

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 39659 of 2023

Applicant :- Om Prakash

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

Counsel for Applicant :- Satya Narayan Yadav

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mrs. Monika Pal Advocate holding brief of Mr. S. N. Yadav, 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-Om Prakash seeking his enlargement on bail in Case Crime No. 69 of 2020 under Sections 363, 366 376, 506, 352 I.P.C. and 4 POCSO Act, Police Station- Sakeet, District-Etah, during the pendency of trial.

4. Present application came up for orders on 09.10.2023 and this court passed the following order:

"Heard Mr. S.N. Yadav, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant Om Prakash seeking his enlargement on bail in Case Crime No. 69 of 2020, under Sections 363, 366, 376, 506, 352 IPC and Section 4 POCSO Act, 2012, P.S. Sakeet, District Etah, during the pendency of trial.

Perused the record.

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 31.8.2023. 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 that age of the prosecutrix has been determined as per the date of birth recorded in the

scholar register/transfer certificate. By virtue of the provisions contained in Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015, the date of birth of the prosecutrix recorded in the aforementioned documents could not be considered for determining her age. 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 22.7.2020. 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 regarding the date of birth of the prosecutrix as per the provisions contained in Section 94 of (1) (a) and 94 (1) (b) of the aforementioned Act. 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 2.11.2023.

Order Date :- 9.10.2023 "

5. In compliance of above order dated 09.10.2023, the learned A.G.A. has filed an affidavit of compliance in Court today, which is taken on record.

6. Record shows that in respect of an incident, which is alleged to have occurred on 07.05.2020, a delayed F.I.R. dated 09.05.2020 was lodged by first informant Ram Veer Singh (father of the prosecutrix) and was registered as Case Crime No. 69 of 2020 under Sections 363, 366 376, 506, 352 I.P.C. Police Station- Sakeet, District-Etah,. In the aforesaid F.I.R. applicant Om Prakash has been nominated as named accused whereas an unknown person has also been arraigned as an accused.

7. The gravamen of the allegations made in the F.I.R is to the effect that on 07.05.2020 at around 5.00 AM, the daughter of the

first informant i.e. prosecutrix namely X had gone out in the field to attend the call of nature. At this juncture named accused Om Prakash alongwith his associate kidnapped the daughter of first informant i.e. prosecutrix on gun point.

8. After aforementioned F.I.R. was registered, Investigating Officer proceeded with statutory investigation of aforementioned case crime number in terms of Chapter XII Cr.P.C. The prosecutrix was recovered on 103.07.2020. Thereafter, statement of prosecutrix was recorded under Section 161 Cr.P.C, copy of which is on record at page 19 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 herself solemnized court marriage with applicant on 15.02.2020. Subsequently, 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. The Doctor, who medically examined the prosecutrix, did not find any signs on the body of prosecutrix so as to denote commission of deliberate or forceful sexual assault. However, with regard to the private part of the prosecutrix, the Doctor opined as under:

"Hymen - Old torn hymen."

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 reiterated her previous statement recorded under Section 161 Cr.P.C.

10. During course of investigation, Investigating Officer recovered Transfer Certificate of the prosecutrix from Institution from where the prosecutrix passed class IXth. As per said document, the date of birth of the prosecutrix is 05.02.2007. The occurrence giving rise to present criminal proceedings occurred on 07.05.2020. As such, the prosecutrix

was aged about 13 years, 3 months and two days. During course of investigation, Investigating Officer examined first informant 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 accused is fully established in the crime in question. He accordingly submitted the charge sheet dated 22.07.2020 whereby applicant has been charge sheeted under Sections 363, 366 376, 506, 352 I.P.C. and Section 4 POCSO Act.

11. Learned counsel for applicant submits that applicant is innocent. Though applicant is a named and charge-sheeted accused yet he is liable to be enlarged on bail. The prosecutrix has admittedly solemnized marriage with applicant. This fact is clearly evident from the document occurring at page 49 of the paper book. As per date of birth of the prosecutrix recorded in the institution which was first attended by her i.e 17.06.2005, the prosecutrix was below 18 years of age at the time of her marriage with applicant. Yet the marriage of prosecutrix with the applicant shall not be void but voidable at the instance of the prosecutrix in view of the provisions contained in Section 11 (2) of the Hindu Marriage Act. However, no proceedings have been initiated by the prosecutrix for declaring the her marriage with applicant as void. On the above premise, learned counsel for applicant submits that criminality if any committed by applicant is washed of.

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 11.07.2020. As such he has undergone more than three years and 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 be relied upon by the prosecution against applicant stands crystallised. Up to 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.

13. Per contra, the learned A.G.A. has 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. Admittedly prosecutrix was below 18 years of age on the date of occurrence as well as on the date of her marriage with applicant. Since the prosecutrix is minor, therefore her consent if any has no relevance. On the above premise, the learned A.G.A. 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.

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 as per the statements of the prosecutrix recorded under Sections 161/164 Cr.P.C., the prosecutrix is a willing and consenting party, the prosecutrix has herself solemnized marriage with applicant, as such the prosecutrix was neither abducted nor kidnapped by the applicant for the purpose of marriage or to dislodge her modesty, as such prima facie no offence under Section 363, 366 I.P.C. is made out against applicant, the

prosecutrix has solemnized marriage with applicant, in view of above, no offence under Section 376 I.P.C and Section 4 POCSO Act can be said to have been committed by applicant, even though the prosecutrix was below 18 years of age, on the date of her marriage with applicant but simply on that ground the marriage of the prosecutrix with the applicant shall not be void but voidable at the instance of the prosecutrix 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 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 relied upon by the prosecution against applicant stands crystallised, 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 apex Court in **Sumit Subhashchandra Gangwal Vs. State of Maharashtra, 2023 LiveLaw (SC) 373** (Paragraph 5) the clean antecedents of applicant, the period of incarceration undergone, 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.

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

16. Let the applicant- **Om Prakash** 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 :- 2.11.2023

YK