

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 42726 of 2023

Applicant :- Sumit

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

Counsel for Applicant :- Satish Kumar Shukla

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

Heard Mr. Satish Kumar Shukla, the learned counsel for applicant and the learned A.G.A. for State.

The present application for bail came up for orders on 16.10.2023 and this Court passed the following order :-

"1. Heard Mr. Satish Kumar Shukla, 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-Sumit seeking his enlargement on bail in Case Crime No. 71 of 2023, under Sections 363, 366, 376 IPC and Sections 3/4 POCSO Act, Police Station-Sidhpura, District-Kasganj 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 2 on 01.09.2023. 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 the age of the prosecutrix has been determined as per her date of birth disclosed by the Principal of the institution last attended by the prosecutrix in the Certificate so issued.

6. 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 her date of birth recorded in any of the documents recognized under Sections 94(2)(i) and 94(2)(ii) of the Act of 2015. Similar view has been taken by the Supreme Court in the case of P. Yuvaprakash Vs. State, 2023 SCC OnLine SC 846.

7. Learned A.G.A. submits that the charge sheet has already been submitted against applicant on 30.03.2023.

8. 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 in the matter. After permission is accorded by the court below, Investigating Officer shall proceed to discover the date of birth of the prosecutrix recorded in the institution first attended by her or any other document in consonance with the provisions mentioned above.

9. The necessary exercise shall be undertaken by the Investigating Officer

within a period of three weeks from today.

10. The 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.

11. Matter shall, accordingly, re-appear for orders as fresh on 09.11.2023."

Pursuant to the above order dated 16.10.2023, the learned A.G.A. has filed a compliance affidavit in Court today, which is taken on record.

This application for bail has been filed by applicant Sumit seeking his enlargement on bail in Case Crime No.71 of 2023, under Sections 363, 366, 376 IPC and Section 3/4 PocsO Act, police station Sidhpura, district Kasganj, during the pendency of trial.

Perused the record.

Record shows that in respect of an incident which is alleged to have occurred on 23.03.2023, a prompt first information report dated 23.03.2023 was lodged by first informant-Gaurav Kumar (brother of the prosecutrix) and was registered as Case Crime No.0071 of 2023, under Sections 363, 366, 504, 506 IPC, police station Sidhpura, district Kasganj. In the aforesaid F.I.R., five persons, namely, Sumit (applicant herein); Raj Kumar; Rajveer; Vimla Devi and Nitin have been nominated as named accused.

The gravamen of the allegations made in the first information report is to the effect that the named accused enticed away the minor sister of first informant i.e. prosecutrix namely 'X' aged about 16 years.

After aforesaid first information report was lodged, Investigating Officer proceeded with 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 21 of the paper book. The prosecutrix in her aforesaid statement has not supported the F.I.R. To the contrary, the prosecutrix stated that she herself went to applicant out of her own sweet will. She further stated that she is in relationship with the applicant for the last two years. Thereafter, the prosecutrix was requested for her internal medical examination. However, the prosecutrix has refused to give her consent for the same. As per the medical opinion, the prosecutrix was said to be aged about 18 years. Ultimately, the statement of the prosecutrix was recorded under Section 164 CrPC, which is on record at page 30 of the paper book, wherein she has rejoined her previous statement recorded under Section 161 CrPC. No allegation of any kind has been made by the prosecutrix

against the present applicant. The genesis of the said statement is to the effect that the prosecutrix herself accompanied the applicant willingly.

As per the affidavit of compliance filed by the learned A.G.A. in Court today, the date of birth of the prosecutrix as recorded in the institution first attended by her is 20.12.2006. The occurrence giving rise to the present criminal proceeding is alleged to have occurred on 23.03.2023. As such, the prosecutrix was aged sixteen years three months and three days on the date of occurrence. Investigating Officer also examined the first informant and other witnesses under Section 161 CrPC, who have substantially supported the F.I.R. On the basis of above and other material collected by the Investigating Officer during the course of investigation, he came to the conclusion that the complicity of applicant is fully established in the crime in question. Accordingly, he submitted the charge-sheet dated 30.03.2023, whereby applicant Sumit has been charge-sheeted under Sections 363, 366, 376 IPC and Section 3/4 PocsO Act.

Learned counsel for the applicant contends that though the applicant is a named/charge-sheeted accused, inasmuch as, the charge-sheet has been submitted against applicant on 30.03.2023 yet he is liable to be enlarged on bail. There is no medical evidence to support the charge-sheet, inasmuch as, the prosecutrix has herself refused for her internal medical examination. With reference to the statements of the prosecutrix recorded under Section 161/164 CrPC, it is urged by the learned counsel for applicant that the prosecutrix is a willing and consenting party. Neither the prosecutrix was forcibly abducted nor she was kidnapped by the applicant therefore, no offence under Sections 363, 366 IPC can be said to have been committed by the applicant. Since the prosecutrix was in relationship with the applicant therefore, there was no deliberate or forceful sexual assault committed by the applicant. As such, applicant cannot be held guilty of dislodging the modesty of prosecutrix forcibly.

Even otherwise, applicant is a man of clean antecedents, inasmuch as, he has no criminal history to his credit except the present one. The applicant is in jail since 26.03.2023. As such, he has undergone more than seven months of incarceration. The police report under Section 173 (2) CrPC i.e. the charge-sheet has been submitted against the applicant, therefore the entire evidence sought to be relied upon by prosecution against applicant stands crystalized. However, up to this stage, no such circumstance has emerged on the basis of which it can be said that custodial arrest of applicant is absolutely necessary during the pendency of trial. It is thus contended by the learned counsel for applicant 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 vehemently opposed the prayer for bail. He submits that since the applicant is a named/charge-sheeted accused therefore, he does not deserve any indulgence by this court. He further submits that the prosecutrix is a young girl aged about 16 years 03 months and 03 days on the date of occurrence. The modesty of the prosecutrix has been dislodged by the applicant. Since the prosecutrix is below 18 years of age therefore her consent, if any, is immaterial. As such, 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 the applicant with reference to the record at this stage.

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 there is no medical evidence to support the charge-sheet, inasmuch as the prosecutrix has herself refused for her internal medical examination, as per the statements of the prosecutrix recorded under Section 161/164 CrPC prima facie she is a willing and consenting party, she herself came and join the applicant as such applicant cannot be held to be guilty of either kidnapping or abducting the prosecutrix for dislodging her modesty, therefore no offence under Sections 363, 366 IPC can be said to have been committed by applicant, the prosecutrix in her statements referred to above has not alleged that her modesty was dislodged by the applicant forcibly or deliberately therefore no offence under Section 376 IPC and Section 3/4 PocsO Act can be said to have been made out against applicant, in spite of the fact that the charge-sheet has been submitted against applicant and therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized, yet the learned A.G.A. could not point out any such incriminating circumstance from the record necessitating the custodial arrest of the applicant during the pendency of trial, the judgement of Supreme Court in **Sumit Subhashchandra Gangwal and another Vs. State of Maharashtra and another, 2023 Livelaw SC 373 (Paragraph 5)**, the clean antecedents of the applicant, the period of incarceration undergone therefore irrespective of the objections raised by the learned A.G.A. in opposition to the present application for bail but, without making any comments on the merit of the case, the applicant has made out a case for bail.

Accordingly, the bail application is **allowed**.

Let the applicant **Sumit**, involved in aforesaid case crime number, be released on bail on his furnishing a personal bond with 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) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the date fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under section 229-A I.P.C.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under section 82 Cr.P.C., may be issued and if applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under section 174-A I.P.C.

(iv) The applicant shall remain present, in person, before the trial court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(v) The trial court may make all possible efforts/endeavour and try to conclude the trial within a period of one year after the release of the applicant.

However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his bail so granted by this court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

Order Date :- 9.11.2023.

Rks.