

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 42793 of 2023

Applicant :- Rahul

Opposite Party :- State Of U.P. And 2 Others

Counsel for Applicant :- Rajesh Dutta Pandey, Dinesh Chandra Sharma

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

Heard Mr. Rajesh Dutta Pandey, the learned counsel for applicant and the learned A.G.A. for State.

The present application for bail came up for orders on 27.10.2023 and this Court passed the following order :-

"Heard Mr. R.D. Pandey, the learned counsel for applicant and the learned A.G.A. for State.

Perused the record.

This application for bail has been filed by applicant Rahul, seeking his enlargement on bail in Case Crime No. 119 of 2017, under Sections 363, 366, 376 IPC and Section 3/4 POCSO Act, Police Station- Nauhheel, District Mathura during the pendency of trial.

At the very outset, learned A.G.A. submits that notice of present application for bail has been served upon first informant/opposite party-2 on 12.9.2023. 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 appears that prosecutrix has appeared in her high school examination. However, copy of High School Certificate has not been collected by Investigating Officer. The age of the prosecutrix has been determined as per the date of birth of the prosecutrix mentioned in the certificate issued by the Principal. The same is illegal. The age of the prosecutrix could have been determined only in accordance with date of birth of the prosecutrix as per documents recognized under Section 94(1)(a) and 94(1)(b) of the Juvenile Justice (care and protection) Act, 2015. Similar view has been taken by the Apex Court in the case of P. Yuvaprakash Vs. State, 2023 Live Law (SC) 538.

Learned A.G.A. submits that charge sheet has already been submitted against applicant on 5.7.2017.

In view of the fact that police report in terms of Section 173 (2) Cr.P.C. has been submitted against applicants on 5.7.2017, therefore, 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. Investigating Officer may also collect any other document regarding the date of birth of the prosecutrix which may be in consonance with Section 94 of Act, 2015. The necessary exercise shall be undertaken by the Investigating Officer

within a period of three weeks from today. Copy of supplementary case diary shall also be transmitted to this Court through the learned A.G.A. before the next date fixed.

Matter shall accordingly reappear as fresh on 20.11.2023."

In compliance of the above order dated 27.10.2023, the learned A.G.A. has filed an affidavit of the Investigating Officer bringing on record the supplementary case-diary of concerned case crime number. In the said affidavit, High School Certificate-cum-Marks Sheet of the prosecutrix has been annexed, wherein her date of birth is recorded as 03.12.2000. The occurrence giving rise to the present criminal proceeding is alleged to have occurred on 13.04.2017. As such, the prosecutrix was aged 16 years 04 months and 10 days on the date of occurrence. The compliance affidavit filed by the learned A.G.A. in Court today is taken on record.

Record shows that the trial has already commenced. The prosecutrix, namely, Anshu Kumari has deposed before the court below as PW-2. Perusal of the statement of prosecutrix, which is on record at page 38 of the paper book (Annexure-'7' to the affidavit filed in support of bail application), shows that prima facie the prosecutrix has alleged criminality against the applicant.

When confronted with above, the learned counsel for applicant pointed out various discrepancies in the statement of the prosecutrix with reference to the other material on record.

It is well settled that even if the Court hearing the bail application is a superior court dictates of prudence require that the court hearing bail application should not evaluate the evidence that has emerged during the course of trial as any observation made by the superior court hearing the bail application may affect the prosecution or the defence.

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 small girl aged below 18 years of age (16 years 04 months and 10 days on the date of occurrence), as also considering the fact that the prosecutrix who has deposed before court below as PW-2 in her statement has alleged criminality against the present applicant therefore, this Court declines to entertain the present applicant on bail.

In view of above, this application for bail fails and is liable to be rejected.

It is accordingly **rejected**.

Order Date :- 11.12.2023.

Rks.