

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 38466 of 2023

Applicant :- Sandeep Kumar Bind

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

Counsel for Applicant :- Abrar Ahmad Siddiqui, Shashi Kant Shukla

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

1. Learned A.G.A. has filed compliance affidavit in Court today, which is taken on record.
2. Heard Mr. Shashi Kant Shukla, the learned counsel for applicant and the learned A.G.A. for State
3. Perused the record.
4. Instant application for bail has been filed by applicant-Sandeep Kumar Bind seeking his enlargement on bail in Case Crime No. 73 of 2023 under Sections 363, 366, 376 (3) I.P.C. and Sections 51/6 POCSO Act, Police Station-Jigana, District-Mirzapur, during the pendency of trial.
5. 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.
6. This application was taken up on 22.09.2023 and this Court passed the following order:

"Heard Mr. Shashi Kant Shukla and Mr. Abrar Ahmad Siddiqui, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant Sandeep Kumar Bind seeking his enlargement on bail in Case Crime No.73 of 2023, under Sections 363, 366, 376(3), 504, 506 IPC and Section 5-J/6 PocsO Act, police station Jigna, district Mirzapur, during the pendency of trial.

At the very outset, the learned A.G.A. submits that notice of present application for bail has been served upon first informant-opposite party-2 on 24.08.2023. 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 for bail.

After some arguments, it transpires from the record that the age of the prosecutrix has been determined with reference to her date of birth recorded in the School Leaving Certificate of the prosecutrix dated 01.04.2023.

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 age of the prosecutrix as per the date of birth of the prosecutrix recorded therein. Similar view has been taken by the Supreme Court in P. Yuvprakash Vs. State Represented by Inspector of Police 2023 SCC Online (SC) 846.

Since the charge-sheet has been submitted against the applicant on 08.08.2023, Investigating Officer is directed to conduct further investigation in the matter after obtaining leave of the

court in terms of Section 173(8) CrPC. 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 school records of the said institution. The said 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 by Investigating Officer through the learned A.G.A. on or before the next date fixed.

There is no document showing the medical determination of the age of the prosecutrix either. Accordingly, the Chief Medical Officer, Mirzapur is also directed to get ossification/radio-logical test of the prosecutrix conducted for determining her age. The said exercise shall be completed within a period of three weeks from today. The age determination report shall be sent directly to this Court in a sealed envelop on or before the next date fixed.

Put up again as fresh on 17.10.2023.

Order Date :- 22.9.2023."

7. At the very outset, the learned A.G.A submits that subsequent to the order dated 22.09.2023, the Investigating Officer has recovered the date of birth of the prosecutrix recorded in the institution first attended by her which is 16.04.2009. The occurrence giving rise to present criminal proceedings is alleged to have occurred on 17.06.2023. As such the prosecutrix was aged about 14 years 2 months and 1 day on the date of occurrence. As per medical opinion prosecutrix is said to be aged about 16 years.

8. Record shows that in respect of an incident, which is alleged to have occurred on 17.06.2023 a delayed F.I.R. dated 20.06.2023

was lodged by first informant Viddhya Devi (mother of the prosecutrix) and was registered as Case Crime No. 73 of 2023 under Sections 363, 366, 376 504, 506 I.P.C. and Sections 3/4 POCSO Act, Police Station-Jigana, District-Mirzapur. In the aforesaid F.I.R. two persons namely Sandeep Kumar (applicant herein) and Ram Asre have been nominated as named accused.

9. Subsequent to the aforesaid F.I.R., Investigating Officer proceeded with statutory investigation of aforesaid case crime number in terms of Chapter XII Cr.P.C. The prosecutrix was recovered on 17.06.2023. Thereafter the statement of the prosecutrix was recorded by the Investigating Officer under Section 161 Cr.P.C, which is on record at page 29 of the paper book. In the aforesaid statement, the prosecutrix has not supported the F.I.R. To the contrary, she has stated that on account of affinity which developed in between the prosecutrix herself and applicant, they ultimately solemnized marriage on 14.01.2023 at Maihar Temple. Thereafter, on account of above, parties were in cohabitation as husband and wife. Accordingly, physical relations were developed between them. Thereafter the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor, who medically examined her, has rejoined her previous statement under Section 161 Cr.P.C.. However, the Doctor, who medically examined the prosecutrix did not find any injury on her body so as to denote commission of sexual assault. However, with regard to private part of the prosecutrix, the Doctor has opined as follows:

Hymen- Ruptured old healed tear

10. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C., which is on record at page 48 of the

paper book. The prosecutrix in her aforesaid statement has rejoined her earlier statement under Section 161 Cr.P.C. with the improvement that mother of the appellant is going to solemnized marriage of applicant with another guise. During course of investigation, Investigating Officer recovered School Living Certificate of the prosecutrix and on the basis thereof, he came to the conclusion that as per the date of birth of prosecutrix, she is a child within the meaning of POSCO Act. Accordingly, he submitted the charge-sheet dated 03.08.2023 whereby applicant has been charge sheeted under Section 363, 366, 376 (3) I.P.C. and Sections 5th/6 POCSO Act.

11. Learned counsel for applicant contends that though the applicant is a named as well as charge-sheeted accused yet he is liable to be enlarged on bail. Attention of the Court was then invited to the statement of the prosecutrix recorded under Sections 161/164 Cr.P.C. wherein the prosecutrix has categorically admitted that she has solemnized marriage with applicant in Maihar Temple. There is noting on record to show that the prosecutrix was abducted or kidnapped by applicant for the purpose of marriage or for dislodging her modesty. As such, no offence under Sections 363 and 366 I.P.C. can be said to have been committed by applicant. It is next contended that as per the statement of the prosecutrix recorded under Sections 161/164 Cr.P.C., she has solemnized marriage with applicant. It is on account of above that the prosecutrix and applicant were in cohabitation. As such, no offence under Section 376 (3) I.P.C. and Sections 5/6 POCSO Act can be said to have been committed by applicant. According to the learned counsel for applicant even though the prosecutrix was below 18 years of age, on the date of her marriage with the applicant but simply on that ground the marriage shall not be void

but voidable at the instance of the prosecutrix only by virtue of the provision contained in Section 11 (2) of the Hindu Marriage Act. However upto this stage, no proceedings have been initiated by the prosecutrix for declaration her marriage with the applicant as void. 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 07.07.2023. As such, he has undergone more than three 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 relied upon by the prosecution against applicant stands crystallized. Upto this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. The medical evidence does not support the charge-sheet. On the above premise, the learned counsel for applicant 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.

12. 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 further submits that admittedly on the date of occurrence the prosecutrix was minor as she was below 18 years of age. Since the prosecutrix was below 18 years of age on the date of occurrence, therefore her consent if any is immaterial. As such, 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.

13. 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 the prosecutrix in her statements recorded under Sections 161/164 Cr.P.C. has categorically admitted that she has solemnized marriage with applicant, it is on account of above that the parties were in co-habitation as husband and wife, the physical relations were accordingly maintained between the parties, though the prosecutrix was below 18 years of age on the date of her marriage with applicant, however simply on that ground the marriage shall not be void but voidable at the instance of the prosecutrix alone by virtue of the provisions contained in Section 11 (2) of the Hindu Marriage Act, however upto this stage, no proceedings have been initiated by the prosecutrix for declaration of her marriage with the applicant as void, the clean antecedents of applicant, the period of incarceration undergone, the police report (charge-sheet) in terms of Section 173 (2) Cr.P.C. has already been submitted as such, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized, the learned A.G.A. could not point out any such circumstance from the record necessitating the custodial arrest of applicant during the pendency of trial, the allegation made against the applicant that the mother of the applicant wants to solemnize the marriage of applicant with another guise does not amount to a criminal act, therefore irrespective of the objections raised by learned A.G.A. in opposition to the present application for bail but without expressing any opinion on the merits of the case, applicant has made out a case for bail.

14. Accordingly, present application for bail is **allowed**.

15. Let the applicant- **Sandeep Kumar Bind** involved in aforesaid case crime number be released on bail on his furnishing a personal bond and 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) Applicant will not tamper with prosecution evidence.

(ii) Applicant will abide the orders of court, will attend the court on every date and will not delay the disposal of trial in any manner whatsoever.

(iii) Applicant will not indulge in any unlawful activities.

(iv) Applicant will not misuse the liberty of bail in any manner whatsoever.

16. The identity, status and residential proof of sureties will be verified by court concerned and in case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail of applicant and send him to prison

Order Date :- 17.10.2023

YK