

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 38106 of 2023

Applicant :- Vikash Prajapati

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

Counsel for Applicant :- Nitesh Kumar Singh, Anil Kumar

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

1. Heard Mr. Nitesh Kumar Singh, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. This repeat application for bail has been filed by applicant- Vikash Prajapati seeking his enlargement on bail in Case Crime No. 65 of 2022, under Sections 376 DA IPC, Sections 5 (G)/6 POCSO Act and Sections 3 (2)(V) of SC/ST Act, Police Station Karma, District Sonbhadra, during the pendency of trial i.e. Sessions Trial No.358 of 2022 (State Vs. Vikash Prajapati) under Sections 5 (G)/6 POCSO Act, Sections 3 (2)(V) of SC/ST Act and Sections 376 DA I.P.C., Police Station Karma, District Sonbhadra now pending in the Court of Special Judge, POCSO Act, Sonbhadra.

4. At the very outset, the learned A.G.A. submits that notice of present application for bail has been served upon first informant/opposite party-2. However, inspite of service of notice, no one has put in appearance on behalf of first informant/opposite party-2 to oppose this application for bail.

5. 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. 28183 of 2022 (Vikas Prajapati Vs. State of U.P.). For ready reference, the order dated 17.11.2022 is reproduced herein under:

"1. Heard Mr. Dinesh Kumar Singh, the learned counsel for applicant and the learned A.G.A. for State.

2. This application for bail has been filed by applicant - Vikas Prajapati seeking his enlargement on bail in Case Crime No.65 of 2022, under Sections 376DA I.P.C. and 5g/6 of Protection of Children from Sexual Offences Act and 3(2)(V) of SC/ST Act, Police Station- Karma, District - Sonbhadra, during the pendency of trial.

3. Perused the record.

4. Record shows that in respect of an incident which is alleged to have occurred on 3.5.2022, a delayed F.I.R. dated 6.5.2022 was lodged by first informant namely, Lalji (father of the prosecutrix) and was registered as Case Crime No.0065 of 2022, under Section 376DA I.P.C. and Section 5g/6 of Protection of Children from Sexual Offences Act and 3(2)(V) of SC/ST Act, Police Station - Karma, District - Sonbhadra. In the aforesaid F.I.R, two persons namely Vikash Prajapati (applicant herein) and Rinku Prajapati have been nominated as named accused.

5. The gravamen of the allegations made in the F.I.R. is to the effect that named accused first caught hold of the prosecutrix, thereafter, they dragged her and then named accused Vikash Prajapati dislodged the modesty of the prosecutrix by forcibly committing rape upon her. The other co-accused namely Rinku Prajapati is alleged to be standing near the place of occurrence.

6. After lodging of aforementioned F.I.R., statement of the informant was recorded under Section 161 Cr.P.C., who has supported the F.I.R. Subsequent to above, the prosecutrix was medically examined. However, the doctor, who examined the prosecutrix did not find any sign on her body so as to denote commission of sexual assault and with regard to the private part of the prosecutrix, the doctor opines as follows:-

"Hymen - Old torn"

7. The prosecutrix in her statement before the doctor has

supported the F.I.R. Certain samples were taken from the body of the prosecutrix, however, they show negative results. As per medical opinion, the prosecutrix is said to be aged about 18-20 years. Thereafter, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. wherein she has reiterated her earlier statement under Section 161 Cr.P.C. During the course of investigation, the Investigating Officer recovered the mark-sheet of Class VIIIth examination undertaken by the prosecutrix wherein her date of birth is recorded as 8.7.2006. The occurrence in question occurred on 3.5.2022, as such on the date of occurrence, the prosecutrix was aged about 15 years and 10 months. The other witnesses examined under Section 161 Cr.P.C. have also supported the prosecution story. On the basis of above and other material collected by Investigating Officer, during the course of investigation which is substantially adverse to the named accused, he came to the conclusion that complicity of the named accused is established in the crime in question. Accordingly, the Investigating Officer submitted the charge sheet dated 9.6.2022 whereby named accused have been charge-sheeted under Sections 376DA, 5g/6 of Protection of Children from Sexual Offences Act and 3(2)(V) of SC/ST Act.

8. Learned counsel for applicant submits that applicant is innocent. Applicant has been falsely implicated in aforementioned case crime number on the ground of village rivalry. The grand father of the applicant is the Village Pradhan and previous litigation is going on in between the family of the applicant and the family of prosecutrix. It is further submitted that the provisions of charging Sections under the S.C./S.T. Act shall not be applicable as applicant himself belongs to S.C. category.

9. It is next contended that there is delay in lodging the F.I.R., however, neither in the F.I.R. itself nor in the statement of first informant, delay in lodging the F.I.R. has been sufficiently explained. Referring to the judgment of the Apex Court in *P. Rajagopal vs. State of Tamil Nadu*; AIR (2019) SC 2866, he submits that since the delay in lodging the F.I.R. itself has not been explained, therefore, the prosecution of the applicant cannot be maintained.

10. Referring to the material on record, the learned counsel for applicant submits that the medical evidence does not support the prosecution story. Consequently, in the absence of medical evidence, no conviction of applicant is possible for an offence under Sections 376DA, 5g/6 POCSO Act.

11. Learned counsel for applicant has then invited the attention of the Court to the statements of the prosecutrix recorded under Sections 161 and 164 Cr.P.C. He submits that the prosecutrix has improved the prosecution story as unfolded in the F.I.R.

12. It is lastly submitted that applicant is a man of clean antecedents, inasmuch as he has no criminal history except the present one. Applicant is in jail since 7.5.2022, as such, he has undergone more than 5 months of incarceration. In case, applicant is enlarged on bail he shall not misuse the liberty of bail and will cooperate with the trial.

13. Per contra, the learned A.G.A. opposed the prayer for bail. He submits that applicant is not only a named accused but also a charge-sheeted accused. The statement of the prosecutrix recorded under Sections 161 and 164 Cr.P.C. are categorical and consistent. They clearly implicate the applicant in the crime in question. There is nothing on record on the basis of which false implication of applicant could be inferred. The prosecutrix is a young girl, aged about 15 years and 6 months. There is nothing on record to infer false prosecution of applicant.

14. It is then contended by the learned A.G.A. that by virtue of above, the provisions of POCSO Act are squarely applicable to the facts and circumstances of present case. On the aforesaid premise, the learned A.G.A. submits that applicant does not deserve any indulgence by this Court.

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

16. Having heard learned counsel for applicant, learned A.G.A. for State and upon consideration of evidence on record, accusations made as well as complicity of applicant, coupled with the fact that the applicant is a named as well as charge-sheeted accused, the prosecutrix in her statements under Sections 161 and 164 Cr.P.C. has clearly implicated the named accused in the crime in question, there being nothing on record to infer a false prosecution of applicant but without commenting on the merits of the case, this Court does not find any good ground to enlarge the applicant on bail.

17. Accordingly, this bail application for bail fails and is liable to be rejected.

18. It is accordingly rejected.

Order Date :- 17.11.2022 "

6. Learned counsel for applicant contends that applicant has been charged under Section 5(G)/6 POCSO Act on the basis of Mark-Sheet of Class 8th of the prosecutrix. Learned counsel for applicant submits that the determination so made is manifestly illegal. With reference to Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 it is urged that the age of the prosecutrix can be determined with reference to the date of birth as recorded in any of the documents recognized under Section 94 of the Act 2015. To buttress his submission, he has referred to the judgement of Apex Court in **P. Yuva Prakash Vs. State 2023 SC OnLine SC 846**, wherein court has held that the age of the prosecutrix can be determined with reference to the date of birth recorded in the school register.

7. It is next contended by the learned counsel for applicant that in her statement-in-chief before court below, the prosecutrix has stated that her statement is based upon the tutoring done by her parents. It is thus urged that the prosecutrix has not been fair or truthful in her statements before court below. On the above premise, learned counsel for applicant contends that the statement of prosecutrix is not worthy of trust. It is thus urged that applicant is liable to be enlarged on bail.

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 7.05.2023. As such he has undergone approximately 6 months of incarceration. Police report (charge-sheet) 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 stands

crystallised. Upto this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. The medical evidence does not support the charge-sheet. On the above premise, the learned counsel for applicant 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.

9. Per contra, the learned A.G.A. has opposed the prayer for bail. He submits that the issue with regard to the determination of age of the prosecutrix in accordance with the provisions of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 is an issue which can be decided by the trial court. With regard to the credibility of the statement of the prosecutrix recorded before court below, the learned A.G.A. contends that even though this Court is a superior Court, dictates of prudence require that bail court, even if a superior Court should refrain from evaluating the evidence that has emerged during the pendency of trial. The court having the bail application should refrain from undertaking such an exercise as any observation made by the bail Court regarding the nature and impact of evidence which has emerged during the pendency of trial may affect the prosecution or defence. Same shall amount to pre-empting the trial. The credibility or reliability of the statement of the prosecutrix has to be judged by the trial court. On the above conspectus, the learned A.G.A. submits that no new or sufficient ground has emerged to enlarge the applicant on bail. He therefore contends that applicant does not deserve any indulgence by this Court.

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 the 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 repeat application for bail, this Court does not find any new or good ground to enlarge the applicant on bail.

11. The present repeat application for bail thus fails and is liable to be rejected.

12. It is accordingly **rejected**.

13. However, considering the facts and circumstances of the case and also the fact that as per medical opinion, the prosecutrix is aged about 18 years and prima-facie the age of the prosecutrix has not been determined in accordance with the provisions of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 as well as the law laid down by Apex Court in **P. Yuva Prakash Vs. State 2023 SC OnLine SC 846**, therefore, court below is directed to proceed to decide the trial expeditiously without granting any unnecessary adjournment and by fixing three dates in a week.

Order Date :- 7.11.2023

YK