutrix has been determined on the basis of her date of birth recorded in the certificate issued by the Principal of the Institution last attended by the prosecutrix. The extract of the same is part of case diary which has been brought on record as Annexure 9 to the affidavit filed in support of bail application

5. By virtue of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 as well as the judgement of Apex Court in P. Yuva Prakash Vs. State 2023 SC OnLine SC 846, the said document cannot be relied upon to conclude the age of the prosecutrix as per the date of birth of the prosecutrix recorded therein. The date of birth of the prosecutrix mentioned in any of the documents recognised under Sections 94 (1) (a) and 94 (1) (b) of the aforesaid Act alone can be taken into consideration for determining the age of the prosecutrix.

6. In view of the fact that police report in terms of Section 173 (2) Cr.P.C. has been submitted on 09.06.2023 against applicant, the Investigating Officer is directed to submit an application before court concerned in terms of Section 173 (8) Cr.P.C. seeking permission of the court to conduct further investigation. After obtaining permission of the court, Investigating Officer shall conduct further investigation to find out the date of birth of the prosecutrix recorded in the institution which was first attended by her.

7. Let the necessary exercise be completed by the Investigating Officer within three weeks.

8. Copy of supplementary case diary shall be transmitted to this Court through the learned A.G.A. before the next date fixed.

9. Matter shall accordingly re-appear as fresh on 03.11.2023.

Order Date :- 10.10.2023 "

6. In compliance of above order dated 10.10.2023, the learned A.G.A has filed an affidavit of compliance in Court today, which is taken on record.

7. Record shows that in respect of an incident, which is alleged to have occurred on 19.03.2023, a delayed F.I.R. dated 21.03.2023 was lodged by first informant Sonpal (father of the prosecutrix) and was registered as Case Crime No. 182 of 2023 under Sections 363 I.P.C., Police Station-Tilhar, District-Shahjahanpur,. In the aforesaid F.I.R. five persons namely Rajveer, Ramveer, Dharmveer @ Katiya, Asit and Anil have been nominated as named accused.

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

9. After aforementioned F.I.R. was registered, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter XII Cr.P.C. The prosecutrix was recovered on 22.03.2023. Thereafter statement of the prosecutrix was recorded under Section 161 Cr.P.C., which is on record at page 36 of the paper book. The prosecutrix in her aforesaid statement has clearly stated that she herself called Ramveer the applicant herein and accompanied him. The prosecutrix further stated that she went to Delhi with applicant and thereafter to Punjab. Subsequent to above, 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 under Section 161 Cr.P.C. The Doctor, who medically

examined the prosecutrix did not find any such signs on her body so as to denote commission of deliberate sexual assault. However, with regard to the private part of the prosecutrix, the Doctor opined as under:

"Hymen - Old torned"

10. Certain samples were taken from the body of the prosecutrix for pathological examination. However, the results of the same are in negative. As per supplementary medico legal report, the prosecutrix is said to be aged about 16 years,

11. During course of investigation, Investigating Officer recovered school leaving certificate of the prosecutrix wherein date of birth of the prosecutrix has been mentioned as 20.08.2005. The occurrence giving rise to present criminal proceedings is alleged to have occurred on 19.03.2023. As such prosecutrix was aged about 17 years 6 months and 29 days on the date of occurrence. 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, he submitted the charge sheet dated 07.06.2023 whereby applicant alone has been charge sheeted under Sections 363, 366, 376, 323, 506, 342 I.P.C. and Section 3/4 POCSO Act whereas other named accused have been exculpated.

12. With reference to compliance affidavit filed today, the learned A.G.A. contends that as per school leaving certificate of the prosecutrix first attended by her, copy of which is on record at page 6 of the compliance affidavit, the date of birth of the prosecutrix is 20.08.2005.

13. 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. Attention of the court was then invited to the statement of the prosecutrix recorded under Sections 161 and 164 Cr.P.C. Drawing a parallel between the two statements, the learned counsel for applicant submits that prosecutrix is not clear, categorical and consistent in her statements. In her subsequent statement under Section 164 Cr.P.C. a departure was made from her previous statement under Section 161 Cr.P.C. He therefore submits that the prosecutrix has not been clear and consistent in her statements referred to above. On the above premise, it is thus urged by learned counsel for applicant that the statements of prosecutrix, referred to above suffers from the vice of embellishment and contradiction , which remains unexplained. Referring to the judgement of apex Court in **Phool Singh Vs. State of Madhya Pradesh, (2022) 2 SCC 74** he submits that conviction of an accused for an offence of rape or sexual assault can be maintained even in 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. The prosecutrix is a willing and consenting parry. The prosecutrix was aged about 17 years 6 months and 29 days on the date of occurrence. He therefore submits that applicant is liable to be enlarged on bail.

14. 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 03.04.2023. As such he

has undergone almost seven months of incarceration. 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 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. He therefore 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.

15. Per contra, the learned A.G.A. for State and the learned counsel representing opposite party-3 have vehemently 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. 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.

16. Having heard the learned counsel for applicant, the learned A.G.A. for State, the learned counsel representing opposite party -3, 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 prosecutrix in her statement under Section 161 has not supported the F.I.R., as per said statement, the prosecutrix is a willing and consenting party, the prosecutrix has departed from her previous statement under Section 161 Cr.P.C. in her subsequent statement under Section 164 Cr.P.C., departure so made remains unexplained, from the perusal of the statement of the prosecutrix it is evident that prosecutrix has accompanied the applicant to different places, prima facie prosecutrix is a willing and consenting party, the judgement of Apex Court referred to above, the contradiction emerging in the

subsequent statement of the prosecutrix under Section 164 Cr.P.C. remains unexplained upto this stage, therefore prima facie no prosecution of applicant can be maintained on the basis of the same, , police report (charge-sheet) in terms of Section 173 (2) Cr.P.C. has been submitted therefore the entire evidence sought to relied upon by the prosecution against applicant stands crystallised, yet in spite of above, the learned A.G.A. and the learned counsel representing opposite party-3 could not pointed out any such circumstance from the record necessitating the custodial arrest of applicant during the pendency of trial, the clean antecedents of applicant, the period of incarceration undergone by applicant the judgement of Supreme Court in **Sumit Subhashchandra Gangwal Vs. State of Maharashtra, 2023 LiveLaw (SC) 373** (Paragraph 5), therefore, irrespective of the objections raised by the 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.

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

18. Let the applicant-**Rajveer 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.

19. 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 :- 3.11.2023

YK