

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 35370 of 2023

Applicant :- Jitendra

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

Counsel for Applicant :- Dharmendra Kumar Dwivedi

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Dharmendra Kumar Dwivedi, the learned counsel for applicant and the learned A.G.A. for State.
2. Perused the record.
3. Present application for bail came up for orders on 18.10.2023 and this Court passed the following order:

*"Heard Mr. Anil Kumar Dwivedi, the learned counsel for applicant and the learned A.G.A. for State.
Perused the record.*

This repeat application for bail has been filed by applicant Jitendra seeking his enlargement on bail in Case Crime No. 0072 of 2022, under Sections 376(a) IPC and Sections 3/4 POCSO Act, 2015, P.S. Gunnaur, District Sambhal during the pendency of trial.

At the very outset, the learned A.G.A. submits that notice of present application for bail has been served upon first opposite party 2 on 4.8.2023. 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 for bail.

After some arguments, it transpires that the proceedings under the POCSO Act have been initiated against applicant on the basis of the date of birth of the prosecutrix mentioned in the certificate issued by the Principal of the institution, where the prosecutrix was studying in Class Vth. By virtue of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, the age of the prosecutrix can be determined only with reference to the date of birth of the prosecutrix recorded in any of the document enumerated in Section 94 (i) (ii) of Act 2015. Since the document on the basis of which, the age of the prosecutrix has been determined with reference to the date of birth of the prosecutrix recorded therein is not recognized under the aforesaid provisions of law, therefore, no proceedings under the provisions of POCSO Act can prima

facie be maintained.

Learned A.G.A. submits that the charge sheet has already been submitted against the applicant on 12.7.2022.

In view of above, Investigating Officer is directed to submit an application before Court below under Section 173 (8) Cr. P. C. seeking permission of Court to conduct further investigation. After receiving the permission of the Court, Investigating Officer shall proceed to discover date of birth of the prosecutrix recorded in the institution first attended by her or as well as in any of the documents enumerated in Clause (i) and Clause (ii) of sub section (2) of Section 94 of Act 2015. The necessary exercise shall be completed within a period of three weeks. The 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, accordingly, re-appear as fresh on 17.11.2023.

Order Date :- 18.10.2023 "

4. Subsequent to above order dated 18.10.2023, the Investigating Officer has collected additional material in terms of the aforementioned order. Accordingly, the learned A.G.A. has filed an affidavit of Investigating Officer in Court today, which is taken on record.

5. This repeat application for bail has been filed by applicant-Jitendra seeking his enlargement on bail in Case Crime No. 0072 of 2022, under Sections 376 Ka IPC and Sections 3/4 POCSO Act, Police Station-Gunnaur, District Sambhal during the pendency of trial.

6. First bail application of applicant was rejected by this Court by a detailed order dated 17.11.2022 passed in Criminal Misc. Bail Application No. 51531 of 2022 (Jitendra Vs. State of U.P. and 3 others). For ready reference, the order dated 17.11.2022 is reproduced herein under:

"Heard Mr. Anup Kumar Khare, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed applicant Jitendra seeking his enlargement on bail in Case Crime No. 72 of 2021, under sections 376 (A)

IPC, and 3/4 POCSO Act, Police Station- Gunnaur District Sambhal during the pendency of trial.

Perused the record.

Record shows that in respect of an incident which is alleged to have occurred on 16.3.2022 a belated F.I.R. dated 16.3.2022 was lodged by first informant Shri Chandrapal, which was registered as Case Crime No. 72 of 2021, under sections 376 (A) IPC, and 3/4 POCSO Act, Police Station-Gunnaur District Sambhal. In the aforesaid F.I.R. applicant-Jitendra 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 dislodged the modesty of of prosecutrix by committing sexual harassment.

After lodging of aforesaid F.I.R. Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter XII Cr.P.C. During course of investigation, Investigating Officer examined first informant under section 161 Cr.P.C, who has supported the prosecution story as unfolded in the F.I.R. Thereafter the statements of the prosecutrix and other witnesses were recorded under section 161 Cr.P.C. Prosecutrix in her aforesaid statement has not only supported the F.I.R. but has also detailed the manner of occurrence. She has stated that applicant forcibly dislodged her modesty by committing rape upon her. Thereafter, the prosecutrix was medically examined. The Doctor who examined the prosecutrix did not find any injury on her body. However with regard to private part of the prosecutrix, the Doctor opiofnd as follows:

"No injury seen over the private part"

Certain samples were taken from the body of prosecutrix for pathological examination. However the result of the same was negative. Thereafter the statement of the prosecutrix was recorded under 164 Cr.P.C. wherein the prosecutrix has re-joined his earlier statement. On the basis of above and other material collected by Investigating Officer during course of investigation, which is adverse to applicant, he opined to submit charge sheet. Accordingly he submitted the charge sheet dated 12.7.2022 whereby applicant has been charge-sheeted under sections 376 IPC, and 3/4 POCSO Act.

Learned counsel for applicant contends that though applicant is a named as well as charge sheeted accused but he is innocent. Present criminal proceedings have been initiated on account of an ulterior motive. Applicant is a young man aged about 28 years. Applicant is in jail since 12.7.2022. As such, he has undergone more than 4 months of incarceration. In case 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 has opposed this application. He submits that applicant is a named as well as charge-sheeted accused. As per material on record, the porsecutrix is said to be aged about 13 years. As such, he does not deserve any indulgence by this Court. It is by now well settled that in the

absence of medical evidence, prosecution under section 376 IPC can be maintained on the statement of victim provided such statement is of impeccable character. There is no contradiction or inconsistency in the statements of prosecutrix recorded under sections 161/164 Cr.P.C. It is thus urged that present application is liable to be rejected.

When confronted with above, 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, as well as complicity of applicant, accusation made, coupled with the fact that prosecutrix is aged about 13 years, statements of prosecutrix recorded under sections 161/164 Cr.P.C are consistent and categorical which do not suffer from inconsistency and clearly implicate the applicant in the crime in question but without making any comment on the merits of the case, this court does not find any good ground to enlarge the applicant on bail.

Application fails and is liable to be rejected.

It is accordingly rejected.

Order Date :- 17.11.2022 "

7. The learned counsel for applicant contends that applicant was charge sheeted vide charge sheet dated 12.07.2022. In spite of the fact a period of more than 1 year and 5 months has rolled by from the date of submission of charge-sheet dated 17.07.2022 but the trial has not yet concluded. Attention of the Court was then invited to the judgement of Apex Court in **in A.R. Antulay Vs. R. S. Nayak (1992) 1 SCC 225**. On the basis thereof he submits that the right to speedy trial is a fundamental right of an accused. Since the applicant is in jail therefore it cannot be said the applicant is responsible for the delay in conclusion of trial. With reference to above he submits that since an accused has the right to speedy trial and the said right of the accused/applicant stands infringed on account of lackadaisical approach of the prosecution in pursuing the trial, therefore, applicant is liable to be enlarged on bail.

8. Per contra, the learned A.G.A. for State has vehemently opposed the prayer for bail. He submits that since the applicant is a charge

sheeted accused therefore, he does not deserve any indulgence by this Court. He submits that prosecutrix is a young girl and was aged about 13 years and 1 month on the date of occurrence as per the date of birth of the prosecutrix recorded in the institution first attended by the prosecutrix is 28.01.2009. The prosecutrix has deposed before court below as P.W.-2 and has fully supported the F.I.R. Referring to the judgement of apex Court in **Phool Singh Vs. State of Madhya Pradesh, (2022) 2 SCC 74** he submits that prosecution of an accused for an offence of rape and sexual assault can be maintained even in the absence of medical evidence and on the solitary statement of the prosecutrix. On the aforesaid premise, it is thus urged that no good or sufficient ground exists to enlarge the applicant on bail. As such, present repeat applicant for bail is liable to be rejected.

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

10. 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 objections raised by the learned A.G.A. in opposition to the present repeat application for bail could not be dislodged by the learned counsel for applicant, therefore irrespective of the varied submissions urged by the learned counsel for applicant in support of present application for bail, this Court does not find any sufficient or good ground to enlarge the applicant on bail.

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

12. It is accordingly **rejected**.

Order Date :- 6.12.2023
YK