

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 45062 of 2023

Applicant :- Vijay Kumar Pandey @ Vijay Shankar Pandey

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

Counsel for Applicant :- B.S. Pandey, Kartikey Pandey

Counsel for Opposite Party :- G.A., Akhilesh Kumar Mishra, Vindhavasinee Prasad Pandey

Hon'ble Rajeev Misra, J.

Heard Mr. Kartikey Pandey, the learned counsel for applicant, the learned A.G.A. for State and Mr. Akhilesh Kumar Mishra, the learned counsel representing first informant opposite party 4.

Perused the record.

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

"1. Heard Mr. Kartikey Pandey, 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-Vijay Kumar Pandey @ Vijay Shankar Pandey seeking his enlargement on bail in Case Crime No. 210 of 2023 under Sections 363, 366, 376 (3), 328 I.P.C. and 5/6 POCSO Act, Police Station-Naini, District-Prayagraj, 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-4 on 17.10.2023. However, in spite of service of notice, no one has put in appearance on behalf of first informant/opposite party-4 to oppose this application.

5. After some arguments, it transpires that age of the prosecutrix has been determined on the basis of her date of birth recorded in the transfer certificate of Class IXth of the prosecutrix issued by the Principal of the Institution last attended by the prosecutrix.

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 on 31.07.2023 against applicant, 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 20.11.2023."

Pursuant to above order dated 27.10.2023 the Investigating Officer conducted further investigation. Accordingly, the affidavit of the Investigating Officer dated 7.11.2023 has been filed, which is on record.

Record shows that in respect of an incident which is alleged to have occurred on 23.04.2023, a prompt F.I.R. dated 23.04.2023 was lodged by first informant Mukund Raj Shukla (father of the prosecutrix) and was registered as Case Crime No. 210 of 2023, under Sections 363, 366 IPC P.S. Naini, District Prayagraj, In the aforesaid F.I.R., applicant Vijay Kumar Pandey has been nominated as solitary named accused.

The gravamen of the allegations made in the F.I.R. is to the effect that named accused Vijay Kumar Pandey i.e. applicant herein enticed away the daughter of the first informant i.e. the prosecutrix namely X aged about 15 years .

After above mentioned F.I.R. was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter XII Cr. P. C. The prosecutrix was recovered on 27.04.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 Cr. P. C., which is on record at page 33 of the paper book. The prosecutrix in her aforesaid statement has not supported the F.I.R. As per the aforesaid statement of the prosecutrix, she is a willing and consenting party, she herself joined the applicant and went to Delhi and thereafter accompanied him to different places by public mode of transportation. Subsequent to above, the prosecutrix was requested for her internal examination. However, she refused for the same. Thereafter, the statement of the prosecutrix was recorded under Section 164 Cr. P. C., which is on record at page 48 of the paper book. The prosecutrix in her aforesaid statement has initially

reiterated her previous statement under Section 161 Cr. P. C. but has subsequently, departed from the same. The genesis of the departure so made in the aforesaid statement of the prosecutrix is to the effect that the modesty of the prosecutrix was deliberately dislodged by the applicant.

After the statement of the prosecutrix was recorded under Section 164 Cr. P. C. she was again requested for her internal medical examination. The prosecutrix in her statement before the Doctor who medically examined her which is on record at page 71 of the paper book has rejoined her statement under Section 164 Cr. P. C. However, the Doctor, who medically examined the prosecutrix did not find any injury on her body so as to denote commission of deliberate or forceful sexual assault. With regard to the private part of the prosecutrix, the Doctor has further opined as follows:-

"Hymen Old Torn Healed"

During course of investigation, Investigating Officer recovered transfer certificate of class IXth of the prosecutrix, wherein her date of birth is recorded as 11.11.2006. The occurrence giving rise to present criminal proceedings has occurred on 23.04.2023. As such, the prosecutrix was aged about 16 years and 5 days on the date of occurrence. Investigating Officer further examined first informant and other witnesses under Section 161 Cr. P. C. The 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. Accordingly, Investigating Officer submitted the charge sheet dated 21.7/2023, whereby applicant has been charge sheeted under Sections 363, 366, 376 (3), 328 IPC and Sections 5/6 PCOSO Act.

After the order dated 27.10.2023 was passed by this Court, Investigating Officer has further recovered the date of birth of the prosecutrix in the institution first attended by her which is also 11.11.2006.

Learned counsel for applicant submits that though applicant is a named and charge sheeted accused, yet, he is liable to be enlarged on bail. Prosecutrix in her statement under Section 161 Cr. P. C. has not alleged any criminality against applicant. Therefore, he submits that upto this stage, prosecutrix has remained a consenting party. Subsequently, the prosecutrix has departed from her previous statement in her subsequent statement

under Section 164 Cr. P. C., wherein she has now alleged that her modesty was deliberately and forcibly dislodged by the applicant without her consent. Referring to the judgement of the Supreme Court in **Phool Singh Vs. State of M.P. (2022) 2 SCC 74**, the learned counsel for applicant contends that the prosecution of an accused for an offence of rape or sexual assault can be maintained even in absence of medical evidence and on the solitary statement of the prosecutrix. However, in such a circumstance, the statement of the prosecutrix must be clear, categorical and consistent i.e. unambiguous. When the statements of the prosecutrix referred to above are taken as a whole and are examined in the light of above, it is evident that the prosecutrix in her aforesaid statements has remained inconsistent and contradictory. Therefore, the said statements of the prosecutrix are not of impeccable character. As such, prosecution of the applicant cannot be maintained.

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 19.6.2023. As such, he has undergone more than five and a half months of incarceration. As such, applicant is liable to be enlarged on bail. In case, 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. and the learned counsel for first informant have vehemently opposed the prayer for bail. They submit that since applicant is a named and charge sheeted accused, therefore, he does not deserve any indulgence by this Court. Referring to the scheme of the Code, (Cr. P. C.) it is vehemently urged that under the scheme of the Code the statement of the prosecutrix under Section 164 Cr. P. C. is to be given credence over her statement under Section 161 Cr. P. C. Since the prosecutrix in her statement has categorically implicated the applicant in the crime in question and also the fact that even as per the medical opinion, the prosecutrix is below 18 years of age and therefore a child within the meaning of POCSO Act, no sympathy be shown by this Court in favour of the applicant. However, they could not dislodge the factual/legal submissions urged by the learned counsel for 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 and coupled with the fact that the prosecutrix is a willing and

consenting party, she herself joined the applicant and thereafter accompanied the applicant to Delhi and thereafter accompanied him to different places by public mode of transportation, the prosecutrix in her statement under Section 164 Cr. P. C. has initially reiterated her previous statement under Section 161 Cr. P. C. but has subsequently, departed from the same, however, she has not controverted her previous statement thus the prosecutrix in her aforesaid statements has been inconsistent and contradictory, the charge sheet dated 21.7.2023 has been submitted against applicant, as such, the entire evidence sought to be relied by the prosecution against applicant stands crystallized, yet the learned A.G.A. and the learned counsel for first informant could not point out any such circumstances from the record necessitating the custodial arrest of applicant during the pendency of trial, the clean antecedents of applicant, the period of incarceration undergone, therefore, irrespective of the objections raised by the learned A.G.A. and the learned counsel for first informant in opposition to present application for bail but without making any comments on the merits of the case, the applicant has made out a case for bail.

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

Let the applicant **Vijay Kumar Pandey @ Vijay Shankar Pandey** involved in aforesaid case crime number, be released on bail on his furnishing a personal bond with two heavy 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 :- 11.12.2023

HSM