

**Court No. - 65**

**Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 37934 of 2023

**Applicant :-** Nisar Ahmad

**Opposite Party :-** State of U.P. and Another

**Counsel for Applicant :-** Kartikey Pandey, B.S. Pandey

**Counsel for Opposite Party :-** G.A., Shesh Narayan Mishra

**With**

**Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 36116 of 2023

**Applicant :-** Aadil

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

**Counsel for Applicant :-** B.S. Pandey, Kartikey Pandey

**Counsel for Opposite Party :-** G.A.

**Hon'ble Rajeev Misra, J.**

Heard Mr. B.S. Pandey along with Mr. Kartikey Pandey, the learned counsel for applicants, the learned A.G.A. for State and Mr. Shesh Narayan Mishra, the learned counsel representing first informant in Criminal Misc. Bail Application No.37934 of 2023.

These applications for bail have been filed by applicants Nisar Ahmad and Aadil. Applicant Nisar Ahmad has filed bail application seeking his enlargement on bail in Case Crime No.146 of 2023, under Sections 366, 506, 376, 458 IPC and Section 3/5 U.P. Prohibition of Unlawful Conversion of religion Act, 2021, police station Harraiya, district Basti whereas applicant Aadil has filed bail application seeking his enlargement on bail in Case Crime No.146 of 2023, under Sections 506, 354-A, 458 IPC, Section 7/8 Pocso Act and Section 3/5 U.P. Prohibition of Unlawful Conversion of religion Act, 2021, police station Harraiya, district Basti, during the pendency of trial.

Perused the record.

The present application for bail came up for orders on 04.10.2023 and this Court passed the following order :-

**"Heard Mr. Kartikey Pandey, the learned counsel for applicant the learned A.G.A. for State and Mr. Shesh Narayan Mishra, the learned counsel for first informant.**

**Perused the record.**

**This application for bail has been filed by applicant- Nisar Ahmad seeking his**

enlargement on bail in Case Crime No. 146 of 2023, under sections 366, 506, 376, 458 IPC and 3/5 U.P. Prohibition of Unlawful Conversion of Religion Act, 2021, Police Station- Tarkulwa, District Basti, during pendency of trial.

Record shows that in respect of an incident which is alleged to have occurred on 2.6.2023, a belated F.I.R. dated 3.6.2023 was lodged by first informant, father of the prosecutrix and was registered as Case Crime No. 146 of 2023, under sections 366, 506, 376, 458 IPC and 3/5 U.P. Prohibition of Unlawful Conversion of Religion Act, 2021, Police Station- Tarkulwa, District Basti. In the aforesaid F.I.R. 8 persons namely, Nisar Ahmad, Najuaia, Ainullah, Muvastara, Shahrukh, Kakva, Aadil, Sahil have been nominated as named accused.

The gravamen of the allegations made in the F.I.R. is to the effect that named accused enticed away the daughter of first informant i.e. prosecutrix namely X.

After lodging of aforesaid F.I.R. Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter XII Cr.P.C. The statement of the prosecutrix was recorded under section 161 Cr.P.C. same is on record at page 54 of the paper book. The prosecutrix in her aforesaid statement has fully supported the F.I.R. She has also detailed the manner of occurrence. Thereafter, the prosecutrix was requested for her internal medical examination. The same was refused by her. Ultimately, the statement of prosecutrix was recorded under section 161 Cr.P.C., which is on record at page 59 of the paper book, wherein the prosecutrix has again rejoined her previous statement recorded under section 161 Cr.P.C. Prosecutrix has further detailed the manner of occurrence. Thereafter the statement of first informant and other witnesses was recorded under section 161 Cr.P.C. Investigating Officer recovered the mark-sheet of Class-VIII of the prosecutrix, wherein her date of birth is recorded as 17.3.2008. On the basis of above, he came to the conclusion that since the prosecutrix is below 18 years of age, therefore, the provisions of POCSO Act are fully attracted.

The Court finds that date of birth of the prosecutrix relied upon by prosecution for determining her age cannot be relied upon by virtue of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection) of Children Act, 2015. The age of the prosecutrix can be determined only in accordance with the date of birth of the prosecutrix recorded in such documents which are recognized vide sub Section (a) and (b) of aforesaid section. Only in the absence of sub-section (a) and (b) of Section 94, the medical evidence can be relied upon.

Learned A.G.A. submits that charge sheet has already been submitted against applicant on 24.7.2023.

In view of the fact that police report in terms of Section 173 (2) Cr.P.C. has been submitted on 24.7.2023, the Investigating Officer is directed to submit an application before court concerned in terms of Section 173 (8) Cr.P.C. seeking permission of the Court to conduct further investigation. After obtaining permission of the court, Investigating Officer shall conduct further investigation to find out the date of birth of the prosecutrix recorded in the institution which was first attended by her. The necessary exercise shall be completed within three weeks from today. Copy of supplementary case diary shall also be transmitted to this Court through the learned A.G.A. before the next date fixed.

Matter shall accordingly reappear as fresh on 31.10.2023."

In compliance of above order dated 04.10.2023, the learned A.G.A. has placed before the Court copy of the supplementary case-diary.

Record shows that in respect of an incident which is alleged to have occurred on 02.06.2023, a delayed F.I.R. dated 03.06.2023 was lodged by first informant, namely, Ram Kishun (father of both the prosecutrix) and was registered as Case Crime No. 146 of 2023, under sections 366, 504, 506, 352, 120-B, 354 IPC and 7/8 Pocso Act, Police Station-Harraiya, District Basti. In the aforesaid F.I.R., eight persons namely, Nisar Ahmad, Najuiya, Ainullah, Muvastara, Shahrukh, Kakva, Aadil and Sahil have been nominated as named accused.

The gravamen of the allegations made in the F.I.R. is to the effect that named accused Nisar Ahmad enticed away the daughter of first informant i.e. prosecutrix, namely, Nidhi Pal. The other named accused are alleged to have connived with named accused Nisar Ahmad in the commission of the said crime. The FIR also records that named accused Aadil and Sahil committed molested another daughter of first informant, namely, Nancy.

After lodging of aforesaid F.I.R., Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter XII Cr.P.C. The statement of the prosecutrix Nidhi Pal was recorded under Section 161 Cr.P.C., which is on record at page 57 of the paper book. The prosecutrix in her aforesaid statement has not fully supported the F.I.R. Thereafter, the prosecutrix was requested for her internal medical examination, which was refused by her. Ultimately, the statement of aforesaid prosecutrix was recorded under Section 164 Cr.P.C., which is on record at page 62 of the paper book. The prosecutrix in her aforesaid statement has departed from her previous statement recorded under section 161 Cr.P.C. She has now alleged that applicant Nisar Ahmad is guilty of snapping obscene photographs of the prosecutrix. However, she has not stated that applicant Nisar Ahmad deliberately or forcibly dislodged her modesty or committed sexual assault upon her.

The statement of another prosecutrix, namely, Nancy was recorded under Section 161 Cr.P.C., which is on record at page 54 of the paper book. The prosecutrix in her aforesaid statement has implicated accused applicant Aadil for molesting her. Thereafter, the prosecutrix was requested for her internal medical examination, which was refused by her. Ultimately, the statement of aforementioned prosecutrix was recorded under Section 164 Cr.P.C., which is on record at page 59 of the paper book. The prosecutrix in her aforesaid statement has clearly implicated the applicant Aadil for deliberately dislodging her modesty.

As per the medical determination of age of the prosecutrix Nancy, she is said to be aged 18 years. However, the date of

birth of the prosecutrix, namely, Nancy recorded in the institution first attended by her is 17.3.2008. The occurrence giving rise to the present criminal proceeding is alleged to have occurred on 02.06.2023. As such, the prosecutrix Nancy was aged about 15 years and two months on the date of occurrence. On the basis of above and other material collected by Investigating Officer during the course of investigation, he came to the conclusion that complicity of applicants is fully established in the crime in question. He, accordingly, submitted the charge-sheet dated 24.07.2023, whereby applicant Nisar Ahmad has been charge-sheeted under Sections 366, 506, 376, 458 IPC and Section 3/5 U.P. Prohibition of Unlawful Conversion of religion Act, 2021 and applicant Aadil has been charge-sheeted under Sections 506, 354-A, 458 IPC, Section 7/8 PocsO Act and Section 3/5 U.P. Prohibition of Unlawful Conversion of religion Act, 2021.

Learned counsel for the applicants contends that though the applicants are named/charge-sheeted accused, inasmuch as, the charge-sheet has been submitted against applicants on 24.07.2023 yet they are liable to be enlarged on bail. In respect of applicant Nisar Ahmad, learned counsel for applicants submits that prosecutrix, namely, Nidhi Pal in her subsequent statement under Section 164 CrPC, has stated that she is major as she is aged about 22 years. The prosecutrix in her statements under Section 161/164 CrPC has not implicated applicant Nisar Ahmad for deliberately and forcibly dislodging her modesty. As the prosecutrix Nidhi Pal has refused for her internal medical examination, there is no medical evidence on record. He, therefore, contends that applicant Nisar Ahmad is liable to be enlarged on bail.

With regard to applicant Aadil, the learned counsel for applicants contends that applicant Aadil has been falsely implicated in the crime in question. Applicant Aadil is the real brother of applicant Nisar Ahmad whereas both the prosecutrix are real sisters. There is departure in the subsequent statement of the prosecutrix Nancy under Section 164 CrPC. The departure so made in the subsequent statement remains unexplained. It is thus urged that no credence can be attached to the said statement. There is no medical evidence to support the ocular version of the occurrence as the prosecutrix has clearly refused for her internal medical examination. As such, applicant Aadil is also liable to be enlarged on bail.

Even otherwise, applicants are men of clean antecedents having no criminal history to their credit except the present one. The applicants are in custody since 13.06.2023. As such, they have undergone more than five 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 applicants stands crystalized. However, up to this stage, no such circumstance has emerged necessitating the custodial arrest of applicants during the pendency of trial. He, therefore, contends that applicants are liable to be enlarged on bail. In case the applicants are enlarged on bail, they 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 applicants are named/charge-sheeted accused therefore they do not deserve any indulgence by this Court. Learned A.G.A. further submits that the prosecutrix Nancy is a young girl of tender age as she was aged about 15 years and two months on the date of occurrence. The prosecutrix Nancy in her statement under Section 164 CrPC has not only supported the FIR but has also detailed the manner of occurrence. Under the scheme of the Code of CrPC the statement of the prosecutrix under Section 164 CrPC is to be given preference over the previous statement under Section 161 CrPC. Up to this stage, no such material has emerged on record on the basis of which the prosecution story as unfolded in the FIR can be said to be false or the prosecution of applicant Aadil can be said to be false or malicious. No such material has been brought on record to establish the innocence of the applicant. On the above premise, the learned A.G.A. contends that irrespective of the anomaly occurring in the prosecution case as noted above since the prosecutrix is below 16 years of age therefore, the rigours of law laid down by the Apex Court in **X (Minor) Vs. State of Jharkhand 2022 Livelaw (SC) 194** are fully attracted in the present case as such no sympathy be shown by this court in favour of applicant Aadil.

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

Having heard the learned counsel for applicants, 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 and coupled with the fact that the prosecutrix Nidhi Pal is major, she is aged about 22 years, she in her statements under Section 161/164 CrPC has not implicated applicant Nisar Ahmad for dislodging her modesty deliberately or forcibly therefore, applicant Nisar Ahmad can not be said to be guilty of dislodging the modesty of prosecutrix Nidhi Pal, therefore, irrespective of the objections raised by the learned A.G.A. in opposition to the application for bail of applicant Nisar Ahmad but, without making any comments on the merits of the case, the applicant Nisar Ahmad has made out a case for bail.

Accordingly, the bail application of applicant Nisar Ahmad is allowed.

However, considering the objection raised by the learned A.G.A. in respect of the bail application of applicant Aadil, which objections could not be dislodged by the learned counsel for applicants, therefore irrespective of the varied submissions raised by the learned A.G.A. in support of the present application for bail this Court does not find any good or sufficient ground to enlarge the applicant Aadil on bail.

The application for bail of applicant Aadil thus fails and is liable to be rejected. It is accordingly **rejected**.

Let the applicant **Nisar Ahmad**, 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 :- 16.11.2023.**

Rks.