

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 39134 of 2023

Applicant :- Surendra Ram

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

Counsel for Applicant :- Anand Kumar

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Anand Kumar Dubey, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. Instant application for bail has been filed by applicant-Surendra Ram seeking his enlargement on bail in Case Crime No. 89 of 2023 under Sections 363, 376 I.P.C., and Sections 3/4 POCSO Act, Police Station-Kotwali Chunar, District-Mirzapur, during the pendency of trial.

4. Present application for bail came up for orders on 06.10.2023 and this Court passed the following order:

"Heard Mr. Anand Kumar, the learned counsel for applicant and the learned A.G.A. for State.

Perused the record.

This application for bail has been filed by the applicant Surendra Ram seeking his enlargement on bail in Case Crime No. 89 of 2023, under Section 363, 366 and 376 IPC and Sections 3/4 PCOSO Act, 2012, P.S. Kotwali, 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 4. 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.

After some arguments, it transpires that the age of the prosecutrix was determined as per her date of birth mentioned in the School Leaving Certificate of the prosecutrix issued by the Principal/Head Master of the School last attended by the prosecutrix dated 29.7.2020. The date of birth of the prosecutrix recorded in the School Leaving Certificate cannot be relied upon for determining her age by virtue of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. Similar view has been taken by the Supreme Court in the case of the P. Yuva Prakash Vs. State represented by Inspector of Police, 2023 SCC Online SC, 826.

Learned A.G.A. submits that the charge sheet has already been submitted against applicant on 21.4.2023. In view of above, Investigating Officer is directed to submit an application before the Court below in terms of Section 173 (8) Cr. P. C. seeking permission of the Court to conduct further investigation. After permission is granted by Court below, Investigating Officer shall proceed to discover the date of birth of the prosecutrix recorded in the institution first attended by her. It shall be open to the Investigating Officer to discover any other document as per the provisions contained in Section 94 of (1) (a) and 94 (1) (b) of the aforementioned Act regarding the date of birth of the prosecutrix. The necessary exercise shall be completed within a period of three weeks from today. Copy 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.

Matter shall, accordingly, re-appear as fresh on 1.11.2023.

Order Date :- 6.10.2023 "

5. At the very outset, the learned A.G.A. contends that subsequent to above order dated 06.10.2023, Investigating Officer conducted further investigation. The date of birth of the prosecutrix recorded in the institution first attended by her has been collected, which is 15.06.2006. The occurrence giving rise to present criminal proceedings occurred on 15.03.2023. As such, the prosecutrix was aged about 16 years and a month on the date of occurrence.

6. Record shows that in respect of an incident, which is alleged to have occurred on 15.03.2023, a delayed F.I.R. dated 18.03.2023 was lodged by first informant Smt. Meera Devi (mother of the prosecutrix) and was registered as Case Crime No. 89 of 2023 under Sections 363, 376 I.P.C., and Sections 3/4 POCSO Act, Police Station-Kotwali Chunar, District-Mirzapur. In the aforesaid

F.I.R. applicant-Surendra Ram has been nominated as solitary named accused.

7. The gravamen of the allegations made in the F.I.R is to the effect that the named accused i.e. applicant herein enticed away the daughter of first informant i.e. prosecutrix namely X and thereafter dislodged her modesty by committing deliberate sexual assault upon her.

8. After aforementioned F.I.R. was registered, Investigating Officer proceeded with statutory investigation of afore-mentioned case crime number in terms of Chapter XII Cr.P.C. The statement of prosecutrix was recorded under Section 161 Cr.P.C, copy of which is on record at page 25 of the paper book. In her aforesaid statement, the prosecutrix has fully supported the F.I.R. Subsequently, prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor, who medically examined her has improved upon her previous statement under Section 161 Cr.P.C. inasmuch as she has partially departed from her previous statement under Section 161 Cr.p.C. However, the Doctor, who medically examined the prosecutrix, did not find any signs on her body so as to denote commission of deliberate or forceful sexual assault. However, with regard to the private part of prosecutrix, the Doctor opined as under:

"Hymen -Ruptured old healed torn."

9. Ultimately, the statement of prosecutrix was recorded under Section 164 Cr.P.C., which is on record at page 42 of the paper book. In her aforesaid statement the prosecutrix has come out with a story which is totally alien to her previous statement under Section 161 Cr.P.C. as well as the statement before doctor, who medically examined her.

10. During course of investigation, Investigating Officer recovered the School Leaving Certificate of the prosecutrix issued by the Principal of the Institution where she studied. As per said certificate, the date of birth of the prosecutrix is 14.06.2006. Occurrence giving rise to the present criminal proceedings occurred on 15.03.2023. As such, prosecutrix was said to be aged about 16 years and 7 months on the date of occurrence. During course of investigation, Investigation Officer examined first informant (mother of the prosecutrix) and other witnesses under Section 161 Cr.P.C. Witnesses so examined have substantially supported the F.I.R.. On the basis of above and other material collected by him during 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 21.04.2023 whereby applicant a named accused has been charge sheeted under Sections 363, 376 I.P.C. and 3/4 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. According to the learned counsel for applicant, medical evidence does support the ocular version of the occurrence as unfolded in the statement of the prosecutrix recorded under Sections 161/164 Cr.P.C. According to the learned counsel for applicant, as per scheme of the Code (i.e. Cr.P.C.) statement of the prosecutrix recorded under Section 164 Cr.P.C. has to be given credence over the statement under Section 161 Cr.P.C.. Drawing a parallel between the two statements i.e. statements under Sections 161/164, learned counsel for applicant submits that the prosecutrix in her aforesaid statements has not remained clear, categorical and consistent qua the manner of occurrence. He therefore submits that no credence can be attached to the aforesaid statements of the

prosecutrix. Attention of the Court was then invited to the judgement of apex Court in **Phool Singh Vs. State of Madhya Pradesh, (2022) 2 SCC 74**. With reference to above, the learned counsel for applicant submits that the prosecution of an accused for an offence of rape and sexual assault can be maintained even in the absence of medical evidence and on the solitary statement of the prosecutrix. However, in such a circumstance, the statement of the prosecutrix must be clear, categorical and consistent. When the statements of the prosecutrix as recorded under Section 161 Cr.P.C., statement before Doctor and statement under Section 164 Cr.P.C. are taken as a whole then they do not fall in the category of impeccable evidence. They suffer from vice of exaggeration, embellishment and contradiction which remains unexplained upto this stage. As such, no credence can be attached to the same.

12. 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 20.03.2023. As such he has undergone more than eight months of incarceration. Police report (charge-sheet) in terms of Section 173 (2) Cr.P.C. has already been submitted against applicant, therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystallised. Upto this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. He therefore 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.

13. 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-sheet accused, therefore he does not

deserve any indulgence by this Court. 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.

14. 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 medical evidence does not support the ocular version of the occurrence, as per statement of the prosecutrix recorded under Sections 161/164 she herself accompanied the applicant, as such applicant has neither kidnapped the prosecutrix nor he abducted the prosecutrix, as no offence under Section 363 I.P.C. can be said to have been committed by applicant. , police report (charge-sheet) in terms of Section 173 (2) Cr.P.C. has been submitted against applicant therefore the entire evidence sought to relied upon by the prosecution against applicant stands crystallized, 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 applicant during the pendency of trial, the judgement of Supreme Court in **Sumit Subhashchandra Gangwal Vs. State of Maharashtra, 2023 LiveLaw (SC) 373** (Paragraph 5), the medical evidence does not support the ocular version of the occurrence as unfolded in the statements of the prosecutrix, the statements of the prosecutrix referred to above when taken as a whole are not of impeccable evidence, the judgement of the Supreme Court in **Phool Singh (supra)**, the clean antecedents of applicant, the period of incarceration undergone by applicant , therefore, irrespective of the objection raised by the 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.

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

16. Let the applicant-**Surendra Ram** 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.

17. 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 :- 23.11.2023

YK