

Court No. - 68

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 19345 of 2024

Applicant :- Prakash Kumar Gupta

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

Counsel for Applicant :- Raj Kumar Singh, Sunil Kumar Singh

Counsel for Opposite Party :- Ajeet Kumar Singh, G.A.

Hon'ble Krishan Pahal, J.

1. A photocopy of the ossification test report has been placed on record filed in compliance of the order of this Court. It indicates that the age of the victim is about 19 years.

2. Heard Sri Raj Kumar Singh, learned counsel for the applicant and Sri Ajeet Kumar Singh, learned counsel for the informant as well as Sri V.K.S. Parmar, learned A.G.A. for the State and perused the material placed on record.

3. Applicant seeks bail in Case Crime No. 61 of 2023, U/S 363, 366, 376(3) IPC and 5L/6 Protection of Children From Sexual Offences Act, Police Station Sahatwar, District Ballia, during the pendency of trial.

PROSECUTION STORY:

4. The applicant is stated to have enticed away the minor daughter of the informant aged about 13 years on 16.3.2023.

ARGUMENTS ON BEHALF OF THE APPLICANT:

5. The applicant is absolutely innocent and has been falsely implicated in the present case with a view to cause unnecessary harassment and to victimize him. He has nothing to do with the said offence.

6. The FIR is delayed by one day and there is no explanation of the said delay caused.

7. There is no time of offence mentioned in the FIR. The victim by her appearance, seems to be major. The victim was sent for ossification test and it is learnt that her age has come out to be 19 years.

8. The victim is the consenting party, as is but evident from her statement recorded u/s 164 Cr.P.C., whereby she has stated that she had gone with the applicant out of her own sweet will and had established corporeal relationship with him and has shown her willingness to spend the rest of her life in the house of her in-laws.

9. Several other submissions have been made on behalf of the applicant to demonstrate the falsity of the allegations made against him. The circumstances which, as per counsel, led to the false implication of the applicant have also been touched upon at length.

10. There is no criminal history of the applicant. The applicant is languishing in jail since 20.2.2024. In case, the applicant is released on bail, he will not misuse the liberty of bail.

ARGUMENTS ON BEHALF OF INFORMANT/STATE:

11. The bail application has been opposed on account of the age of the victim, which was 13 years at the time of offence. The victim was minor at the time of the said offence, as such, her consent, if any, cannot be taken into consideration in the eyes of law.

CONCLUSION:

12. The informant deliberately reported the victim's age as 13 years, which is below the age of majority (18 years) and thus makes the case fall under the purview of the POCSO Act. This misrepresentation has led to severe legal consequences for the accused, which is his incarceration.

13. The ossification test report indicates that the victim is actually 19 years old. This suggests that the victim is legally an adult and, therefore, the application of the POCSO Act may be inappropriate in this case.

14. Due to the false representation of the victim's age, the applicant has been incarcerated since 20.02.2024 which is a substantial period of more than 6 months. This wrongful imprisonment could have serious implications for the applicant's life, reputation, and future.

15. The POCSO Act is designed to protect minors, but in this case, it appears to have been misused due to the false information provided by the informant. This misuse not only harms the applicant but also undermines the credibility and integrity of the legal system and the POCSO Act itself.

16. This situation exemplifies how the misuse of protective laws like the POCSO Act can lead to significant injustices. It underscores the need for careful verification of facts, especially in sensitive cases involving minors, to ensure that the law is applied appropriately and that justice is served for all parties involved.

17. POCSO Act was formulated to protect children under the age of 18 years from sexual exploitation. Nowadays more often than not it has become a tool for their exploitation. The Act was never meant to criminalise consensual romantic relationships between adolescents. However, this has to be seen from the facts and circumstances of each case.

18. The fact of consensual relationship borne out of love should be of consideration while granting bail because it would amount to perversity of justice if the statement of victim was ignored and accused was left to suffer behind jail.

19. In the judgement of Supreme Court passed in *Jaya Mala Vs. State of J & K, (1982) 2 SCC 538* and *Mohd. Imran Khan vs. State (Govt. of NCT of Delhi), (2011) 10 SCC 192*, it has been opined that the radiologist cannot predict the correct date of birth rather there is a long margin of 1 to 2 years on either side.

20. The well-known principle of "*Presumption of Innocence Unless Proven Guilty*," gives rise to the concept of bail as a rule and imprisonment as an exception.

21. A person's right to life and liberty, guaranteed by Article 21 of the Indian Constitution, cannot be taken away simply because the person is accused of committing an offence until the guilt is established beyond a reasonable doubt. Article 21 of the Indian Constitution states that no one's life or personal liberty may be taken away unless the procedure established by law is followed, and the procedure must be just and reasonable. The said principle has been recapitulated by the Supreme Court in *Satender Kumar Antil Vs. Central Bureau of Investigation and Ors.*, 2022 INSC 690.

22. Reiterating the aforesaid view the Supreme Court in the case of *Manish Sisodia Vs. Directorate of Enforcement* 2024 INSC 595 has again emphasised that the very well-settled principle of law that bail is not to be withheld as a punishment is not to be forgotten. It is high time that the Courts should recognize the principle that "*bail is a rule and jail is an exception*".

23. Learned AGA and learned counsel for the informant could not bring forth any exceptional circumstances which would warrant denial of bail to the applicant.

24. It is settled principle of law that the object of bail is to secure the attendance of the accused at the trial. No material particulars or circumstances suggestive of the applicant fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like have been shown by learned AGA.

25. Considering the facts and circumstances of the case, submissions made by learned counsel for the parties, the evidence on record, and without expressing any opinion on the merits of the case, the Court is of

the view that the applicant has made out a case for bail. The bail application is *allowed*.

26. Let the applicant- **Prakash Kumar Gupta** involved in aforementioned case crime number be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions.

(i) The applicant shall not tamper with evidence.

(ii) 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.

27. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail. Identity, status and residence proof of the applicant and sureties be verified by the court concerned before the bonds are accepted.

28. It is made clear that observations made in granting bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

PERSONAL APPEARANCE OF C.M.O., BALLIA:

29. C.M.O., Ballia, was directed to get the ossification test of the victim conducted vide order dated 4.7.2024.

30. On non-compliance of the order of this Court, C.M.O. Ballia was directed vide order dated 7.8.2024 to be present in Court on 29.8.2024.

31. C.M.O. Ballia, is present before this Court today. The personal affidavit filed by him is taken on record.

32. The concerned CMO was directed to get the ossification test of the victim conducted. The affidavit indicates that the victim had suffered because of the lack of any radiologist in the entire district of Ballia.

33. Learned A.G.A. has informed that as per the directions of Additional Director, Health, Azamgarh, the victim was taken from Ballia to Varanasi but her radiological examination was refused there as the order was for C.M.O. Ballia only. This is a classic example of red tape approach. The victim was then sent to Azamgarh and her ossification test was conducted at the 100 bed CHC at Atraulia, District Azamgarh.

34. It is stated in the affidavit that there was only one radiologist posted at Ballia, but he sadly expired on 07.07.2024, as such, there is no radiologist in the district of Ballia, working in the Provincial Medical and Health Services (PMHS), as such, the radiological examination of the victim could not be conducted there.

35. The explanation given by the C.M.O. Ballia is to the satisfaction of this Court, as such, his personal appearance is dispensed with.

36. The circumstances of the instant case instead of reducing have added to the woes of the victim, as she has been carried from one place to another due to the non-availability of a radiologist.

37. This Court has time and again observed that the radiologists are not posted at various districts across the State. The victims are facing undue harassment due to delays in their medico-legal radiological examination, primarily caused by the non-availability of radiologists in various districts across the state. It is unfortunate that many districts do not have any radiologists posted, exacerbating the situation.

38. Radiology indeed plays a crucial role in modern medicine, serving as the backbone for various specialities like medicine, surgery, orthopaedics, gynaecology etc. It is integral to diagnosis, treatment planning, and even in guiding interventions. As radiology continues to be a cornerstone of

modern medicine, effectively supporting various branches of allopathy, some curative action is need of the hour.

39. The Chief Medical Officer, Ballia had sent the victim for Ossification test before C.M.O. Varanasi in view of the directions of Additional Director, Health, Azamgarh.

40. The C.M.O. Varanasi and Additional Director, Health, Azamgarh are directed to appear in person on the date fixed explaining the reasons for the lethargic and irresponsible approach causing extreme trauma to the victim due to delay in conducting her ossification test.

41. The Director General (Medical and Health Services), State of U.P., is directed to also appear in person on the date fixed with a response explaining the reasons for not having posted a radiologist at District Ballia. He shall also file an affidavit elucidating the following district wise details:

- i. Number of radiologists posted at present.*
- ii. Number of degree holders (MD) & diploma holders (DMRD) in radiology including their present posting and also mentioning the fact whether they are posted as radiologist or not?*
- iii. Number of degree holders (MD) & diploma holders (DMRD) in radiology, who got the benefit of admission in such courses through PMHS quota.*
- iv. Number of government medical colleges across the state obviously having radio diagnostic facilities.*

42. List on **27.9.2024** in the additional cause list among top ten cases before this Court for compliance of the said order.

43 The Registrar Compliance of this Court is directed to communicate the order passed by this Court to the C.J.M. concerned for necessary compliance within 72 hours.

44. Learned A.G.A. is also directed to inform the respective officials for compliance of the said order.

Order Date :-29.8.2024

Shalini

(Justice Krishan Pahal)