

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 39312 of 2023

Applicant :- Faisal @ Faizal

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

Counsel for Applicant :- Ravi Shankar Tripathi

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Shyam Shankar Mishra, 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-Rahul Kumar seeking his enlargement on bail in Case Crime No. 432 of 2023 under Sections 363, 366, 376 I.P.C. and Sections 3/4, POCSO Act, Police Station-Sirauli, District-Bareilly, during the pendency of trial.

4. Present application came up for orders on 15.09.2023 and this Court passed the following order:

"1. Heard Mr. Ravi Shankar Tripathi, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. This application for bail has been filed by applicant-Faisal @ Faizal seeking his enlargement on bail in Case Crime No. 432 of 2022, under Sections 363, 366, 376 IPC and Sections 3/4 POCSO Act, Police Station-Sirauli, District-Bareilly during the pendency of trial.

4. 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 3 on 05.09.2023. However, in spite of service of notice, no one has put in appearance on behalf of first informant-opposite party 3 to oppose this application for bail.

5. The provisions of the POCSO Act has been invoked against applicant on the basis of date of birth of the prosecutrix recorded in the school leaving

certificate. Copy of which is on record at page 31 of the paper book. Prima-facie by virtue of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The said document cannot be relied upon to determine the age of the prosecutrix as per the date of birth as recorded thereof.

6. In view of above, the Chief Medical Officer, Bareilly is directed to get the ossification test/radiological test of the prosecutrix conducted and thereafter medically determine her age. The age determination report shall be transmitted before this Court in a sealed cover before the next date fixed.

7. Since the charge sheet has been submitted against the applicant on 03.07.2023, the Investigating Officer is directed to submit an application under Section 173(8) Cr.P.C. before court below and seek permission of court to conduct further investigation. Investigating Officer shall endeavour to discover the date of birth of the prosecutrix recorded in the institution first attended by her. The copy of supplementary case diary shall be transmitted to this Court through the learned A.G.A. before the next date fixed.

8. Matter shall, accordingly, re-appear as fresh on 16.10.2023.

Order Date :- 15.9.2023 "

5. Subsequent to above order dated 15.09.2023, the Investigating Officer has recovered the date of birth certificate of the prosecutrix in the institution first attended by her which is 06.05.2005. The occurrence giving rise to present application for bail is alleged to have occurred on 16.11.2022. As such, the prosecutrix on the date of occurrence was aged about 17 years 6 months and 10 days. As per the medical opinion, the prosecutrix is said to be aged about 18 years. The Chief Medical Officer concerned has sent the documents pertaining to age determination of the prosecutrix before this Court which are taken on record.

6. Record shows that in respect of an incident which is alleged to have been occurred on 16.11.2022, a delayed F.I.R. dated 18.11.2022 was lodged by first informant Pappu @ Gulam Rasul (Father of the prosecutrix) and was registered as Case Crime No.432 of 2023 under Section 363, Police Station-Sirauli, District-Bareilly, Police Station-Ganjdundwara, District-Kasganj. In the

aforesaid F.I.R. Faisal @ Faizal has been nominated as solitary named accused.

7. 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 namely X, aged about 15 years on 16.11.2022 at around 4.00 PM.

8. Learned counsel for applicant contends that though applicant a named and charge-sheeted accused inasmuch as the charge sheet has been submitted against applicant on 03.07.2023 yet the applicant is liable to be enlarged on bail. Referring to the statement of the prosecutrix recorded under Section 164 Cr.P.C., he submits that the prosecutrix is a willing and consenting party. The prosecutrix herself willingly joined the applicant and thereafter accompanied the applicant to Himachal Pradesh. As such, no offence under Sections 363 and 366 I.P.C. can be said to have been committed by applicant as neither the prosecutrix was enticed away, abducted nor kidnapped by the applicant. It is then contended that physical relationship between the parties was established upon the consent of the prosecutrix. As such, the modesty of the prosecutrix was not dislodged by the applicant forcibly or deliberately. Consequently, no offence under Section 376 (3) I.P.C. and 3/4 POCSO Act is made out against applicant. He further submits that prosecutrix has not solemnized marriage with applicant.

9. 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 02.07.2023. As such, he has undergone more than three months of incarceration. The police report in terms of Section 173 (2) Cr.P.C. has already been

submitted against applicant therefore the entire evidence sought to relied upon by the prosecution against applicant stands crystalized. Upto this stage, no such circumstance has merged on the basis of which it can be said that the custodial arrest of applicant is absolutely necessary 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

10. 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. The prosecutrix is a young girl aged about 17 years 6 months month and 10 days on the date of occurrence as such she was below 18 years on the date of occurrence. Consequently, her consent is wholly immaterial. As a result the provisions of section 376 I.P.C. and Section 3/4 POCSO Act are squarely attracted against applicant. He therefore submits that 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.

11. Having heard the learned counsel for applicant, the learned A.G.A. for State, the learned counsel representing first informant, 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 prosecutrix is a willing and consenting party, the prosecutrix herself came to the applicant and joined him, as such, no offence under Sections 363 and 366 I.P.C. can be said to have been committed by applicant, physical

relationship between the parties was established upon the consent of the prosecutrix, as such, modesty of the prosecutrix was not dislodged by applicant forcibly or deliberately, no offence under Section 376 (3) I.P.C. and 3/4 POCSO Act can be said to have been committed by applicant, the clean antecedents of applicant, the period of incarceration undergone by applicant, 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, in spite of above, 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 present applicant for bail, but without expressing any opinion on the merits of the case, applicant has made out a case for bail.

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

13. Let the applicant-**Faisal @ Faizal** 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.

14. 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 :- 16.10.2023

YK