

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 39152 of 2023

Applicant :- Ashuthosh Maurya @ Shanauj Maurya

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

Counsel for Applicant :- Ashish Srivastava, Raj Kumari Devi

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

1. Heard Mr. Ashish Srivastava, 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- Ashuthosh Maurya @ Shanauj Maurya seeking his enlargement on bail in Case Crime No. 219 of 2023 under Sections 363, 366, 376 D I.P.C., 3/4 POCSO Act and Sections 3 (2) 5 SC/ST Act, Police Station- Mubarakpur, District- Azamgarh, during the pendency of trial.

4. Record shows that in respect of an incident, which is alleged to have occurred on 04.05.2023, a delayed F.I.R. dated 06.05.2023 was lodged by first informant Chandan Kumar (father of the prosecutrix) and was registered as Case Crime No. 219 of 2023 under Sections 363 I.P.C., Police Station- Mubarakpur, District- Azamgarh. In the aforesaid F.I.R. a solitary unknown person has been arraigned as an accused.

5. The gravamen of the allegations made in the F.I.R is to the effect that the daughter of first informant namely X, who is aged about 13 years has gone missing.

6. After the 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 prosecutrix was recovered on 09.05.2023. Thereafter, statement of prosecutrix was recorded under Section 161 Cr.P.C, copy of which is on record at page 27 of the paper book. In her aforesaid statement, the prosecutrix has not supported the F.I.R. To the contrary, she has stated that she willingly joined the applicant and accompanied him to Bombay. Subsequently, prosecutrix was requested for her internal medical examination. The Doctor, who medically examined the prosecutrix, did not find any signs on the body of prosecutrix so as to denote commission of sexual assault. However, with regard to the private part of the prosecutrix, the Doctor opined as under:

"Hymen - Torn.

7. Certain samples were taken from the body of the prosecutrix for pathological examination. However, the result of the same is in negative. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C., which is on record at page 36 of the paper book. The prosecutrix in her aforesaid statement has not only implicated Roshan but has his friend for having forcibly kidnapped her. The prosecutrix in her aforesaid statement has clearly implicated co-accused Roshan for dislodging her modesty forcibly and deliberately.

8. During course of investigation, Investigating Officer recovered the certificate issued by the Principal of the Institution where she studied. As per said certificate, the date of birth of the prosecutrix is 11.08.2010. 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 23.06.2023 whereby both the accused have been charge sheeted under Sections 363, 366, 376 D I.P.C., 3/4 POCSO Act and Sections 3

(2) 5 SC/ST Act.

9. Instant application for bail came up for orders on 15.09.2023 and this Court passed the following order:

"Heard Mr. Ashish Srivastava, the learned counsel for applicant and the learned A.G.A. for State.

At the very outset, the learned A.G.A. submits that notice of present application for bail has been served upon the first informant-opposite party-4 on 28.08.2023. However, in spite of service of notice upon the first informant, no one has put in appearance on behalf of first informant-opposite party-4 to oppose this application for bail.

The age of the prosecutrix has been determined on the basis of certificate issued by the Principal of the institution concerned, copy of which is at page 38 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 date of birth of the prosecutrix.

In view of above, as the charge-sheet has been submitted against applicant on 23.06.2023, the Investigating Officer is directed to file an application before the court below in terms of Section 173(8) CrPC and seek permission of the court to conduct further investigation in the matter to find out the date of birth of the prosecutrix recorded in the institution first attended by her.

Let necessary exercise be undertaken within a period of three weeks.

Copy of the supplementary case-diary shall be transmitted to this Court through the learned A.G.A. on or before the next date fixed.

Put up again as fresh on 16.10.2023.

Order Date :- 15.9.2023. "

10. In compliance of above order dated 15.09.2023, the learned A.G.A. has filed an affidavit of compliance in Court today, which is taken on record.

11. Learned counsel for applicant submits that applicant is

innocent. He is not named in the F.I.R.. Though applicant is a charge-sheeted accused yet he is liable to be enlarged on bail. Complicity of applicant in the crime in question has emerged in the subsequent statement of the prosecutrix under Section 164 Cr.P.C. On the above premise, he submits that applicant is liable to be enlarged on bail. As per subsequent statement of the prosecutrix her modesty was forcibly dislodged by charge-sheeted co-accused Roshan and not by the applicant. Therefore, case of present applicant is clearly distinguishable from co-accused Roshan.

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 03.06.2023. As such, he has undergone approximately eight 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 be relied upon by the prosecution against applicant stands crystallised. However, upto this stage, no such incriminating circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. On the above premise, he 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 charge sheeted accused therefore, he does not deserve any indulgence by this Court. With reference to the scheme under the Code (Cr.P.C.), the learned A.G.A. submits that the statement of prosecutrix recorded under Section 164 Cr.P.C. has to be given credence over the statement under Section 161. The prosecutrix in her aforesaid statement has clearly implicated the applicant. The medical evidence clearly corroborates the ocular

version as unfolded in the statement of the prosecutrix under Section 164 Cr.P.C. As per date of birth of the prosecutrix recorded in the institution, which was first attended by her is 04.08.2010. Occurrence giving rise to present criminal proceedings is alleged to have occurred on 04.05.2023. As such, the prosecutrix was aged about 12 years and 9 months on the date of occurrence. It is thus contended that no sympathy be shown by this Court in favour of applicant. Prosecutrix is a young girl of tender age. Even if there was consent given by the prosecutrix, the same is immaterial. To buttress his submission he has relied upon the judgement of Supreme court in **X (Minor) Vs. The State of Jharkhand and Another (2022 Live Law (SC) 194**. On the aforesaid premise, it is thus urged that no good ground exists to enlarge the applicant on bail. As such, present applicant for bail is liable to be rejected.

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

15. 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 objections raised by the learned A.G.A. in opposition to the present application for bail could not be dislodged by the learned counsel for applicant, therefore irrespective of the varied submissions urged by the learned counsel for applicant in support of present application for bail, this Court does not find any sufficient or good ground to enlarge the applicant on bail.

16. As a result, present application for bail thus fails and is liable to be rejected.

17. It is accordingly **rejected**.

Order Date :- 2.11.2023

YK