

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 37085 of 2023

Applicant :- Abdul Rahman

Opposite Party :- State Of U.P. Though It Principal Secretary And 3 Others

Counsel for Applicant :- Atul Kumar

Counsel for Opposite Party :- G.A.,Chandra Bhushan Prasad

Hon'ble Rajeev Misra,J.

Heard Mr. Atul Kumar, the learned counsel for applicant, the learned A.G.A. for State and Mr. Chandra Bhushan Prasad, the learned counsel representing first informant-opposite party-2.

This application for bail has been filed by applicant Abdul Rahman seeking his enlargement on bail in Case Crime No.138 of 2023, under Sections 363, 366, 376 IPC and Section 3/4 PocsO Act, police station Jansath, district Muzaffar Nagar, during the pendency of trial.

Perused the record.

Record shows that in respect of an incident which is alleged to have occurred on 12.06.2023, a delayed first information report dated 13.06.2023 was lodged by first informant-Mohd. Ali (father of the prosecutrix) and was registered as Case Crime No.0138 of 2023, under Sections 363, 366 IPC, police station Jansath, district Muzaffar Nagar. In the aforesaid F.I.R., applicant Abdul Rahman has been nominated as solitary named accused.

The gravamen of the allegations made in the FIR dated 13.06.2023 is to the effect that on 12.06.2023 at about 3.00 p.m., named accused Abdul Rahman i.e. applicant herein enticed away the daughter of the first informant i.e. prosecutrix namely, 'X'.

Learned counsel for applicant contends that after aforesaid first information report was lodged, Investigating Officer proceeded with statutory investigation of concerned Case Crime number in terms of Chapter XII CrPC. The prosecutrix was recovered on 13.06.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 CrPC, which is on record at page 34 of the paper book. The prosecutrix in her aforesaid statement has not supported the FIR. To the contrary she has alleged that she is aged about 19 years and wants to reside with the applicant. She further stated that physical relations between the parties were established upon the consent of the prosecutrix. Subsequently, the prosecutrix

was requested for her internal medical examination. The prosecutrix in her statement before the Doctor has rejoined her previous statement under Section 161 CrPC with better particulars and details. The Doctor, who examined the prosecutrix, did not find any external injury on the body of the prosecutrix so as to denote commission of deliberate sexual assault. However, with regard to the private part of the prosecutrix, the Doctor has opined as follows :-

"Hemen : Old, torned & healed margin."

Subsequent to above, certain samples were taken from the body of the prosecutrix for pathological examination. However, the result of the same is in negative.

Thereafter, the statement of the prosecutrix was recorded under Section 164 CrPC, which is on record as Annexure-1 to the compliance affidavit dated 26.09.2023 filed by the learned A.G.A. However, the prosecutrix in her aforesaid statement has not implicated the applicant in the crime in question. During course of investigation, Investigating Officer recovered the Certificate of the Principal of the institution where the prosecutrix had last studied. As per record of the said institution, the date of birth of the prosecutrix was said to be 01.01.2006. The occurrence giving rise to the present criminal proceeding is alleged to have occurred on 12.06.2023. As such, the prosecutrix was said to be aged about 17 years 05 months and 11 days on the date of occurrence. Investigating Officer further examined the first informant and other witnesses under Section 161 CrPC, who have supported the FIR. On the basis of above and other material collected by the Investigating Officer during course of investigation, he came to the conclusion that complicity of applicant is fully established in the crime in question. Accordingly, Investigating Officer submitted the charge-sheet dated 21.07.2023, whereby applicant has been charge-charged under Sections 363, 366, 376 IPC and Section 3/4 Pocso Act, police station Jansath, district Muzaffar Nagar.

The present application for bail came up for orders on 23.08.2023 and this Court passed the following order :-

"Heard Mr. Atul Kumar, the learned counsel for applicant, the learned A.G.A. for State and Mr. Chandra Bhushan Prasad, the learned counsel representing first informant.

At the very outset, the learned A.G.A. submits that the provisions of the Pocso Act have been invoked against the applicant on the basis of the certificate issued by the Principal of the institution concerned from where the prosecutrix passed out Class-IX.

By virtue of the provisions contained in Section 94 of The Juvenile Justice (Care and Protection of Children) Act, 2015, the said certificate cannot be relied upon for determining the date of birth of the prosecutrix.

In view of above, the Chief Medical Officer, Muzaffar Nagar is directed to get ossification/radio-logical test of the prosecutrix conducted for determining her age. The age determination report shall be sent to this Court on or before the next date fixed.

Investigating Officer is further directed to conduct further investigation in the matter after obtaining leave of the court in terms of Section 173(8) CrPC in case the charge-sheet has been submitted. 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 said institution. The copy of the supplementary case diary shall also be supplied before the Court on or before the next date fixed.

Put up again as fresh on 13.09.2023."

Pursuant to above order dated 23.08.2023, the learned A.G.A. has filed an affidavit of compliance which is on record. Subsequent to above order dated 23.08.2023, Investigating Officer conducted further investigation. As per subsequent investigation, it was discovered that the prosecutrix had first studied in Adarsh Public School, Muzaffar Nagar, wherein the date of birth of the prosecutrix as recorded in the school record is 17.12.2006. As such, the prosecutrix is said to be aged about 16 years 05 months and 25 days on the date of occurrence. Further, pursuant to the above order, a medical board was constituted to get ossification/radio-logical test of the prosecutrix for determining her age. As per the report of Chief Medical Officer, Muzaffar Nagar, the prosecutrix is said to be aged about 18 years.

As the statement of the prosecutrix recorded under Section 164 CrPC was not been annexed with the affidavit filed in support of the bail application, this Court vide order dated 20.09.2023 directed the learned A.G.A. to bring it on record. In compliance of above order, the learned A.G.A. filed a compliance affidavit annexing therewith copy of statement of the prosecutrix recorded under Section 164 CrPC dated 15.06.2023.

Learned counsel for applicant contends that though applicant is a named/charge-sheeted accused yet he is liable to be enlarged on bail. The prosecutrix in her statements recorded under Section 161/164 CrPC has not supported the FIR. The prosecutrix and the applicant were in love with each other for the last three years as is clearly explicit from her statement under Section 161 CrPC. Therefore, she is a willing and consenting party. As per the medical opinion, the prosecutrix is major. As such, no offence as complained of can be said to have been committed by the applicant.

Even otherwise, the applicant is a man of clean antecedents having no criminal history to his credit except the present one. The applicant is in jail since 13.06.2023. As such, he has undergone more than three months of incarceration. The

police report under Section 173 (2) CrPC i.e. charge-sheet has already been submitted against the applicant, therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized. However, up to this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. It is thus contended 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 vehemently opposed the prayer for bail. They submit that since the applicant is a named/charge-sheeted accused therefore, he does not deserve any indulgence by this court. As per the material on record, the prosecutrix is minor as she is below 18 years of age. As such, no sympathy be shown by this Court in favour of 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, nature and gravity of offence, evidence, complicity of the accused, accusation made coupled with the fact that though the prosecutrix is about 18 years of age as per medical opinion, since there is no conclusive proof regarding the date of birth of the prosecutrix in accordance with the provisions of Section 94 of The Juvenile Justice (Care and Protection of Children) Act, 2015, the applicant is a named/charge-sheeted accused yet the Court finds that the prosecutrix in her statements referred to above has not supported the F.I.R., the prosecutrix is a willing and consenting party, there is no allegation regarding commission of deliberate or forcible sexual assault upon the prosecutrix, the medical evidence does not support the F.I.R., the parties appeared to be in acquaintance with each other for a long time, in spite of the fact that the charge-sheet has been submitted against applicant and therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized, yet the learned A.G.A. nor the learned counsel representing first informant could point out any such incriminating circumstance from the record necessitating the custodial arrest of the applicant during the pendency of trial, the judgement of Supreme Court in **Sumit Subhashchandra Gangwal and Another Vs. State of Maharashtra and Another 2023 LiveLaw (SC) 373 (paragraph 5)** the clean antecedents of the applicant, the period of incarceration undergone, 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 comments on the

merit of the case, the applicant has made out a case for bail.

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

Let the applicant **Abdul Rahman**, 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 :- 17.10.2023.

Rks.