

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 35964 of 2023

Applicant :- Pawan

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

Counsel for Applicant :- Reena Pal, Adarsh Srivastava

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

1. Heard Ms. Reena Pal, the learned counsel for applicant and the learned A.G.A. for State

2. Perused the record.

3. Instant bail application has been filed by applicant-Mangal Pandey seeking his enlargement on bail in Case Crime No. 64 of 2022 under Sections 376 (2) (i) I.P.C., Sections 3/4 POCSO Act and Sections 3 (2) (5) SC/ST Act, Police Station-Expressway, District-Gautam Buddh Nagar, during the pendency of trial.

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

"Heard Mr. Adarsh Srivastava, the learned counsel for applicant and the learned A.G.A. for State.

Perused the record.

At the very outset, the learned A.G.A. submits that notice of present application for bail has been served upon the first informant-opposite party-4 on 08.08.2023. However, in spite of service of notice upon the first informant, no one has put in appearance on behalf of first informant-opposite party-4 to oppose this application for bail.

This application for bail has been filed by applicant-Pawan seeking his enlargement on bail in Case Crime No.64 of 2022, under Section 376 (2)(i)

IPC, Section 3/4 Pocso Act and Section 3(2)(5) SC/ST Act, police station Expressway, district Gautam Budh Nagar, during the pendency of trial.

After some arguments, it transpires from record that the age of the prosecutrix has been determined as per her date of birth recorded in the mark-sheet of Class-VI. The reliance so placed upon the aforesaid document is patently erroneous in view of Section 94 of The Juvenile Justice (Care and Protection of Children) Act, 2015. The age of the prosecutrix can be determined only as per her date of birth recorded in any of the document mentioned in Section 94 (1)(a) and 94 (1)(b) of the Act, 2015. Similar view has been taken by the Supreme Court in P. Yuvprakash Vs. State Represented by Inspector of Police 2023 SCC Online (SC) 846.

At this juncture, the learned A.G.A. submits that the charge-sheet has already been submitted against the applicant on 20.05.2022.

In view of above, Investigating Officer is directed to submit an application under Section 173(8) CrPC before the court below seeking permission of the court to conduct further investigation in the matter. After permission is accorded by the court concerned, Investigating Officer shall examine the record of the institution where the prosecutrix had first studied and shall endeavour to discover the date of birth of the prosecutrix as recorded in the records of said institution. It shall be open for the Investigating Officer to collect any other document which may be in consonance with the provisions of Section 94 (1)(a) and 94 (1)(b) of Act, 2015. The said exercise shall be completed within a period of three weeks from today. The copy of the supplementary case diary shall be transmitted to this Court by Investigating Officer through the learned A.G.A. before the next date fixed.

Put up again as fresh on 03.11.2023.

Order Date :- 10.10.2023. "

5. Pursuant to 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.

6. Record shows that in respect of an incident, which is alleged to have occurred on 17.04.2022, a prompt F.I.R. dated 17.04.2022

was lodged by first informant Radha (sister of the prosecutrix) and was registered as Case Crime No. 0064 of 2022 under Sections 376 ((2) (i) I.P.C., Sections 3/4. 11 ng and Sections 3 (2) (5) SC/ST Act Police Station-Expressway, District-Gautam Buddh Nagar. In the aforesaid F. I.R.,applicant Pawan has been nominated as solitary named accused.

7. After completion of statutory investigation of concerned case crime number in terms of Chapter XII Cr.P.C. the charge sheet was submitted against applicant on 03.05.2022. Threreafter, trial commenced. The first informant deposed before court below as P.W.-1 whereas prosecutrix deposed before court below as P.W.-2. Both the witnesses have not supported the F.I.R. On the above premise, it is thus urged by learned counsel for applicant that no useful purpose shall be served in prolonging the custodial arrest of applicant during the pendency of trial.

8. 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 19.04.2022. As such, he has undergone more than one year and six months of incarceration. Police report (charge-sheet) in terms of Section 173 (2) Cr.P.C. has already been submitted against applicants, therefore the entire evidence sought to be relied upon by the prosecution against applicants stands crystallised. Since the statements of the first informant and prosecutrix have been recorded therefore there is no question of tampering with the evidence or terrorizing the crucial witnesses. Upto this stage, no such incriminating circumstance has emerged necessitating the custodial arrest of applicants during the pendency of trial. On the above premise, the learned counsel for applicants thus submits that applicants are 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..

9. Per contra, the learned A.G.A. has opposed the prayer for bail. However, the learned A.G.A. could not dislodge the factual and legal submissions urged by the learned counsel for applicant with reference to the record at this stage.

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 first informant has deposed before court below as P.W.-1 whereas the prosecutrix has deposed before court below as P.W.-2, however, both the witnesses have not supported the F.I.R., as such there is no fear of tampering with the evidence or terrorizing the crucial witnesses, in view of above, no useful purpose shall be served in prolonging the custodial arrest of applicant during the pendency of trial, considering the above as well as the clean antecedents of applicant, the period of incarceration undergone, 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.

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

12. Let the applicant-**Pawan** 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.

13. 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