

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 45267 of 2023

Applicant :- Vipin

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

Counsel for Applicant :- Santosh Kukmar Tiwari

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

Heard Mr. Santosh Kumar Tiwari, 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. Santosh Kumar Tiwari, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant Vipin seeking his enlargement on bail in Case Crime No.45 of 2023, under Sections 363, 376 (3) IPC and Section 3/4 (2) Pocso Act, police station Hafizpur, district Hapur, during the pendency of trial.

At the very outset, learned A.G.A. submits that notice of the present application for bail has been served upon first informant-opposite party-2 on 16.10.2023. 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 transpires from the record that the age of the prosecutrix has been determined as per date of birth of the prosecutrix mentioned in the certificate issued by the Principal of the institution in which the prosecutrix is said to be studying. The reliance so placed upon aforesaid document for determining the age of the prosecutrix is misconceived.

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 with reference to the date of birth mentioned in any of the documents mentioned in Section 94 (2)(i) and 94 (2)(ii) of Act, 2015. Similar view has been taken by the Supreme Court in P. Yuvprakash Vs. State Represented by Inspector of Police 2023 SCC Online (SC) 846.

Learned A.G.A. submits that the charge-sheet has already been submitted against the applicant on 12.04.2023.

In view of above, Investigating Officer is directed to submit an application under Section 173(8) CrPC before the court below seeking permission of the court to conduct further investigation in the matter. After permission is accorded by the court concerned, Investigating Officer shall proceed to discover the date of birth of the prosecutrix recorded in the institution first attended by her. It shall be open for the Investigating Officer to collect any other document regarding the date of birth of the prosecutrix which may be in consonance with the provisions of Section 94 of Act, 2015. The said exercise shall be completed within a period of three weeks from today. The copy of the

supplementary case diary shall be transmitted to this Court by Investigating Officer through the learned A.G.A. before the next date fixed.

Put up again as fresh on 20.11.2023."

Pursuant to the above order dated 27.10.2023, the Investigating Officer has conducted further investigation. The material so collected by the Investigating Officer upon further investigation has been brought on record by the learned A.G.A. by means of an affidavit of the Investigating Officer dated 22.11.2023 along with the supplementary case-diary of concerned case crime number which is already on record.

This application for bail has been filed by applicant Vipin seeking his enlargement on bail in Case Crime No.45 of 2023, under Sections 363, 376 (3) IPC and Section 3/4 (2) Pocso Act, police station Hafizpur, district Hapur, during the pendency of trial.

Perused the record.

Record shows that in respect of an incident which is alleged to have occurred on 13.03.2023, a delayed first information report dated 14.03.2023 was lodged by the first informant, namely, Vijender Singh (Phoofa of the prosecutrix) and was registered as Case Crime No.0045 of 2023, under Section 363 IPC, police station Hafizpur, district Hapur. In the aforesaid first information report, one unknown person has been arraigned as solitary accused.

The gravamen of the allegations made in the FIR is to the effect that the daughter of brother-in-law of first informant i.e. prosecutrix, namely, X aged about 13 years has gone missing since 13.03.2023 at 8.00 A.M.

After aforementioned FIR was lodged, Investigating Officer proceeded with statutory investigation of concerned Case Crime Number in terms of Chapter XII CrPC. The prosecutrix was recovered on 26.03.2023. The statement of the prosecutrix was recorded under Section 161 CrPC, which is on record at page 25 of the paper book. The prosecutrix in her aforesaid statement has not supported the FIR. To the contrary, the prosecutrix has stated that she came and joined the applicant herself and thereafter accompanied him to Rudrapur. The prosecutrix has further stated that physical relations were also maintained between the parties upon consent of the prosecutrix. Thereafter, the prosecutrix was requested for her internal medical examination, which was refused by her. Ultimately, the statement of the prosecutrix was recorded under Section 164 CrPC, which is on record at page 27 of the paper book, wherein she has rejoined and re-affirmed her previous statement recorded under Section 161

CrPC.

During course of investigation, Investigating Officer examined the Principal, Sarvodaya Inter College, Banboi, Bulandshahar where the prosecutrix was studying in Class-IX. As per the school record, the date of birth of the prosecutrix recorded therein is 08.04.2010. Investigating Officer further examined the first informant and other witnesses under Section 161 CrPC. The witnesses so examined have supported the FIR. On the basis of above and other material collected by the Investigating Officer during the course of investigation, he came to the conclusion that since the prosecutrix is below 18 years of age therefore offence complained of against the applicant is fully established in the crime in question. Accordingly, he submitted the charge-sheet dated 12.04.2023, whereby applicant has been charge-sheeted under Sections 363, 376 (3) IPC and Section 3/4 (2) Pocso Act.

Learned counsel for the applicant contends that though applicant is not named in the FIR but a charge-sheeted accused, yet he is liable to be enlarged on bail. Referring to the statements of the prosecutrix recorded under Section 161/164 CrPC, he submits that the prosecutrix is a willing and consenting party. There is no medical evidence to support the charge-sheet. In view of above, it cannot be said that the applicant has deliberately and forcibly dislodged the modesty of the prosecutrix. On the above premise, he therefore submits that applicant is liable to be enlarged on bail.

Even otherwise, applicant is a man of clean antecedents having no criminal history to his credit except the present one. The applicant is in custody since 26.03.2023. As such, he has undergone more than eight months of incarceration. The police report under Section 173 (2) CrPC has already been submitted. As such, the entire evidence sought to be relied upon by the prosecution against the applicant stands crystalized. However, up to 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 charge-sheeted accused therefore, he does not deserve any indulgence by this Court. Attention of the Court was invited to the affidavit of the Investigating Officer dated 22.11.2023 and on basis thereof the learned A.G.A. contends that the date of birth of the prosecutrix recorded in the institution first attended by her is 14.08.2008. The occurrence giving rise to the present criminal proceedings is alleged to have occurred on 13.03.2023. As

such, the prosecutrix was aged about 14 years 06 months and 29 days on the date of occurrence therefore she was below 16 years of age. In view of above, the consent, if any, of the prosecutrix is wholly immaterial. To buttress his submission, the learned A.G.A. has referred to the judgement of the Supreme Court in **X (Minor) Vs. State of Jharkhand 2022 Livelaw (SC) 194** and on basis thereof he contends that no sympathy be shown by this court in favour of applicant. As such, the 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, nature and gravity of offence, evidence, complicity of the accused, accusation made, coupled with the fact that the objections raised by the learned A.G.A. in opposition to the present application for bail could not be dislodged by the learned counsel for applicant with reference to the record therefore, irrespective of the varied submissions urged by the learned counsel for applicant in support of the present application for bail, this Court does not find any good or sufficient ground to enlarge the applicant on bail.

As a result, this application for bail thus fails and is liable to be rejected.

It is accordingly **rejected**.

Order Date :- 16.12.2023.

Rks.