

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 45287 of 2023

Applicant :- Abdul Salam

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

Counsel for Applicant :- Mujiburrahman, Mushir Khan

Counsel for Opposite Party :- G.A., Sanjai Kumar Pandey

Hon'ble Rajeev Misra, J.

1. Heard Mr. Mushir Khan, the learned counsel for applicant, the learned A.G.A. for State and Mr. Sanjai Kumar Pandey, the learned counsel representing first informant.

2. Perused the record.

3. This application for bail has been filed by applicant-Abdul Salam seeking his enlargement on bail in Case Crime No. 154 of 2023, under Sections 363, 366, 376(3) IPC and Sections 5/6 POCSO Act, Police Station-Dumariyaganj, District-Siddharth Nagar during the pendency of trial.

4. Record shows that in respect of an incident, which is alleged to have occurred on 12.07.2023, a delayed FIR dated 13.07.2023 was lodged by first informant-Hakikullah (father of the prosecutrix) and was registered as Case Crime No. 154 of 2023, under Sections 363, 366 IPC, Police Station-Dumariyaganj, District-Siddharth Nagar. In the aforesaid FIR, applicant-Abdul Salam has been nominated as solitary named accused.

6. The gravamen of the allegations made in the FIR is to the effect that named accused Abdul Salam enticed away the minor daughter of first informant i.e. the prosecutrix namely X aged about 16 years.

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 prosecutrix was recovered on 16.07.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 Cr.P.C. The prosecutrix in her aforesaid statement has not supported the FIR. The prosecutrix has further stated that she readily and willingly

joined the applicant and thereafter accompanied him to various places. However, the prosecutrix has categorically stated that no physical relations were established between the parties. Subsequent to above, 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. but with the improvement that physical relations between the parties were established on numerous occasions. The Doctor, who medically examined the prosecutrix, did not find any such signs on her body so as to denote commission of deliberate or forceful sexual assault. However, with regard to the private part of the prosecutrix, the Doctor has opined as follows:-

"Hymen - Old, Torn, Healed tags"

8. As per the medical opinion, the prosecutrix was said to be aged about 17 years. Thereafter, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. Same is on record at page 64 of the paper book. The prosecutrix in her aforesaid statement expresses her willingness to marry the applicant. However, no allegation with regard to dislodging the modesty of prosecutrix by the applicant has been made therein.

9. During course of investigation, Investigating Officer recovered the date of birth of the prosecutrix recorded in the institution first attended by her. As per the school records (Madarsa), the date of birth of prosecutrix recorded therein is 01.05.2008. The occurrence giving rise to present criminal proceedings is alleged to have occurred on 12.07.2023. As such, the prosecutrix was aged about 15 years, 2 months and 11 days on the date of occurrence. Investigating Officer further examined the first informant and other witnesses under Section 161 Cr.P.C. Witnesses so examined have substantially supported the FIR. On the basis of above and other material collected by Investigating Officer during course of investigation, he came to the conclusion that offence complained of is fully established against applicant in the crime in question. He, accordingly, submitted the charge sheet dated 07.08.2023 whereby applicant has been charge sheeted under Sections 363, 366, 376(3) IPC and Sections 5/6 POCSO Act.

10. Learned counsel for applicant contends that though the applicant is named as well as charge sheeted accused yet he is liable to be enlarged on bail. Referring to the statements of the prosecutrix recorded under Sections 161/164 Cr.P.C., he submits that the prosecutrix is a willing and consenting party. The

prosecutrix out of her own sweet-will joined the applicant and thereafter, accompanied him to various places. As such, no offence under Sections 363, 366 IPC can be said to have been committed by applicant as the prosecutrix was neither abducted, kidnapped or enticed away by the applicant. In her statement under Section 161 Cr.P.C., the prosecutrix has categorically stated that no physical relations were established between the parties. In her subsequent statement under Sections 164 Cr.P.C., the prosecutrix has remained silent regarding commission of sexual assault. He, therefore, contends that since the prosecutrix in her statements under Sections 161 and 164 Cr.P.C. has not alleged that applicant is guilty of committing aggravated sexual assault or penetrative sexual assault upon the prosecutrix, therefore, no offence under Sections 5/6 POCSO Act can be said to have made out against applicant. As such, applicant is liable to be admitted to 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 16.07.2023. As such, he has undergone more than 5 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 on record 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. and the learned counsel representing first informant have opposed the present application for bail. They contend that the prosecutrix is a young girl and was aged about 15 years, 2 months and 11 days on the date of occurrence, therefore, the consent, if any, of the prosecutrix is wholly immaterial. The fact that modesty of the prosecutrix was dislodged is clearly established by the opinion expressed by the Doctor, who medically examined the prosecutrix, qua her private parts. Since the prosecutrix was below 16 years of age on the date of occurrence, therefore, her consent, if any, in joining the applicant is wholly immaterial. In support of above, the learned A.G.A. and the learned counsel representing first informant have referred to the judgment of Supreme Court in **X (Minor) Vs. The State of Jharkhand and Another 2022 LiveLaw (SC) 194**. On the above conspectus, it is urged by the learned A.G.A. and the

learned counsel representing first informant that no sympathy be shown by this Court in favour of applicant. They, therefore, contend that present application for bail is liable to be rejected.

13. When confronted with above, the learned counsel for applicant could not overcome the same.

14. Having heard, the learned counsel for applicant, the learned A.G.A. for State, the learned counsel representing first informant, upon perusal of record, evidence, nature and gravity of offence, complicity of accused, accusations made coupled with the fact that since the objections raised by the learned A.G.A. and the learned counsel representing first informant 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, 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.

15. As a result, present application for bail fails and is liable to be rejected.

16. It is accordingly **rejected**.

Order Date :- 16.12.2023

Vinay