

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 37398 of 2023

Applicant :- Arvind

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

Counsel for Applicant :- Brijesh Kumar Gautam, Shiv Vilas Mishra

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

1. Heard Mr. Shiv Vilas Mishra, 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-Arvind seeking his enlargement on bail in Case Crime No. 166 of 2023 under Sections 376AB I.P.C. and 5m/6 POCSO Act, Police Station- Babugarh, District- Hapur, during the pendency of trial.
4. Instant application for bail came up for orders on 09.10..2023 and this Court passed the following order:

"1. Heard Mr. Shiv Vilas Mishra, 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-Arvind seeking his enlargement on bail in Case Crime No. 0166 of 2023 under Sections 376AB I.P.C. and 5m/6 POCSO Act, Police Station-Babugarh, District-Hapur, 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. 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. After some arguments, it transpires from record that age of the prosecutrix has been determined as per the date of birth of the prosecutrix recorded in the certificate issued by the Principal of the Institution where the prosecutrix is studying in Class Vith. Admittedly by virtue of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, no reliance could have been placed upon the said certificate for the purpose of date of birth of the prosecutrix. Age of the prosecutrix could have been determined only on the basis of date of birth of the prosecutrix recorded in the documents recognised under Sections 94 (1) (a) and 94 (1) (b) of the aforesaid Act.

6. The learned A.G.A. contends that charge-sheet has already been submitted against applicant on 12.06.2023

7. In view of above, Investigating Officer is directed to submit an application before court concerned in terms of Section 173 (8) Cr.P.C. seeking the permission of court concerned to conduct further investigation. After permission has been granted, Investigating Officer shall endeavour to find out the date of birth of the prosecutrix recorded in the institution which was first attended by her. Apart from above, it would be open to the Investigating Officer to collect any other document, regarding the date of birth of the prosecutrix which may be inconsonance with the aforesaid provision.

8. Let necessary exercise be undertaken by the Investigating Officer within a period of three weeks from today.

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

10. Matter shall accordingly reappear as fresh on 02.11.2023.

Order Date :- 9.10.2023 "

5. In compliance of above order dated 09.10.2023, 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 21.05.2023, a delayed F.I.R. dated 22.05.2023 was lodged by first informant Mukesh (father of the prosecutrix) and was registered as Case Crime No.166 of 2023 under Sections

376(3) I.P.C. and 3/4 (2) POCSO Act, Police Station- Babugarh, District- Hapur. In the aforesaid F.I.R. applicant Arvind has been nominated as solitary named accused.

7. The gravamen of the allegations made in the F.I.R is to the effect that named accused dislodged he modesty of the the daughter of first informant, i.e. prosecutrix.

8. After the aforementioned F.I.R. was registered, Investigating Officer proceeded with statutory investigation of afore-mentioned case crime number in terms of Chapter XII Cr.P.C. Thereafter, statement of prosecutrix was recorded under Section 161 Cr.P.C, copy of which is on record at page 25 of the paper book. In her aforesaid statement, the prosecutrix has not only supported the F.I.R. but also detailed the manner of occurrence. Subsequent to above the prosecutrix was requested for her internal medical examination. From perusal of the case diary, it is evident that presecutri in her statement before the Doctor, who medically examined the prosecutrix, has rejoined her previous statement under Section 161 Cr.P.C. The Doctor who, medically examined the prosecutrix did not find any signs on the body of prosecutrix so as to denote commission of sexual assault. However, with regard to the private part of the prosecutrix, the Doctor opined as under:

"Hymen - Ruptured

9. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C., which is on record at page 28 of the paper book. The prosecutrix in her aforesaid statement has however departed from her previous statement under Section 161 Cr.P.C.

10. During course of investigation, Investigating Officer recovered the certificate issued by the Principal of the Institution

where the prosecutrix had studied. As per said certificate, the date of birth of the prosecutrix as recorded in the school record is 07.10.2011. The occurrence giving rise to present criminal proceedings occurred on 22.05.2023. As such the prosecutrix was 11 years, 7 months and 14 days on the date of occurrence. Investigation Officer further examined first informant and other witnesses under Section 161 Cr.P.C. Witnesses so examined have substantially supported the F.I.R. On the basis of above and other material collected by him 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 12.06.2023 whereby applicant has been charge sheeted under Section 376AB I.P.C. and Section 5m/6 POCSO Act

11. Learned counsel for applicant submits that applicant is innocent. Though applicant is a named and charge-sheeted accused yet he is liable to be enlarged on bail. With reference to the statement of the prosecutrix regarded under Section 164 Cr.P.C., he submits that the prosecutrix in her aforesaid statement has not supported the F.I.R. He therefore contends that applicant is liable to be enlarged on bail. .

12. 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 23.05.2023. As such, he has undergone more than five 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. However, upto this stage, no such incriminating circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. On the above premise, he

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.

13. Per contra, the learned A.G.A. for State has vehemently opposed the prayer for bail. He submits that since the applicant is a named as well as charge sheeted accused therefore, he does not deserve any indulgence by this Court. He submits that the F.I.R. was lodged by the father of the prosecutrix upon the disclosure made by the prosecutrix herself. The prosecutrix in her statement under Section 161 Cr.P.C. has sully supported the F.I.R. Medical evidence clearly supports the statement of the prosecutrix under Section 161 Cr.P.C. Though the prosecutrix in her subsequent statement under Section 164 Cr.P.C. has not fully reiterated her previous statement, however the departure so made has not been explained.. The prosecutrix is a young girl aged about 11 years 7 months and 14 days. It is thus contended that no sympathy be shown by this Court in favour of applicant. Prosecutrix is a young girl of tender age. Even if there was consent given by the prosecutrix, the same is immaterial. To buttress his submissions he has relied upon the judgement of Supreme court in **X (Minor) Vs. The State of Jharkhand and Another (2022 Live Law (SC) 194**. On the aforesaid premise, it is thus urged that no good ground exists to enlarge the applicant on bail. As such, present applicant for bail is liable to be rejected.

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

15. 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 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.

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

17. It is accordingly **rejected**.

Order Date :- 2.11.2023

YK