

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 37957 of 2023

Applicant :- Ankit

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

Counsel for Applicant :- Rajesh Kumar

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

Heard Mr. Naveen Kumar, Advocate holding brief of Mr. Rajesh Kumar, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant Ankit seeking his enlargement on bail in Case Crime No.330 of 2023, under Section 376 IPC, Section 3/4 Pocso Act and Section 67-A Information Technology Act, police station Vijay Nagar, district Ghaziabad, during the pendency of trial.

Perused the record.

Learned A.G.A. submits that notice of the present application for bail has been served upon first informant-opposite party-4 on 22.08.2023. However, in spite of service of notice, no one has put in appearance on behalf of first informant-opposite party-4 to oppose this application for bail.

Record shows that in respect of an incident which is alleged to have occurred on 06.05.2023, a prompt first information report dated 06.05.2023 was lodged by the first informant, namely, Ishaq (father of the deceased) and was registered as Case Crime No.0330 of 2023, under Section 376 IPC, Section 3/4 Pocso Act and Section 67-A Information Technology Act, police station Vijay Nagar, district Ghaziabad. In the aforesaid first information report, one Ankit (applicant herein) has been nominated as solitary named accused.

The gravamen of the allegations made in the FIR is to the effect that the named accused Ankit first developed intimacy with the daughter of the first informant namely 'X' aged about 17 years i.e. the prosecutrix and then enticed away the daughter of the first informant and thereafter made physical relationship with the prosecutrix. The FIR further records that certain obscene photographs of the prosecutrix were snapped by the applicant and thereafter the same was made viral.

After aforementioned FIR was lodged, Investigating Officer proceeded with statutory investigation of concerned Case Crime Number in terms of Chapter XII CrPC. The statement of the prosecutrix was recorded under Section 161 CrPC, which is on record at page 21 of the paper book. The prosecutrix in her aforesaid statement has not fully

supported the FIR. She has stated that she was acquainted with the applicant for the last two years. One day she accompanied the applicant out of her own free will and went to a hotel. The statement further details the fact that thereafter relationship were established between the parties. However, the applicant is alleged to have snapped some obscene photographs of the prosecutrix. Ultimately, the said photographs were made viral on Instagram. Thereafter, the prosecutrix was requested for her internal medical examination. However, the prosecutrix has refused to give her consent for the same. Ultimately, the statement of the prosecutrix was recorded under Section 164 CrPC, which is on record at page 28 of the paper book, wherein she has rejoined her previous statement recorded under Section 161 CrPC. The genesis of the said statement is to the effect that the prosecutrix herself accompanied the applicant willingly.

During course of investigation, Investigation Officer recorded the statement of the Principal of the institution where the prosecutrix was studying. As per the statement of Head Master of the institution, the date of birth of the prosecutrix as recorded in the school record is 23.03.2006. The occurrence giving rise to the present criminal proceeding is alleged to have occurred on 06.05.2023. As such, the prosecutrix was aged about 17 years 03 months and 13 days on the date of occurrence. Investigating Officer also examined the first informant and other witnesses under Section 161 CrPC, who have substantially supported the F.I.R. On the basis of above and other material collected by the Investigating Officer during the 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 04.06.2023, whereby applicant has been charge-sheeted under Section 376 IPC, Section 3/4 PocsO Act and Section 67-A Information Technology Act, police station Vijay Nagar, district Ghaziabad.

The preset application for bail came up for orders on 20.09.2023 and this Court passed the following order :-

"1. Heard Mr. Rajesh Kumar, 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-Ankit seeking his enlargement on bail in Case Crime No. 330 of 2023 under Sections 376 I.P.C., Section 3/4 POCSO Act and Section 67A I.T. Act, Police Station-Vijay Nagar, District-Ghaziabad during the pendency of trial.

4. It transpires from record that the prosecutrix in her statement under Section 161 Cr.P.C. has stated that she has passed High School Examination. However, no attempt has been made by the Investigating Officer to recover the High School Certificate of the prosecutrix.

5. In view of above, determination of age of the prosecutrix on the basis of the certificate issued by the Principal of the Institution and on the statement of the Principal could not be relied upon by virtue of the provisions contained in Section 94 of Juvenile Justice (Care and Protection of Children) Act 2015.

6. The police report in terms of Section 173 (2) Cr.P.C. has been submitted on 04.06.2023. The Investigating Officer is therefore directed to submit an application before court concerned in terms of Section 173 (8) Cr.P.C. seeking permission of the court below to conduct further investigation and thereafter the Investigating Officer shall make an endeavour to collect the photocopy of the high school certificate of the prosecutrix. The photocopy of the supplementary case diary shall be transmitted by the Investigating Officer to this Court through the learned A.G.A. before the next date fixed.

7. Matter shall accordingly re-appear as fresh on 11.10.2023."

Subsequent to above order dated 20.09.2023, Investigating Officer conducted further investigation. As per subsequent investigation, Investigating Officer recovered the High School Certificate of the prosecutrix, wherein her date of birth is recorded as 23.06.2006. As such, the prosecutrix was aged about 17 years 03 months and 13 days on the date of occurrence. The said material has emerged on record by means of a compliance affidavit filed by the learned A.G.A. in Court today, which is taken on record.

Learned counsel for the applicant contends that though the applicant is named as well as charge-sheeted accused, yet he is liable to be enlarged on bail. The applicant and the prosecutrix were in love relationship for almost two years. The prosecutrix willingly accompanied the applicant where physical relationship between the parties were established upon the consent of the prosecutrix. As such, the applicant has neither forcibly abducted nor kidnapped the prosecutrix nor the applicant has committed deliberate or forcible sexual assault upon the prosecutrix. With regard to the offence under Section 67-A Information Technology Act, the learned counsel for applicant submits that there is no requisite certificate as is required under Section 65-B of the Indian Evidence Act in respect of electronic evidence i.e. obscene photographs and video of the prosecutrix which was uploaded on Instagram by the applicant after creating fake ID of prosecutrix. In the absence of requisite certificate as required under Section 65-B of the Evidence Act, the said material cannot be looked into at this stage.

Even otherwise, applicant is a man of clean antecedents having no criminal history to his credit except the present one. The applicant is in custody since 01.06.2023. 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 the applicant during the pendency of trial. It is thus urged 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. has opposed the prayer for bail. He submits that since applicant is a named/charge-sheeted accused therefore, he does not deserve any indulgence by this Court. The prosecutrix in her statements under Section 161/164 CrPC has

remained consistent in respect of the allegation that obscene photographs of the prosecutrix were snapped by the applicant which has been made viral subsequently. It is thus urged that no sympathy be shown by this Court in favour of applicant. However, he 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, upon perusal of material brought on record, nature and gravity of offence, evidence, complicity of the accused, accusation made and coupled with the fact that the prosecutrix is a willing and consenting party as is established from her statements recorded under Section 161/164 CrPC, there is no evidence to support the charge-sheet under Section 376 IPC and Section 3/4 Ponso Act as the prosecutrix has herself refused for her internal medical examination, the statements of the prosecutrix referred to above clearly show that physical relations were established between the parties upon consent of the prosecutrix herself, in the absence of requisite certificate in terms of Section 65-B of Indian Evidence Act in respect of the electronic evidence relied upon by the prosecution with regard to the obscene photographs and video of the prosecutrix alleged to have been snapped and thereafter made it viral by the applicant cannot be considered at this state, the clean antecedents of the applicant, the period of incarceration undergone, 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 prosecution against applicant stands crystalized, yet in spite of above the learned A.G.A. could not point out any such circumstance from the record necessitating the custodial arrest of the applicant during the pendency of trial, the judgement of the Supreme Court in **Sumit Subhashchandra Gangwal and another Vs. State of Maharashtra and another, 2023 Livelaw SC 373 (Paragraph 5)**, therefore irrespective of the objections raised by the learned A.G.A. in opposition to the present application for bail but, without making any comments on the merits of the case, the applicant has made out a case for bail.

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

Let the applicant **Ankit**, 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 :- 18.10.2023.

Rks.