

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 40050 of 2023

Applicant :- Mohd Fariyad

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

Counsel for Applicant :- Arvind Kumar Sahu, Praveen Kumar Srivastava

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

Heard Mr. Arvind Kumar Sahu, 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- Mohd Fariyad, seeking his enlargement on bail in Case Crime No. 108 of 2023, under sections 363, 376(2) N, 376(A,B) IPC and 5-M/6 POCSO Act, Police Station- Bithari Chainpuri, District Bareilly, during the pendency of trial.

At the very outset, the learned A.G.A. submits that notice of present application for bail has been served upon opposite party-4 on 8.9.2023. However, inspite of service of notice, no one has put in appearance on behalf of first informant-opposite party-4 to oppose this application for bail.

Present application for bail came up for orders on 9.10.2023 and this Court passed the following order:

"1. Heard Mr. Arvind Kumar Sahu, 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-Mohd. Fariyad seeking his enlargement on bail in Case Crime No. 108 of 2023, under Sections 363, 376(2)N, 376(A,B) IPC and Sections 5-M/6 POCSO Act, Police Station-Bithari Chainpur, 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 4 on 08.09.2023. However, inspite of service of notice, no one has put in appearance on behalf of first informant-opposite-party-4 to oppose this application for bail.

5. After some arguments, it transpires that the age of the prosecutrix has been determined as per her date of birth recorded in the Transfer Certificate of Class-6 wherein, the date of birth of the prosecutrix is mentioned as 06.08.2001. As such, the prosecutrix was aged about 11 years, 7 months and 13 days on the date of occurrence. However, reliance so placed upon aforementioned document is manifestly illegal. By virtue of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, the age of the prosecutrix can be determined only in accordance with the date of birth of the prosecutrix recorded in any of the documents recognized under Sections 94(1)(a) and 94(1)(b) of the Act of 2015.

6. Learned A.G.A. submits that the charge sheet has already been submitted against applicant on 29.06.2023.

7. In view of above, the Investigating Officer is directed to submit an application before court below in terms of Section 173(8) Cr.P.C. seeking the permission of Court to conduct further investigation. After permission has been granted, the Investigating Officer shall endeavour to discover the date of birth of the prosecutrix recorded in the institution first attended by her. The necessary exercise shall be completed by the Investigating Officer within a period of three weeks from today. 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 02.11.2023. "

Pursuant to above order, Investigating Officer conducted further investigation. The additional material collected by him upon further investigation, has been brought on record by means of an affidavit dated 2.11.2023, filed by the learned A.G.A. The statement of the Head Master of the institution, where the prosecutrix has first studied from Class-I to Class-V was recorded. The head master has supported the certificate, issued by him. As per said transfer certificate, the date of birth of the prosecutrix is 6.8.2011. As such, prosecutrix was aged about 11 years and 7 months on the date of occurrence, which is 19.3.2023.

Record shows that in respect of an incident which is alleged to have occurred on 19.3.2023, a belated F.I.R. dated 23.3.2023 was lodged by first informant Lalla Khan, father of the prosecutrix and was registered as Case Crime No. 108 of 2023, under sections 363, 376(2) N, 376(A,B) IPC and 5-M/6 POCSO Act, Police Station- Bithari Chainpuri, District Bareilly. In the aforesaid F.I.R. an unknown person has been arraigned as solitary accused.

The gravamen of the allegations made in the F.I.R. is to the effect that daughter of the first informant i.e. the prosecutrix namely-X aged about 12 years went missing on 19.3.2023 from

3:00 pm. After lodging of above mentioned first information report, Investigating Officer proceeded with statutory investigation of aforesaid case crime number in terms of Chapter XII Cr.P.C.

The prosecutrix was recovered on 5.6.2023. Thereafter the statement of prosecutrix was recorded under section 161 Cr.P.C. Copy of same is on record at page 29 of the paper book. The prosecutrix in her aforesaid statement has not supported the F.I.R. To the contrary, the prosecutrix has stated that she herself left home and went to Delhi where she met the applicant, whereupon applicant forcibly and deliberately dislodged her modesty. Subsequently, the 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 her body so as to denote commission of deliberate or forceful sexual assault. However, with regard to private party of the prosecutrix, the Doctor opined as follows:

"Hymen - Old and Torn"

Certain samples were taken from the body of the prosecutrix for pathological examination. However, supplementary medico legal report of the prosecutrix has not been brought on record. Ultimately, the statement of the prosecutrix was recorded under section 164 Cr.P.C. which is on record at page 41 of the paper book. The prosecutrix in her aforesaid statement has rejoined her previous statement under sections 161 Cr.P.C. During course of investigating Officer, Investigating Officer recovered the transfer certificate of the prosecutrix, which is of Class-Vth, wherein the date of birth of the prosecutrix is recorded as 6.8.2011. The occurrence giving rise to present proceedings is alleged to have occurred on 19.3.2023. As such, the prosecutrix was aged about 11 years and 7 months on the date of occurrence. Investigating Officer examined the 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 Investigating Officer, during course of investigation he came to the conclusion that complicity of applicant is fully established in the crime in question. He, accordingly submitted the charge sheet dated 29.6.2023, whereby applicant has been charge sheeted under sections 363, 376(2) N, 376(A,B) IPC and 5-M/6 POCSO Act.

Learned counsel for applicant contends that though the applicant is a named and charge sheeted accused yet he is liable to be enlarged on bail. With reference to the statements of the

prosecutrix recorded under sections 161/164 Cr.P.C. he submits that the prosecutrix was in company of applicant for 75 days. As such, prosecutrix is a willing and consenting party. In view of above, no offence as complained of can be said to have been committed by applicant.

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 jail since 7.6.2023. As such, he has undergone five months of incarceration. Police report in terms of Section 173 (2) Cr.P.C. has already been submitted against applicant, as such, the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized. However, upto this stage, no such, circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. It is thus urged 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 applicant is a named as well as charge sheeted accused, therefore he does not deserve any indulgence by this Court. According to the learned A.G.A. from the perusal of statements of the prosecutrix recorded under section 161 and 164 Cr.P.C, it is apparent that the prosecutrix is not a consenting party. The prosecutrix in her aforesaid statements has stated in categorical terms that her modesty was deliberately and forcibly dislodged by applicant. Apart from above, prosecutrix was just aged about 11 years and seven months on the date of occurrence. Resultantly, the provisions of Section 5 (M) of POCSO Act are squarely attracted. Attention of the Court was also invited to the judgement of Supreme Court in **X(Minor) Vs/State of Jharkhand and Anr., 2022 Live Law (SC) 194** and on basis of above, it is urged by learned A.G.A. that since prosecutrix is below 16 years of age and a non consenting party, therefore, no sympathy be shown by this Court in favour of applicant. He, therefore, contends that present application for bail 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, evidence, nature and gravity of offence as well as complicity of applicant, accusation made coupled with the fact that objections raised by the learned A.G.A. in opposition to the present application bail could not be dislodged by learned counsel for applicant, therefore irrespective of the varied submissions urged

by learned counsel for applicant in support of the present application for bail, but without making any comments on the merits of the case, this Court does not find any good or sufficient ground to enlarge the applicant on bail.

In view of above, the application fails and is liable to be rejected.

It is accordingly **rejected**.

Order Date :- 8.12.2023

Arshad