

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 37578 of 2023

Applicant :- Ayush Gupta

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

Counsel for Applicant :- Chandra Prakash Awasthi, Mahesh Kumar

Counsel for Opposite Party :- G.A., Om Prakash Mishra

Hon'ble Rajeev Misra, J.

Heard Mr. Mahesh Kumar Tripathi, the learned counsel for applicant, the learned A.G.A. for State and Mr. Om Prakash Mishra, the learned counsel for first informant-opposite party-2.

This application for bail has been filed by applicant-Ayush Gupta seeking his enlargement on bail in Case Crime No.178 of 2023, under Section 376 IPC and Section 3/4 POCsO Act, police station Prem Nagar, district Jhansi, during the pendency of trial.

Perused the record.

The present application for bail came up for orders on 31.10.2023 and this Court passed following order :-

"Heard Mr. Mahesh Kumar Tripathi, 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 Aneema Yadav @ Annu seeking his enlargement on bail in Case Crime No. 178 of 2023, under Section 376 IPC and Sections 3/4 POCSO Act, P.S. Prem Nagar, District Jhansi, during the pendency of trial.

After some arguments, it transpires that the age of the prosecutrix has been determined with reference her date of birth mentioned in the scholar register/transfer certificate. As per the said document, the date of birth of the prosecutrix is said to be 29.11.2003.

Prima facie, the determination of age of the prosecutrix made with reference to above mentioned document is manifestly illegal. By virtue of the provisions contained in Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015, the age of the prosecutrix could be determined only with reference to her date of birth mentioned in any of the documents recognized under Section 94 (2) (i) and 94 (2) (ii) of Act, 2015.

Learned A.G.A. contends that the charge sheet has already been submitted on 8.7.2023 against three persons including the applicant.

In view of above, Investigating Officer is directed to submit an application under Section 173 (8) Cr. P. C. before Court concerned seeking the permission

of Court to conduct further investigation. After permission has been accorded by the Court concerned, then the Investigating Officer shall proceed to discover the date of birth of the prosecutrix recorded in the institution first attended by her and also any such document which is in consonance with the provisions of Section 94 of the Act, 2015 regarding the date of birth of the prosecutrix. The necessary 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 through the learned A.G.A. before the next date fixed.

Matter shall, accordingly, re-appear as fresh on 23.11.2023."

On the matter being taken up, the learned A.G.A. contends that subsequent to the order dated 31.10.2023, Investigating Officer has conducted further investigation. As per the material collected by Investigating Officer, the date of birth of the prosecutrix recorded in the institution first attended by her is 29.11.2003. The occurrence giving rise to the present criminal proceeding is alleged to have occurred in between 01.01.2022 to 01.05.2023. As such, on the date of lodging of FIR, the prosecutrix was aged about 19 years and 05 months.

Record shows that in respect of an incident which are alleged to have occurred in between 01.01.2022 to 01.05.2023, a delayed first information report dated 06.05.2023 was lodged by first informant i.e. prosecutrix and was registered as Case Crime No.0178 of 2023, under Sections 493, 504, 506 IPC, police station Prem Nagar, district Jhansi. In the aforesaid F.I.R., three persons, namely, Ayush Gupta (applicant herein); Uma Shankar Gupta and Saransh Gupta have been nominated as named accused.

The gravamen of the allegations made in the first information report is to the effect that named accused Ayush Gupta developed intimacy with the prosecutrix. He thereafter extended the promise of marriage and on basis thereof repeatedly dislodged the modesty of the prosecutrix by establishing physical relations with her. Ultimately, accused Ayush Gupta i.e. applicant herein is alleged to have resiled from the promise so made.

After aforementioned F.I.R. was lodged, the Investigation Officer proceeded with the statutory investigation of concerned case crime number in terms of Chapter XII CrPC. Thereafter, the statement of the prosecutrix was recorded under Section 161 CrPC, which is on record at page 68 of the paper book. The prosecutrix in her aforesaid statement has not fully supported the FIR. She has come out with a new story different from the one unfolded in the FIR with regard to the manner and place of occurrence which is alien to the FIR. Subsequently, the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor, who medically examined her, has improved upon her earlier statement recorded under Section 161 CrPC and has narrated the facts which have occurred prior to lodging of

the FIR. However, the Doctor who medically examined the prosecutrix did not find any injury on her body so as to denote commission of deliberate or forcible sexual assault upon her. With regard to the private part of the prosecutrix, the Doctor has opined as follows :-

"Hymen - Torn, old and healed."

Certain samples were taken from the body of the prosecutrix for pathological examination. However, the supplementary medical report of the prosecutrix has not been brought on record. Ultimately, the statement of the prosecutrix was recorded under Section 164 CrPC, which is on record at page 71 of the paper book. The prosecutrix in her aforesaid statement has narrated a new story which is different from her statement under Section 161 CrPC and the statement given before the Doctor.

During course of investigation, the Investigating Officer recovered the Transfer Certificate of the prosecutrix wherein her date of birth is recorded as 29.11.2003. As such, the Investigating Officer concluded that on the date of the first occurrence alleged in the FIR, the prosecutrix was minor. He, accordingly, submitted the charge-sheet dated 08.07.2023, whereby applicant has been charge-sheeted under Section 376 IPC and Section 3/4 Pocso Act.

Learned counsel for the applicant contends that though the applicant is a named as well as charge-sheeted accused, yet he is liable to be enlarged on bail. The prosecutrix was major on the date of lodging of the FIR. However, in the FIR it is alleged that the modesty of the prosecutrix was dislodged in between 01.01.2022 to 01.05.2023 on several occasions when the prosecutrix was minor. He, therefore, contends that the FIR is highly belated. However, neither in the FIR nor in the statements of the prosecutrix, referred to above, any explanation regarding delay in lodging the FIR has been offered. Referring to the judgement of the Apex Court in **P. Rajagopal Vs. The State of Tamil Nadu AIR 2019 SC 2866 (paragraph 8)**, learned counsel for applicant contends that since the delay in lodging the FIR has not been explained, the prosecution of the applicant itself cannot be maintained. Attention of the Court was then invited to the judgement of the Supreme Court in **Mandar Deepak Pawar Vs. The State of Maharashtra and Another 2022 LiveLaw (SC) 649**, wherein on account of the delay in lodging the FIR in case of consensual relationship between the parties was quashed. On the above premise, it is thus urged by the learned counsel for applicant that since the prosecutrix was major on the date of lodging of FIR and was in consensual relationship with the applicant therefore no offence as complained of can be said to have been committed by the

applicant. The issue with regard to false promise of marriage and breach of promise and its effect has been considered by the Supreme Court in **Pramod Suryabhan Pawar Vs. State of Maharashtra 2019 SCC OnLine SC 1073; Maheshwar Tigga Vs. State of Jharkhand (2020) 10 SCC 108; Sonu alias Subhash Kumar Vs. State of U.P. 2021 SCC OnLine SC 181; Mandar Deepak Pawar Vs. The State of Maharashtra and Another 2022 LiveLaw (SC) 649 and Naim Ahmed Vs. State (NCT of Delhi), 2023 SCC OnLine SC 89**. Referring to the judgement of the Apex Court in **Naim Ahmed Vs. State (NCT of Delhi), 2023 SCC OnLine SC 89**, the learned counsel for applicant contends that present case is not a case of false promise of marriage but a breach of promise inasmuch as there is no such material on record on the basis of which it can be conclusively concluded that applicant extended false promise of marriage. He, therefore, contends that in view of above the applicant is liable to be enlarged on bail.

Even otherwise, applicant is a man of clean antecedents having no criminal history to his credit except the present one. Applicant is in custody since 02.07.2023. As such, he has undergone more than four months of incarceration. The police report under Section 173 (2) CrPC has already been submitted. As such the entire evidence sought to be relied upon by the prosecution against the applicant stands crystalized. However, up to this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. He, therefore, contends 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 learned counsel representing first informant have opposed the prayer for bail. They submit that since the applicant is a named as well as charge-sheeted accused therefore, he does not deserve any indulgence by this court. Learned counsel for first informant has urged that subsequent to the present FIR, two more FIRs on complaint made by the prosecutrix have been lodged against the applicant on account of his vindictive attitude. They submit that the prosecutrix in her statements under Section 161/164 CrPC has fully supported the FIR. The prosecutrix is a young girl aged about 19 years and 05 months (on the date of lodging of the FIR) whose modesty has been dislodged by the applicant. As such, no sympathy be shown by this Court in favour of the applicant. However, they could not dislodge the factual and legal submissions urged by the learned counsel for applicant with reference to the record at this stage.

Having heard the learned counsel for applicant, the learned

A.G.A. for State, the learned counsel representing first informant, upon perusal of material brought on record, evidence, complicity of the accused, nature and gravity of offence, accusation made and coupled with the fact that admittedly the date of occurrence mentioned in the FIR is in between 01.01.2022 to 01.05.2023 as such there is huge delay in lodging of FIR, however neither in the FIR nor in the statements of the prosecutrix referred to above there is any explanation regarding the delay in lodging the FIR, by virtue of the law laid down by the Apex Court in **P. Rajagopal (supra)** prima facie the prosecution of the applicant itself cannot be maintained, in view of the law laid down by the Apex Court in **Mandar Deepak Pawar (supra)** in case of sexual assault based upon consensual relationship if there is delay in lodging of the FIR the same is fatal to the prosecution, admittedly on the date of lodging of FIR the prosecutrix was major, the police report under Section 173(2) CrPC has already been submitted, as such the entire evidence sought to be relied upon by the prosecution against the applicant now stands crystalized, however in spite of above the learned A.G.A. nor the learned counsel for first informant could point out any such circumstance from the record necessitating the custodial arrest of the applicant during the course of trial, the clean antecedents of the applicant, the period of incarceration undergone, the prosecutrix is a willing and consenting party, up to this stage present case is a case of breach of promise and not false promise of marriage, therefore irrespective of the objections raised by the learned A.G.A. and the learned counsel for first informant in opposition to the present application for bail but, without making any comment on the merits of the case, the applicant has made out a case for bail.

Accordingly, the bail application is **allowed**.

Let the applicant **Ayush Gupta**, involved in aforesaid case crime number, be released on bail on his furnishing a personal bond with 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) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the date fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under section 229-A I.P.C.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under section 82 Cr.P.C., may be issued and if applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under section 174-A I.P.C.

(iv) The applicant shall remain present, in person, before the trial court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(v) The trial court may make all possible efforts/endeavour and try to conclude the trial within a period of one year after the release of the applicant.

However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his bail so granted by this court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

Order Date :- 23.11.2023.
Rks.