

**Court No. - 65**

**Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 34904 of 2024

**Applicant :-** Dharmendra

**Opposite Party :-** State Of Up And 3 Others

**Counsel for Applicant :-** Shashi Kumar Mishra

**Counsel for Opposite Party :-** G.A.

**Hon'ble Ajay Bhanot,J.**

1. Matter is taken up in the revised call.
2. Shri Paritosh Kumar Malviya, learned AGA-I for the State contends that the police authorities in compliance of the directions issued by this Court in **Junaid Vs State of U.P. and another<sup>1</sup>** and with a view to implement the provisions of POCSO Act, 2012 read with POCSO Rules, 2020, have served the bail application upon the victim/legal guardian as well as upon the CWC.
3. By means of this bail application, the applicant has prayed to be enlarged on bail in Session Trial No.103 of 2024 arising out of Case Crime No.492 of 2023 at Police Station-Kotwali Dehat, District-Etah under Sections 376, 506, 120B I.P.C. and Section 3/4 of the POCSO Act, 2012. The applicant is in jail since 17.12.2023.
4. The bail application of the applicant was rejected by the learned trial court on 23.08.2024.
5. The following arguments made by Shri Shashi Kumar Mishra, learned counsel on behalf of the applicant,

<sup>1</sup> 2021 (6) ADJ 511

which could not be satisfactorily refuted by Shri Paritosh Kumar Malviya, learned AGA-I from the record, entitle the applicant for grant of bail:

I. The victim was wrongly shown as a minor of 15 years in the F.I.R. only to falsely implicate the applicant under the stringent provisions of the POCSO Act and cause her imprisonment.

II. The age of the victim set out in the prosecution case is refuted in light of the judgement of this Court in **Monish vs State of U.P.** <sup>2</sup> and on the following grounds:

(i) There are material contradictions in the age of the victim as recorded in various prosecution documents.

(ii) The age of the victim was incorrectly got registered in the school records by the victim's parents to give her an advantage in life. There is no lawful basis for the age related entry of the victim in the school records. The school records disclosing her age as 15 years are unreliable.

(iii) The victim in her statement under Section 161 Cr.P.C. has stated that she is 15 years of age.

(iv) The medical report records the age of the victim as 13 years. The medical report has been drawn up in a mechanical manner and is bereft of all reasons. The scientific criteria and medical parameters on the basis of which the said age has been determined are not disclosed in the medical report. The said medical report is in the teeth of Section 27 of the POCSO Act read with Section

164A (2)(3) of the Cr.P.C.

(v) No medical examination in consonance with Section 27 of the POCSO Act read with Section 164A (2)(3) of the Cr.P.C. to determine the correct age of the victim as per the latest scientific criteria and medical protocol by competent doctors was got done and no such medical report was drawn up by the prosecution as it would establish the majority of the victim and falsify the prosecution case. The victim is in fact a major.

III. Delay in lodgement of the F.I.R. in the facts of this case is fatal to the prosecution case.

IV. The victim was intimate with the applicant. The couple had eloped together and got married.

V. Subsequently the victim and her husband became estranged. The victim returned her home after five months.

VI. False and aggravated allegations were made by the victim against the applicant only to deflect attention from her conduct.

VII. The victim was present at various public places but never raised an alarm nor did she resist the applicant. The conduct of the victim shows that she was a consenting party.

VIII. Medical evidence to corroborate commission of rape by the applicant with the victim has not been produced by the prosecution.

IX. The victim has not identified the applicant as the

principal offender who committed rape with her.

X. The applicant does not have any criminal history apart from this case.

XI. The applicant is not a flight risk. The applicant being a law abiding citizen has always cooperated with the investigation and undertakes to join the trial proceedings. There is no possibility of the applicant influencing witnesses, tampering with the evidence or reoffending.

6. In the light of the preceding discussion and without making any observations on the merits of the case, the bail application is allowed.

7. Let the applicant-Dharmendra be released on bail in the aforesaid case crime number, on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court below. The following conditions be imposed in the interest of justice:-

(i) The applicant will not tamper with the evidence or influence any witness during the trial.

(ii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

8. The learned trial court is directed to fix the sureties after due application of mind in light of the judgement rendered by this Court in **Arvind Singh v. State of U.P. Thru. Prin. Secy. Home Department.**<sup>3</sup>

The learned trial court shall ensure that the right of bail of the applicant granted by this Court is not frustrated by arbitrary demands of sureties or onerous

<sup>3</sup> (Application U/S 482 No.2613 of 2023)

conditions which are unrelated to the socioeconomic status of the applicant.

9. The issue relating to determination of age of a victim in a bail under a POCSO Act offence has arisen in the instant case. The said issue will now be addressed. It is noteworthy that the same issue is constantly arising in bail applications under the POCSO Act offences.

10. The age of the victim in the POCSO Act offences has to be determined in light of the statutory provisions holding the field. Needless to add, only a prima facie determination of the age of a victim is made in a bail application of an accused under the POCSO Act.

11. It has been repeatedly noticed by this Court that the age of a victim is disputed by the accused in an overwhelming majority of cases. On many occasions there are no age related documents pertaining to the victim which are available with the prosecution. The age related documents are disputed with credibility by the accused persons in the other set of cases. At times there are material contradictions in the age of the victim in the prosecution documents. This has led to a widespread misuse of the POCSO Act.

12. The provisions which govern and regulate determination of age of victims of POCSO Act offences are as follows:

A. Section 94 of Juvenile Justice (Care and Protection of children) Act, 2015;

B. Section 27 of POCSO Act read with Section 164A(2)(3) of Cr.P.C.

13. The said statutory provisions have to be construed as a complete scheme. No part thereof can be made redundant by non consideration of the documents mentioned therein or failure to comply with the mandate of said provisions. The manner of an application of the said provisions in bail jurisdiction however has been the subject matter of various decisions of this Court.

14. This Court was faced with the issue of age determination of victims under the POCSO Act for the purposes of deciding the bail applications in **Monish (supra)**. In **Monish (supra)** while examining the manner of applicability of Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015, it was held:

"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 46 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."

15. Apart from Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015, there are other provisions also which deal with the determination of age of a victim in a POCSO Act offence. The said provisions are Section 27 of POCSO Act read with Section 164A (2)(3) of Cr.P.C. A faultline in police investigations which has repeatedly come to fore is the failure of the police and the medical authorities to comply with the provisions of Section 27 of POCSO Act read with Section 164A (2)(3) of Cr.P.C. It will be apposite to reproduce the said provisions to facilitate the discussion:

**"Section 27 of the POCSO Act- Medical examination of a child.—**

(1) The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973 (2 of 1973).

(2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

(3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

(4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

**Section 164A of CrPC- Medical examination of the victim of rape.-**

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:—

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.”

16. The legislative mandate of Section 27 of the POCSO Act read with Section 164A (2)(3) of the Cr.P.C. is explicit and mandatory. The law enforcement authorities as well as competent medical authorities are enjoined to draw up the medical report pertaining to the age of the victim. (This is apart from other medical parameters). The same is of course subject to the consent of the victim. The age of the victim is a jurisdictional issue in the POCSO related offences. Thus, the determination of



age under Section 27 of the POCSO Act read with Section 164A (2)(3) of the Cr.P.C. assumes critical importance and has jurisdictional significance. The said medical reports traceable to Section 27 of POCSO Act read with Section 164A (2)(3) of Cr.P.C. determining the age have to record the scientific criteria and the medical protocols on which the opinion regarding the age is based. The said medical reports are examined by the courts on the footing of the reasoning and the scientific tests/medical protocols adopted to make the finding on age.

17. The medical reports determining the age of the victim which are bereft of reasoning or made in breach of the existing scientific parameters and medical protocols are inconsistent with Section 27 of the POCSO Act read with Section 164A (2)(3) of the Cr.P.C. In the instant case the age column has been simply filled, and the reasons for the conclusion regarding age is absent. The report is invalid.

18. Reasons and description of the medical parameters or scientific criteria adopted to determine the age of the victim are the mandatory prerequisites of a valid medical report. The Court is noticing that in a number of cases the medical report mechanically records the age of the victim. The medical reports which do not give reasons in support of conclusions with respect to the victim's age are vitiated, being in contravention of Section 27 of the POCSO Act read with Section 164A (2)(3) of the Cr.P.C.

19. This Court handed down the directions to the police authorities in **Aman @ Vansh vs State of U.P.**<sup>4</sup> to ensure strict compliance with Section 27 of POCSO Act read with Section 164A (2)(3) of Cr.P.C. The competent medical authorities of the State too are liable to implement the mandate of Section 27 of POCSO Act read with Section 164A (2)(3) of Cr.P.C. by giving reasoned medical reports for age determination of victims.

20. The statutory scheme of determination of age of the victims in POCSO Act offences is a composite one and involves an interplay of Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 and also Section 27 of POCSO Act read with Section 164A(2)(3) of Cr.P.C.

21. As seen earlier the scope of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 has been determined by various holdings of the Supreme Court and the High Courts. In particular, the nuanced applicability of Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 in relation to the offences under the POCSO Act has been considered by this Court in **Monish (supra)** for the purposes of grant of bail of an accused.

22. The age of the victim in POCSO Act cases has to be determined in light of and upon holistic examination of the above said provisions, namely, Section 94 of Juvenile Justice (Care and Protection of children) Act, 2015 and

Section 27 of POCSO Act read with Section 164A(2)(3) of Cr.P.C. The criteria and the documents referenced in all the aforesaid provisions are liable to be considered to determine the age of the victim while deciding the bail applications under the POCSO Act. The said statutory provisions mandate that the consideration of the age of the victim of a POCSO Act offence has to be made in a manner which implements the above said provisions in an integrated manner and neglects no provision.

23. The documents mentioned in Section 94 of Juvenile Justice (Care and Protection of children) Act, 2015 cannot be neglected from consideration. Similarly, the provisions of Section 27 of the POCSO Act read with Section 164A(2)(3) of the Cr.P.C. cannot be rendered otiose by non consideration of the medical report determining the age of the victim, or on account of failure to submit a reasoned medical report determination of age of the victims.

24. The Principal Secretary, Medical Health and Family Welfare, Uttar Pradesh and Director General, Medical and Health, Uttar Pradesh, shall ensure that the medical specialists who determine the age of the victims/medical reports under the POCSO Act are properly trained and the said medical reports are drawn up after giving reasons for the conclusions consistent with the mandate of Section 27 of the POCSO Act read with Section 164A (2)(3) of the Cr.P.C.

25. After composite consideration of the law in **Monish**

**(supra)**, **Aman (supra)** and the provisions of Section 27 of the POCSO Act read with Section 164A(2)(3) of the Cr.P.C., this Court in **Anurudh**<sup>5</sup> issued appropriate directions. The directions in **Anurudh (supra)** are reiterated.

26. The Director General of Police, Government of U.P. Lucknow, Principal Secretary, Medical Health and Family Welfare, Uttar Pradesh and Director General, Medical and Health, Uttar Pradesh are directed to ensure compliance of the judgements rendered in **Monish (supra)**, **Aman (supra)**, **Anurudh (supra)** and the instant case.

**Order Date :-** 27.9.2024  
Ashish Tripathi