

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 34432 of 2023

Applicant :- Kishan

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

Counsel for Applicant :- Pankaj Bharti

Counsel for Opposite Party :- G.A., Amit Rai

Hon'ble Rajeev Misra, J.

Heard Mr. Pankaj Bharti, the learned counsel for applicant and the learned A.G.A. for State.

Perused the record.

This application for bail has been filed by applicant Kishan seeking his enlargement on bail in Case Crime No. 254 of 2023, under Sections 363, 366, 376 IPC and U/s 3/4 POCSO Act, Police Station- Kotwali Nagar, District Muzaffar Nagar during the pendency of trial.

Record shows that in respect of an incident which is alleged to have occurred on 24.4.2023, a belated F.I.R. dated 29.4.2023 was lodged by first informant Sunita Devi and was registered as Case Crime No. 254 of 2023, under Sections 363, 366, 376 IPC and U/s 3/4 POCSO Act, Police Station- Kotwali Nagar, District Muzaffar Nagar. In the aforesaid F.I.R. four persons namely, Kishan, Rekha, Bittu and Prati, have been nominated as solitary named accused.

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

Subsequent to aforesaid F.I.R., Investigating Officer proceeded with statutory investigation of aforesaid case crime number in terms of Chapter XII Cr.P.C. Prosecutrix was recovered on 6.5.2023. Thereafter, statement of prosecutrix was recorded by Investigating Officer under section 161 Cr.P.C on 6.5.2023, which is on record at page 29 of the paper book. Prosecutrix in her aforesaid statement has not supported the F.I.R. The genesis of the statement of the prosecutrix is that she is a willing and consenting party. She herself accompanied the applicant. Thereafter,

prosecutrix was requested for her internal medical examination, which was refused by her. Ultimately, statement of the prosecutrix was recorded under section 164 Cr.P.C. which is on record at page 38 of the paper book. The prosecutrix in her aforesaid statement has rejoined her previous statement. During course of investigation, Investigating Officer recovered the certificate of the Principal of the institution where the prosecutrix had last studied. As per the certificate of the Principal, the date of birth of the prosecutrix recorded in the School record is 18.12.2007. The occurrence giving rise to present proceedings is alleged to have occurred on 24.2.2023. As such, prosecutrix was aged about 15 years and four months. Investigating Officer recorded the statement of first informant and other witness under section 161 Cr.P.c. who have 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 the named accused i.e. applicant is established in the crime in question. Accordingly he submitted the charge sheet dated 21.6.2023, whereby applicant has been charge-sheeted under sections 363, 366, 376 IPC and U/s 3/4 POCSO Act.

Present application came up for orders on 26.9.2023 and this Court passed the following order:

"1. Heard Mr. Pankaj Bharti, the learned counsel for applicant, the learned A.G.A. for State and Mr. Amit Rai, the learned counsel representing first informant/opposite party-2.

2. Perused the record.

3. Instant bail application has been filed by applicant-Kishan seeking his enlargement on bail in Case Crime No. 254 of 2023 under Sections 363, 366, 376 I.P.C. and 3/4 POCSO Act, Police Station-Kotwali Nagar, District-Muzaffar Nagar, during the pendency of trial.

4. After some arguments, it transpires that age the prosecutrix has been determined on the basis of her date of birth recorded in the certificate issued by the Principal of Arya Kanya Pathshala Inter College, Muzaffar Nagar.

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.

6. In view of the fact that police report in terms of Section 173 (2) Cr.P.C. has been submitted on 28.05.2023, 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. Copy of supplementary case diary shall be transmitted to this Court through the learned A.G.A. before the next date fixed.

8. Matter shall accordingly reappear as fresh on 11.10.2023. "

Pursuant to above order dated 26.9.2023, the learned A.G.A. has filed an affidavit of compliance which is already on record. The birth certificate of the prosecutrix has been brought on record as Annexure-1 to the aforesaid affidavit of compliance

Learned counsel for applicant submits that though applicant is a named as well as charge sheeted accused yet he is liable to be enlarged on bail. Prosecutrix has refused for her internal medical examination. As such, there is no medical evidence to support the ocular version of the occurrence. Attention of the Court was invited to the statements of the prosecutrix recorded under sections 161/164 Cr.P.C. On the basis of above, it is urged that the prosecutrix is a willing and consenting party. Physical relation between the parties were maintained upon the consent of the prosecutrix herself. As such, no deliberate sexual assault was committed by applicant upon the prosecutrix. On the cumulative strength of above, it is urged by the learned counsel for applicant that no offence as alleged can be said to have been committed by applicant.

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 6.5.2023. As such, he has undergone more than five months of incarceration. 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 applicant stands crystalized. Up to this stage no such circumstance has emerged, necessitating the custodial arrest of applicant. It is thus urged 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.

Per contra, the learned A.G.A. and the has opposed the prayer for bail. He submits that since applicant is a named as well as charge sheeted accused, therefore he does not deserve any indulgence by this Court. The date of birth of the prosecutrix as recorded in the birth certificate is 18.12.2007. As such, prosecutrix was aged about 15 years, 4 months and 6 days on the date of occurrence. Even if the prosecutrix is a consenting party, no benefit can be derived from the same. Consequently, her consent is immaterial. To buttress his submission he has relied upon the judgement of

Supreme Court in **X(Minor) Vs/ State of Jharkhand and Anr., 2022 Live Law (SC) 194**. It is thus urged that no sympathy be shown in favour of applicant.

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

Having heard the learned counsel for applicant, 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 applicant, accusation made coupled with the fact that even though the prosecutrix in her statement under section 161/164 Cr.P.C. has not supported the F.I.R, she is a willing and consenting party, physical relations between the parties were maintained upon the consent of the prosecutrix herself, yet inspite of above, since prosecutrix is below 16 years of age on the date of occurrence as per the birth certificate, therefore her consent if any is wholly immaterial, judgment of Supreme Court in **X(Minor) Vs/ State of Jharkhand and Anr., 2022 Live Law (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 comment on the merits of the case, this Court does not find any good ground or sufficient to enlarge the applicant on bail. Resultantly, the application fails and is liable to be rejected.

It is accordingly **rejected**.

Order Date :- 18.10.2023

Arshad