

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 39097 of 2023

Applicant :- Naushad

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

Counsel for Applicant :- Ashok Kumar Singh, Preeti Dwivedi

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

1. Supplementary affidavit has been filed by the learned counsel for applicant in Court today, which is taken on record.
2. Heard Mr. Ashok Kumar Singh, the learned counsel for applicant and the learned A.G.A. for State.
3. Perused the record.
4. The present application came up for orders on 22.09.2023 and this Court passed the following order:

"Heard Mr. Ashok Kumar Singh, the learned counsel for applicant-Naushad and the learned A.G.A. for State.

This application for bail has been filed by applicant Naushad seeking his enlargement on bail in Case Crime No.135 of 2023, under Sections 376, 504, 506, 452 IPC, and Section 3/4 Pocso Act, police station Lohta, district Varanasi.

At the very outset, the learned A.G.A. submits that notice of present bail application has been served upon the first informant-opposite party-2 on 04.09.2023. However, in spite of service of notice, no one has put in appearance on behalf of first informant-opposite party-2 to oppose the application for bail.

The provisions of the Pocso Act have been invoked against applicant on the basis of the date of birth of the prosecutrix recorded in the certificate issued by the Head Master of the concerned primary school, Managalpur, Kashi Vidyapeeth, Varanasi, which is on record at page 26 of the paper book.

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 her date of birth 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 06.07.2023, 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 said institution. The said exercise shall be completed within a period of three weeks from today. The copy of the supplementary case diary shall also 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 age of the prosecutrix either. Accordingly, the Chief Medical Officer, Varanasi 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 by the Chief Medical Officer, Varanasi directly to this Court in a sealed envelop on or before the next date fixed.

Put up again as fresh on 17.10.2023. "

5. Pursuant to above order dated 22.09.2023 an affidavit of compliance has been filed by the learned A.G.A. which is already on record.

6. This application for bail has been filed by applicant-**Naushad** seeking his enlargement on bail in Case Crime No.135 of 2023, under Sections 376, 504, 506, and 452 I.P.C., and Section 3/4 POCSO Act, Police Station- Lohata, District- Varanasi during the pendency of trial.

7. Record shows that in respect of an incident, which is alleged to have occurred on 07.05.2023, a delayed F.I.R. dated 18.06.2023 was lodged by first-informant Mohd Shareef (father of the prosecutrix) and was registered as Case Crime No.135 of 2023, under Sections 376, 504, 506, and 452 I.P.C., and Section 3/4 POCSO Act, Police Station- Lohata District- Varanasi. In the

aforesaid F.I.R. applicant Naushad has been nominated as solitary named accused.

8. The gravamen of the allegations made in the F.I.R. is to the effect that the named accused Naushad is alleged to have deliberately and forcibly dislodged the modesty of the daughter of the first informant that is the prosecutrix aged about 17 years at the house of the first informant.

9. After above-mentioned F.I.R. was lodged, Investigating Officer proceeded with the statutory investigation of concerned case crime number in terms of Chapter XII of Cr.P.C. The statement of the prosecutrix was recorded under Section 161 Cr.P.C. which is on record at page 22 of the paper book. The prosecutrix in her aforesaid statement has supported the F.I.R. Thereafter, the prosecutrix was requested for her internal medical examination. The doctor who medically examined the prosecutrix did not find any internal or external injury on her body so as to denote commission of deliberate or forceful sexual assault. Since, the prosecutrix was in adverse bio-logical condition therefore, no examination with regard to the private part of the prosecutrix could be conducted. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. The same is on record at page 28 of the paper book. The prosecutrix in her aforesaid statement has not only re-joined her previous statement but also has detailed the manner of occurrence. During course of investigation, Investigating Officer recovered the certificate from the Principal of the institution where the prosecutrix had studied. As per the said certificate the date of birth of the prosecutrix as recorded in the school record is 29.12.2006. The occurrence giving rise to the present criminal proceedings occurred on 07.05.2023. As such, the prosecutrix was aged about 16 years and 5 months on the date of occurrence. In compliance of order dated 22.09.2023 passed by this Court, the prosecutrix was subjected to medical examination wherein the prosecutrix is said to be aged about 17 to 18 years. In the light of above and other material collected by Investigating Officer he came to the conclusion that the complicity of applicant is established in the crime in question. Accordingly, he submitted the charge sheet dated 06.07.2023 whereby, applicant has been charge sheeted under Sections 376, 504, 506, and 452 I.P.C., and Section 3/4 POCSO Act.

10. 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. With reference to the medical opinion regarding the age of prosecutrix he submits that prosecutrix is

major. Attention of the Court was then invited to the document occurring at page 9 of the supplementary affidavit filed today in support of the submission that the prosecutrix and the applicant were in relationship. Considering the small area of the house in which the family of the prosecutrix resides the occurrence could not be possible without consent of the prosecutrix herself. On the above premise, he submits that the prosecutrix is a willing and consenting party and therefore, the applicant is liable to be enlarged on bail.

11. Even otherwise, applicant is a man of clean antecedents having no criminal history to his credit except the present one. Applicant is in jail since 22.12.2021. As such, he has undergone more than one year and five months of incarceration. The police report in terms of Section 173(2) Cr.P.C. has already been submitted. Therefore, the entire evidence sought to be relied upon by the prosecution against the applicant stands crystallized. 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, 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. has opposed the prayer for bail. He submits that since applicant is a named and charge sheeted 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.

13. Having heard the learned counsel for applicant, the learned A.G.A. for State, upon perusal of record, evidence, nature and gravity of offence, complicity of accused and accusation made coupled with the fact that though the prosecutrix in her statement under Sections 161/164 Cr.P.C. has supported the F.I.R., the medical evidence does not support the ocular version of the occurrence, the document occurring at page 9 of the supplementary affidavit referred to above clearly denotes that parties were in relationship with each other, as per the medical opinion prima facie the prosecutrix is major, the clean antecedents of applicant, the period of incarceration undergone, the police report in terms of Section 173(2) Cr.P.C. has already been submitted, therefore, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized, yet inspite 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, therefore, irrespective of the objections raised by the learned A.G.A. in opposition to the present application for bail, but without making any comment on the merits of the case, applicant has made out a case for bail.

14. Accordingly, the bail application is **Allowed**.

15. Let the applicant-**Naushad** be released on bail in aforesaid case crime number 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) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT THAT HE/SHE 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/HER COUNSEL. IN CASE OF HIS/HER ABSENCE, WITHOUT SUFFICIENT CAUSE, THE TRIAL COURT MAY PROCEED AGAINST HIM/HER UNDER SECTION 229-A IPC.

(iii) IN CASE, THE APPLICANT MISUSES THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE HIS/HER 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/HER, IN ACCORDANCE WITH LAW, UNDER SECTION 174-A IPC.

(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 THE HIM/HER 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.

16. However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his/her 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.

17. The papers relating to the medical opinion regarding the age of the prosecutrix and the certificate of principal shall be transmitted to Court below.

Order Date :- 31.10.2023

Imtiyaz