

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

A.F.R.

Neutral Citation No. - 2023:AHC-LKO:54168

Court No. - 27

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 10246 of 2022

Applicant :- Sandeep Kumar

Opposite Party :- State Of U.P. Thru. Prin. Secy. Deptt. Home And 3 Others

Counsel for Applicant :- Bhoomika Bajpai, Chandra Bhanu Singh, Prashant Singh, Rahul Kumar Shukla

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

Hon'ble Brij Raj Singh, J.

1. Heard Shri Prabhat Kumar Mishra, Advocate holding brief of Shri Rahul Kumar Shukla, learned counsel for the applicant, Shri Rajesh Kumar Singh, learned AGA-I for the State and Shri Dilip Kumar Pandey, learned counsel for the complainant and perused the record.

2. The present bail application has been filed by the applicant Sandeep Kumar with a prayer to enlarge him on bail in Case Crime No.055 of 2022, under Sections-363, 366, 376(3) I.P.C., and Section 5/6 of The Protection of Children from Sexual offences (POCSO) Act, Police Station -Shivratanganj, District Amethi.

3. Learned counsel for the applicant has submitted that the First Information Report was lodged by mother of the prosecutrix under Sections 363, 504 IPC on 06.04.2022. As per version of the First Information Report, she has stated that her daughter was missing. She further stated that she had gone to the house of Kusma, wife of Vinay Rawat and asked whereabouts of her daughter but she was scolded by her and her family members.

4. Learned counsel submitted that the prosecutrix was recovered after one month 26 days and in her statement recorded under Section 164 Cr.P.C., she has deposed that she had gone to Haryana with the applicant out of her own free will. She has performed marriage in the temple and used to reside with the applicant as his wife. She has further deposed that police had taken her in custody on 28.05.2022 and took her to Raebareilly Station and deposed that she did not want to contest the case.

5. Learned counsel further submitted that the prosecutrix refused for internal medical examination. As per ossification test, it was found that the prosecutrix was more than 18 years and was major. It is further submitted that as per Pariwar register, the date of birth of the applicant is recorded as 2004 and she is more than 18 years of age. Learned counsel for the applicant has submitted that though school leaving certificate indicates the date of birth as 12.05.2006 and appears to be minor but looking to the other relevant documents i.e. Pariwar Register and ossification test, it is evident that the prosecutrix is more than 18 years of age. Learned counsel submitted that it is a case of consent and as per the statement of the prosecutrix, it has come on record that she has performed marriage with applicant and she had gone along with the applicant to Haryana.

6. In support of his contention, learned counsel for the applicant has placed reliance upon a judgment of the Apex Court reported in 2023 LiveLaw (SC) 538 P. Yuvaprakash vs. State Rep. by Inspector of Police. The relevant para nos. 14 and 19 of the judgment are quoted below :

"14. Section 94 (2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e.

Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e, the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94 (2)(i) as it was a mere transfer certificate, E C-1, could not have been relied upon to hold that M was below 18 years at the time of commission of the offence."

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19. It is clear from the above narrative that none of the documents produced during the trial answered the description of "the date of birth certificate from the school" or "the matriculation or equivalent certificate" from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstance, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim's age was below 18 years as per Section 94 (2)(iii) of the JJ Act. PW-9, Dr. Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issue stating " that the age of the said girl would be more than 18 eyars and less than 20 years". In the cross examination, she admitted that M's age could be taken as 19 years. However, the High Court rejected this evidence, saying that "when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor". This finding is, in this court's considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94(2)(i) mandates; nor are they in accord with Section 94 (2)(ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with Section 94 of the JJ Act was the medical ossification test, based on several X-rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victim's bones, stage of their development and opined that she was between 18-20 years; in cross examination she said that the age might be 19 years. Given all these circumstances, this Court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, P-9."

7. Learned counsel for the applicant has also placed reliance upon the judgment in the case of Monish vs. State of U.P. and others passed by the coordinate Bench of this Court in Criminal Misc. Bail Application No.55026 of 2021. He has relied upon para Nos.12, 13, 14, 15, 43, 54 to 67, 59, 60, 91 92, 93, 94. The relevant para nos. 54 and 93 are quoted hereasunder:

"54. With the advantage of good authorities, the discussion on this issue can now be concluded with the following summation:

1. The presumptions contemplated by law may vary from statute to statute as regards their nature and manner of applicability.
2. Application of the presumptions contemplated in statutes does not preclude the courts from considering peculiar facts and circumstances of a case, nor do they compel the courts to accept the prosecution version as a gospel truth without due application of mind.
3. The stage and manner in which the presumption shall apply will depend on the statutory scheme, facts and circumstances of a case and the nature of evidence.
4. All presumptions are rebuttable. A challenge can weaken or rebut the presumption.

5. The presumptions shall be applied in a manner that they are consistent with the first principles of fair trial in criminal jurisprudence and due process in constitutional processual jurisprudence.

6. The condition precedent for triggering the presumption is that the primary or foundational facts have to be established by the prosecution by attaining standard of evidence which is beyond reasonable doubt and in accordance with law.

7. Presumptions created in a statute will be attracted by the following process. In the first instance after the primary or foundational facts have to be established by applicable standards of evidence. At this stage, the accused will be alerted to his right to assail the presumption. The accused has to be afforded an opportunity to rebut the presumption. After these prerequisites are satisfied, the presumption may ripen into an established fact and made the basis of a judicial finding upon consideration of evidences in the facts and circumstances of a case.

7. The manner and stage of triggering the presumption regarding age related documents under Section 94 of the JJ Act for a juvenile offender shall differ from the case of a minor victim and against an adult accused under the POCSO Act.

8. Prematurely triggering the presumptions under Section 94 of the JJ Act, 2015 and Section 29 of the POCSO Act, 2012 or inappropriately applying them at the stage of bail will violate the law and cause miscarriage of justice.

93. In wake of the preceding narrative, the manner of consideration of age of a victim in a bail application under the POCSO Act shall be guided as follows:

I. The procedure for determination of a victim's age provided in Section 94 of the JJ Act, 2015 read with JJ Rules, 2016 shall not apply to bail applications, though the documents therein are liable to be considered. Age of victim as per procedure prescribed in Section 94 of the JJ Act, 2015 is determined conclusively only in the trial.

II. The line of enquiry and relevant factors to assess the age of the victim in a bail application under the POCSO Act offences are these. The consideration of the age related documents mentioned in Section 94 of the JJ Act, 2015 i.e. school certificate (including matriculation), date of birth certificate issued by a local body, and medical report for age determination as produced by the prosecution is a good start point in the process.

III. The accused has a right to assail the veracity of the age of the victim as stated in the prosecution case.

IV. The court while deciding the said bail application is obligated to independently:

A. Examine the challenge laid to the victim's age by the accused applicant.

B. Evaluate credible doubts about the age of the victim.

V. The assessment of age in a bail order is of a tentative nature, and is based on probative value of documents which are yet to be proved or statements of witnesses who are still to be examined in court. Such determination by a court is not conclusive and is made only for the limited purpose for deciding the bail application.

VI. Same parameters shall apply to the bail applications filed at a different stages of trial. However, with each stage of the trial, the threshold of the satisfaction of the court may be raised in the facts and circumstances of the case. Heightened threshold of satisfaction means the duty of the court to give full weight to prosecution evidence, and due regard to the defence case while considering grant of bail.

VII. It is not advisable to lay down an inflexible or a straitjacket formula for grant of bail which will fit all cases. Practices and precedents in point are a reliable guide for the Court while exercising its judicial discretion in bail proceedings and a good defence against arbitrary decisions.

4. Learned counsel for the applicant has further relied upon Section 35 of the Evidence Act and has submitted that medical report as well as Parivar register are public documents and the same are important facts as per Evidence Act and the benefit of doubt will go in favour of

the applicant so far as bail is concerned.

5. On the other hand, Shri Dilip Kumar Pandey, learned counsel for the complainant has submitted that as per school leaving certificate, the age of the prosecutrix is below 16 years therefore, it is presumed that she is minor. He has further submitted that though it is a case of consent but if the girl is minor, consent has no meaning, thus the bail is liable to be rejected. It is further submitted that Juvenile Justice Act, 1994 will prevail and it should be inferred that the prosecutrix is minor.

6. Shri Rajesh Kumar Singh, learned AGA-1 has also opposed the prayer for bail and has invited attention of this Court towards the fact that as per school leaving certificate, the age of the girl is 16 years and she is minor and consent of minor has no value, therefore, the bail of the applicant is liable to be rejected.

7. Without expressing any opinion on the merits of the case and after hearing learned counsel for the parties and considering the argument that as per medical report as well as parivar register, the age of the prosecutrix is found to be 18 years and the statement of the prosecutrix under section 164 Cr.P.C. indicates that it is a case of consent and the argument that the applicant having no criminal history is languishing in jail since 01.06.2022 and looking to the the law points cited above, I am of the opinion that the applicant is entitled to be released on bail.

8. Let the applicant, Sandeep Kumar, be released on bail in the above case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of Court concerned with the following conditions :-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates 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 of the Indian Penal Code.

(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. is issued and the 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 of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) 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.

9. It is made clear that the observations made in this order are limited to the purpose of determination of this bail application and will in no way be construed as an expression on the merits of the case. The Trial Court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything in this order.

Order Date :- 16.8.2023

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