

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 39866 of 2023

Applicant :- Omkar Singh Alias Beenu Paswan

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

Counsel for Applicant :- Ravi Sahu

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

Heard Mr. Ravi Sahu, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant-Omkar Singh Alias Beenu Paswan seeking his enlargement on bail in Case Crime No.38 of 2023, under Sections 363, 342, 376 IPC and Section 3/4 PocsO Act, police station Gujaini, district Kanpur Nagar, during the pendency of trial.

Perused the record.

The present application for bail came up for orders on 28.10.2023 and this Court passed following order :-

"1. Heard Mr. Ravi Sahu, 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- Omkar Singh Alias Beenu Paswan seeking his enlargement on bail in Case Crime No.38 of 2023 under Sections 363, 366, 376 I.P.C. and 3/4 POCSO Act, Police Station-Gujaini, District-Kanpur Nagar, during the pendency of trial.

4. At the very outset, the learned A.G.A. submits that notice of present bail application has been served upon first informant/opposite party-2 on 30.08.2023. 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.

5. After some arguments, it transpires that age of the prosecutrix has been determined with reference to her date of birth recorded in the School Leaving Certificate dated 23.07.2021.

6. By virtue of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 as well as the judgement of Apex Court in P. Yuva Prakash Vs. State 2023 SC OnLine SC 846, the said document cannot be relied upon to conclude the age of the prosecutrix as per the date of birth of the prosecutrix recorded therein. The age of the prosecutrix can be determined only with reference to the date of birth of the prosecutrix recorded in any document recognised under Sections 94 (2) (i) and 94 (2) (ii) of the aforesaid Act.

7. In view of the fact that police report in terms of Section 173 (2) Cr.P.C. has been submitted against applicant, on 06.04.2023, the Investigating Officer is directed to submit an application before court concerned in terms of Section 173 (8) Cr.P.C. seeking permission of the court to conduct further investigation. After obtaining permission of the court, Investigating Officer shall conduct further investigation to find out the date of birth of the prosecutrix recorded in the institution which was first attended by her. It shall be open to the Investigating Officer to collect any other document regarding the date of birth of the prosecutrix as per Section 94 of the Act 2015.

8. Let the necessary exercise be completed by the Investigating Officer within three weeks.

9. Copy of supplementary case diary shall be transmitted by the Investigating Officer to this Court through the learned A.G.A. before the next date fixed.

10. Matter shall accordingly re-appear as fresh on 23.11.2023."

On the matter being taken up, the learned A.G.A. contends that subsequent to the order dated 28.10.2023, Investigating Officer has conducted further investigation in the matter. The additional material collected by Investigating Officer has been brought on record by means of an affidavit filed by the learned A.G.A. in Court today, which is taken on record.

Record shows that in respect of an incident which is alleged to have occurred on 24.02.2023, a prompt first information report dated 24.02.2023 was lodged by first informant, namely, Vijay Narain (father of the prosecutrix) and was registered as Case Crime No.0038 of 2023, under Sections 363, 342, 376 IPC and Section 3/4 Poo Act, police station Gujaini, district South (Commissionerate Kanpur Nagar). In the aforesaid F.I.R., applicant-Omkar Singh Alias Beenu Paswan has been nominated as solitary named accused.

The gravamen of the allegations made in the first information report is to the effect that named accused Omkar Singh Alias Beenu Paswan has deliberately dislodged the modesty of daughter of the first informant i.e. prosecutrix aged about 16 years.

After aforementioned F.I.R. was lodged, the Investigation Officer proceeded with the statutory investigation of concerned case crime number in terms of Chapter XII CrPC. Thereafter, the statement of the prosecutrix was recorded under Section 161 CrPC, which is on record at page 49 of the paper book. The prosecutrix in her aforesaid statement has not fully supported the FIR. To the contrary she has stated that she was in acquaintance with the applicant and prior to the lodging of the FIR physical relations were established between the parties repeatedly but upon the consent of the prosecutrix herself. Subsequently, the prosecutrix was requested for her medical examination. The prosecutrix in her statement made before the Doctor, who medically examined

her, has departed from her earlier statement recorded under Section 161 CrPC. She has now alleged that her modesty was deliberately and forcibly dislodged by the applicant. However, the Doctor who medically examined the prosecutrix has opined as is evident from the recital contained at page 46 of the paper book that there is evidence of recent sexual assault present. With regard to the private part of the prosecutrix, the Doctor has opined as follows :-

"HYMEN - TORN-RECENT"

Certain samples were taken from the body of the prosecutrix for pathological examination. However, the supplementary medical report of the prosecutrix has not been brought on record. Ultimately, the statement of the prosecutrix was recorded under Section 164 CrPC, which is on record at page 51 of the paper book. The prosecutrix in her aforesaid statement has departed from her previous statement under Section 161 CrPC and the statement given before the Doctor.

During course of investigation, the Investigating Officer recovered the School Leaving Certificate of the prosecutrix wherein her date of birth is recorded as 28.12.2006. The occurrence giving rise to the present criminal proceeding is alleged to have occurred on 24.02.2023. As such, the prosecutrix was aged about 16 years and 01 month on the date of occurrence. Investigating Officer also examined the first informant and other witnesses under Section 161 CrPC. The witnesses so examined have substantially supported the FIR. On the basis of above and other material collected by the Investigating Officer, he came to the conclusion that complicity of applicant is fully established in the crime in question. He, accordingly, submitted the charge-sheet dated 06.04.2023, whereby applicant has been charge-sheeted under Section 363, 342, 376 IPC and Section 3/4 Pocs0 Act.

Learned counsel for the applicant contends that though the applicant is a named as well as charge-sheeted accused, yet he is liable to be enlarged on bail. It is next contended that the prosecutrix in her statement under Section 164 CrPC has departed from her previous statement under Section 161 CrPC. He, therefore, contends that when the statements of the prosecutrix recorded under Section 161 CrPC, before the Doctor and under Section 164 CrPC are taken as a whole, they do not fall in the category in impeccable evidence as they suffer from the vice of embellishment, contradiction and exaggeration which remains unexplained up to this stage. Though as per the medical opinion there is evidence of sexual assault upon the prosecutrix but as per the statement of the prosecutrix recorded under Section 164 CrPC, the prosecutrix has not nominated any person for having dislodged her modesty therefore, the said medical evidence cannot be

taken in aid of the prosecution case. Referring to the statement of the prosecutrix recorded under Section 161 CrPC, learned counsel for applicant contends that the prosecutrix was in consensual relationship with the applicant for a long period. On the above premise, he submits that the applicant is liable to be enlarged on bail.

Even otherwise, applicant is a man of clean antecedents having no criminal history to his credit except the present one. Applicant is in custody since 16.03.2023. As such, he has undergone more than eight months of incarceration. The police report under Section 173 (2) CrPC has already been submitted. As such the entire evidence sought to be relied upon by the prosecution against the applicant stands crystalized. However, up to this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. He, therefore, contends 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.

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-sheeted accused therefore, he does not deserve any indulgence by this court. As per the material collected by the Investigating Officer, the date of birth of the prosecutrix as recorded in the institution is 08.12.2006. As such, the prosecutrix was a young girl of tender age (aged about 16 years and 01 month) on the date of occurrence. According to the learned A.G.A. though the prosecutrix in her statement under Section 161 CrPC has not supported the FIR and has subsequently resiled from her previous statement under Section 161 CrPC in her subsequent statement under Section 164 CrPC, yet the statement under Section 164 CrPC is more worthy of credit as per the scheme of the Code (CrPC) itself. The prosecutrix in her statement under Section 164 CrPC has clearly implicated the applicant in the crime in question. It is thus urged that no sympathy be shown by this Court in favour of applicant. As such, the bail application is liable to be rejected.

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

Having heard the learned counsel for applicant, the learned A.G.A. for State, upon perusal of material brought on record, nature and gravity of offence, evidence, complicity of the accused, accusation made, coupled with the fact that the prosecutrix is a young girl of tender age (aged about 16 years and 01 month) and as per the statement of the prosecutrix under Section 161 CrPC the applicant has been dislodging her modesty much before the date of lodging of the first

information report, the medical evidence clearly shows that there is clear evidence of recent sexual assault, up to this stage there is no such material brought on record on the basis of which false or malicious prosecution of the applicant can be inferred, no material has been brought on record to infer the innocence of applicant, therefore irrespective of the statement of the prosecutrix under Section 161 CrPC and the varied submissions urged by the learned counsel for applicant in support of the present application for bail, this Court does not find any good or sufficient ground to enlarge the applicant on bail.

This application for bail thus fails and is liable to be rejected.

It is accordingly **rejected**.

Order Date :- 23.11.2023.

Rks.