

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 43722 of 2023

Applicant :- Dilshad

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

Counsel for Applicant :- Ram Jee Saxena, Raghuvansh Chandra, Rohit Kumar

Counsel for Opposite Party :- G.A., Sandeep Kumar Dubey

Hon'ble Rajeev Misra, J.

1. Heard Mr. Raghuvansh Chandra, the learned counsel for applicant, the learned A.G.A. for State and Mr. Sandeep Kumar Dubey, the learned counsel representing opposite party 3 High Court Legal Services Committee, High Court, Allahabad.

2. Perused the record.

3. Present application for bail came up for orders on 03.11.2023 and this Court passed the following order:-

"1. Heard 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-Dilshad seeking in enlargement on bail in Case Crime No.245 of 2023, under Sections 363, 323, 506, 376D I.P.C., & Section 5(g)/6 POCSO Act, Police Station-Kharkhoda, District- Meerut 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-3 on 05.10.2023. However, inspite of service of notice no one has put in appearance on behalf of first informant/opposite party-3 to oppose this application for bail.

5. After some arguments, it transpires that the age of the prosecutrix has been determined on the basis of date of birth of the prosecutrix mentioned in the Certificate issued by the School i.e. Little Flower Public School, District Meerut. The same is manifestly illegal.

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 could have been determined only as per the date of birth mentioned in any

of the documents recognized under Section 94(2)(i) and 94(2)(ii) of Act, 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 charge-sheet has already been submitted against applicant.

8. In view of above, the Investigating Officer is directed to submit an application under Section 173(8) Cr.P.C. before Court below seeking permission of the Court to conduct further investigation. After permission has been accorded by Court below, Investigating Officer shall proceed to discover any such document regarding the date of birth of the prosecutrix which is in consonance with the provisions of Section 94 of Act, 2015. The Investigating Officer shall also endeavour to discover the date of birth of the prosecutrix recorded in the institution first attended by her.

9. The necessary exercise shall be completed within a period of three weeks from today. Thereafter, the Investigating Officer shall transmit the copy of the supplementary case diary to this Court through the learned A.G.A. before the next date fixed.

10. Matter shall accordingly re-appear as fresh on 28.11.2023"

4. Subsequent to above order dated 03.11.2023, the Investigating Officer has collected additional material. Same has been brought on record by means of an affidavit of the Investigating Officer dated 04.12.2023, which is already on record.

5. Record shows that an FIR dated 04.06.2023 was lodged by first informant-Roshni i.e. the prosecutrix herself and was registered as Case Crime No. 0245 of 2023, under Sections 363, 323, 506, 376-D IPC and Sections 3/4 POCSO Act, Police Station-Kharkhauda, District-Meerut. In the aforesaid FIR, 2 persons namely Dilshad and Mohd. Faiz have been nominated as named accused whereas two brothers of Dilshad have also been arraigned as accused.

6. The gravamen of the allegations made in the FIR is to the effect that named accused Dilshad enticed away the prosecutrix and thereafter by extending false promise of marriage (Nikah) repeatedly and continuously dislodged the modesty of the prosecutrix.

7. After above-mentioned FIR was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter-XII Cr.P.C. The statement of the prosecutrix was recorded under Section 161 Cr.P.C. Same is on record at page 52 of the paper book. The prosecutrix in her aforesaid statement has supported the FIR. Thereafter, 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. However, the Doctor, who medically examined the prosecutrix, did not find any injury on her person so as to denote commission of deliberate or forceful sexual assault. With regard to the private part of the prosecutrix, the Doctor has opined as follows:-

"Hymen - No bleeding"

8. Certain samples were taken from the body of prosecutrix. However, copy of the supplementary medico legal report has not been brought on record. According to the learned A.G.A., the UPT test of the prosecutrix was also conducted, the result of which is positive. Ultimately, the statment of the prosecutrix was recorded under Section 164 Cr.P.C. wherein the prosecutrix has reiterated her previous statement under Section 161 Cr.P.C.

9. During course of investigation, Investigating Officer recovered the certificate of the Principal of the institution i.e. Little Flower Public School, where the prosecutrix had studied. Asper the said certificate, the date of birth of the prosecutrix is 05.07.2005. The FIR giving rise to present criminal proceedings was lodged on 04.06.2023. As such, the prosecutrix was aged about 17 years, 4 months and 1 day. Investigating Officer on the basis of above and other material collected by him during course of investigation, came to the conclusion that complicity of applicant is fully established in the crime in question. He, accordingly, submitted the charge sheet dated 19.07.2023.

10. Learned counsel for applicant contends that though applicant is a named as well as charge sheeted accused yet he is liable to be enlarged on bail. Attention of the Court was then invited to the Nikahnama, copy of which is on record at pages 63/64 of the paper book. With reference to above, it is contended by the learned counsel for applicant that prosecutrix is the legally wedded wife of applicant. It is then submitted by the learned counsel for applicant that subsequently the prosecutrix was divorced (Talaq) by the applicant on 30.05.2023. It is thereafter, the FIR dated 04.06.2023 giving rise to present criminal proceedings was lodged. It is then contended that since the parties are muslim, therefore, mariagable age of the prosecutrix shall be the age on which she attained puberty. Admittedly, the prosecutrix was over 14 years of age on the date of her marriage with the applicant. On the above conspectus, he, therefore, contends that applicant is liable to be enlarged on bail.

11. 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 16.03.2023. As such, he has undergone more than 8 and 1/2 months of incarceration. The police report in terms of Section 173(2) Cr.P.C. has already been submitted. As such, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized. However, up to this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. On the above premise, he 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.

12. 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. Subsequent to the order dated 03.11.2023 passed by this Court, Investigating Officer collected the date of birth of the prosecutrix recorded in the institution first attended by her which is 03.02.2008. The FIR giving rise to present criminal proceedings was lodged on 04.06.2023. As such, the prosecutrix was aged about 15 years, 4 months and 1 day on the date FIR was lodged. He, therefore, contends that since the prosecutrix was below 16 years of age on the date of lodging of FIR, therefore, no sympathy be shown by this Court in favour of applicant. Learned A.G.A. has also referred to the judgment of the Supreme Court in **X (Minor) Vs. The State of Jharkhand and Another 2022 LiveLaw (SC) 194**. However, the learned A.G.A. could not dislodge the factual and legal submissions urged by the learned counsel for applicant in support of the present application for bail with reference to the record at this stage.

13. Having heard, the learned counsel for applicant, the learned A.G.A. for State, upon perusal of record, evidence, nature and gravity of offence, accusations made, complicity of accused and coupled with the fact that since the prosecutrix had solemnized marriage with the applicant (Nikahnama) which fact could not be dislodged by the learned A.G.A. or the learned counsel representing opposite party 3, High Court Legal Services Committee, High Court, Allahabad, therefore, prima-facie, present criminal proceedings are not maintainable, the prosecutrix was divorced (Talaq) by the applicant on 30.05.2023, the FIR giving rise to present criminal proceedings was lodged on 04.06.2023, the clean antecedents of applicant, the period of incarceration undergone, the police report 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 crystallized, yet in spite of above, the learned A.G.A. and the learned counsel representing opposite party 3 could not point out any such circumstance from the record necessitating the custodial arrest of applicant during the pendency of trial, therefore, irrespective of the objections raised by the learned A.G.A. and the learned counsel representing opposite party 3 in opposition to the present application for bail, but without making any comments on the merits of the case, applicant has made out a case for bail.

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

15. Let the **applicant-Dilshad**, be released on bail in the aforesaid case crime number 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) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT THAT HE/SHE 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/HER COUNSEL. IN CASE OF HIS/HER ABSENCE, WITHOUT SUFFICIENT CAUSE, THE TRIAL COURT MAY PROCEED AGAINST HIM/HER UNDER SECTION 229-A IPC.

(iii) IN CASE, THE APPLICANT MISUSES THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE HIS/HER 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/HER, IN ACCORDANCE WITH LAW, UNDER SECTION 174-A IPC.

(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 THE HIM/HER 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.

16. 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 :- 14.12.2023

Vinay