

**A.F.R.**

**Court No. - 78**

**Case :- CRIMINAL MISC. BAIL APPLICATION No. - 27563 of 2020**

**Applicant :- Pushpendra Chauhan**

**Opposite Party :- State of U.P.**

**Counsel for Applicant :- Mohit Singh**

**Counsel for Opposite Party :- G.A., Shivam Yadav**

**Hon'ble Krishan Pahal,J.**

1. Heard Sri Mohit Singh, learned counsel for the applicant and Sri Shivam Yadav, learned counsel for the informant as well as Sri P.K. Srivastava, learned AGA for the State and also perused the material placed on record.

2. By means of the present bail application, the applicant seeks bail in Special Sessions Trial No. 291 of 2020 arising out of Case Crime No. 30 of 2020, under Section 376D Indian Penal Code<sup>1</sup> and Sections 5/6 of Protection of Children from Sexual Offences Act, 2012<sup>2</sup>, Police Station- Hasanpur, District- Amroha, during the pendency of trial.

**PROSECUTION STORY**

3. The facts of the case in a nutshell are that the victim was in touch with the applicant through mobile chatting. On 17.01.2020, the victim had gone to the house of her aunt and at about 06:30 PM, she had gone to the crossing at Gajraula and the applicant is stated to have enticed her away on the pretext of giving her some gifts on the promise that they shall return within a period of one hour. On the way to Hasanpur, the applicant is stated to have taken her in a room near tubewell wherein one unknown person was standing guard, armed with a country made pistol and the applicant is stated to have committed rape to the victim. It is also alleged in the FIR that after some time, the co-accused, Jaiveer Chauhan and Kovind Chauhan and the said unknown person are also stated to have

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1 In short "IPC"

2 In short "POCSO Act"

committed rape with the victim and later on, threatened her to kill her father and brother if she ever reveals their identity to anyone. It is also alleged in the FIR that the applicant had deleted all the chats from the mobile phone of the victim at the time of said incident. The victim is also stated to have been threatened by the applicant of his high connections in high echelons of the society. Somehow the victim had contacted her father and also dialled 100 number to the police whereupon the police is stated to have retrieved her. The FIR was lodged on 18.01.2020 at about 05:10 PM by the victim/informant against the applicant and co-accused persons, Jaiveer Chauhan, Kovind Chauhan and one unknown person u/s 376D & 506 IPC and Section 5/6 of POCSO Act.

#### **RIVAL CONTENTIONS**

4. Learned counsel for the applicant has stated that the applicant has been falsely implicated in the present case. The victim is a consenting party. Learned counsel has further stated that the FIR is delayed by about eight hours and there is no explanation of the said delay caused. It is indicated in the FIR itself that the victim had called the police in the morning itself and she was retrieved by the police. Learned counsel has further stated that as per ossification test report, the age of the victim was 18 years. Learned counsel has stated that more often than not the age of the wards is indicated much less by their parents. To buttress his argument, learned counsel has placed much reliance upon the judgement of this Court passed in *Kalim Vs. State of U.P. and Another*<sup>3</sup> of which the relevant para-11 of the judgement is reproduced hereunder:-

*“11. In Sanjeev Kumar Gupta (supra), the credibility and authenticity of the matriculation certificate for the purpose of determination of age under Section 7(A) of the Juvenile Justice Act, 2000 came up for consideration. In the said case, the Juvenile Justice Board had rejected the claim of the juvenility and that decision of the Juvenile Justice Board was restored by the Hon'ble*

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<sup>3</sup> Criminal Revision No.568 of 2022 decided on 22.9.2022

*Apex Court by rejecting the order of the Hon'ble High Court. It was observed therein that the records maintained by the C.B.S.C. were purely on the basis of final list of the students forwarded by the Senior Secondary School where the juvenile had studied from Class 5 to 10 and not on the basis of any other underlying documents. On the other hand, there was clear and unimpeachable evidence of date of birth which had been recorded in the records of another school, which the second respondent therein had attended till class 4 and which was supported by voluntary disclosure made by the accused while obtaining both, Aadhaar Card and driving license. **It was observed that the date of birth reflected in the matriculation certificate could not be accepted as authentic or credible.** In the said case, it was held that the date of birth of the second respondent therein was 17.12.1995 and that he was not entitled to claim juvenility as the date of the alleged incident was 18.08.2015.”*

(Emphasis Added)

5. Learned counsel for the applicant has also placed much reliance upon the settled case law of the Apex Court in **Sushil Kumar vs. Rakesh Kumar**<sup>4</sup>, wherein it has been stated that it is more often in the Indian Society that person shows the age of their wards much below than their actual age. Learned counsel has vehemently argued that the final report of the police categorically indicates that no offence of rape has been committed by the applicant and he has to be tried on account of the age of minority of the victim. The Apex Court in umpteen number of cases has opined that a leverage of two years may be granted to the applicant with respect to the age referred in ossification test report.

6. Learned counsel for the applicant has also stated that to date, no efforts have been made and it has not been revealed as to who was the unknown person who was carrying a country made pistol and threatened the victim at the time of offence. At the time of submitting the final report (charge-sheet), the Investigating Officer was pleased to exonerate the co-accused persons altogether from all the offences. As per the CDRs, the

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4 (2003) 8 SCC 673

said co-accused persons, namely, Jaiveer Chauhan and Kovind Chauhan were not found to be present at the place of occurrence.

7. Learned counsel for the applicant has further stated that even the Investigating Officer has not found the applicant to have committed the offence rather the applicant has been made an accused only on the basis of age of minority of the victim. Neither the injuries sustained by the victim have been disclosed in the FIR nor in her statements recorded u/s 161 and 164 Cr.P.C. In the injury report, no duration of the injuries has been indicated which falsifies the prosecution story. Learned counsel has also stated that the injury report indicates that hymen represented old healed tags meaning thereby the victim was used to sexual intercourse.

8. Learned counsel for the applicant has placed much reliance on the detailed chats of the victim and the applicant filed with the supplementary affidavit indicating their close contiguity.

9. Learned counsel has also placed much reliance upon the statement of one Smt. Neeraj who has categorically stated that the applicant has been falsely implicated in the present case at the behest of one conman Chandra Mohan who runs various institutions in the State of Uttarakhand and Uttar Pradesh. The co-accused persons, Jaiveer and Kovind had filed several applications against the conman Chandra Mohan and the named accused persons have been implicated due to the said Chandra Mohan Maharaj who himself is a history-sheeter. The co-accused person Jaiveer Chauhan is the cousin of the applicant. The said conman has misused his power and money by foisting the present false case upon the applicant and other co-accused persons using victim as a conduit.

10. Learned counsel for the applicant has further indicated that the police has recovered two condom packets from the place of occurrence at the instance of the victim which indicates that the said act committed, if any, was with the consent of the victim.

11. Learned counsel for the applicant has also stated that the impugned order passed by the High Court on 30.3.2022 granting bail to the applicant is correct. Learned counsel has also stated that the Apex Court has not cancelled the bail of the applicant rather has remanded back the bail application to be re-heard on merits. The Apex Court at the time of remanding the matter back has even granted interim protection to the applicant till 30.11.2022. The applicant has no other criminal history except two cases in which closure report has already been filed and, therefore, the applicant deserves to be released on bail. In case, the applicant is released on bail, he will not misuse the liberty of bail and shall cooperate with the trial.

12. Per contra, Sri Shivam Yadav, learned counsel for the informant has vehemently opposed the prayer for bail and has categorically stated at Bar that as per the school certificate of the victim, her age is 17 years and 4 months only. Her date of birth is 10.9.2002 and as per her medical report, her age is 18 years. Learned counsel has further stated that as per the settled law of the Apex Court, a leverage of two years may be granted on either side and why not, it should be read on lower side. Learned counsel has placed much reliance upon the recovery memo dated 20.1.2020 which was taken from the place of occurrence at the instance of the victim herein wherein one quilt and two packets of condoms were recovered in which one was found empty and another contained two unused condoms. The recovery of condoms indicates towards the commissioning of offence.

13. Learned counsel for the informant has also placed much reliance upon the medical report of the injured person wherein the medical examination of the victim was conducted promptly on 18.1.2020 at about 06:35 PM at the CHC Hospital, Gajraula. The doctor had found following injuries on the body of the victim/injured but for the sake of brevity, only the relevant part of injury is being reproduced hereunder:-

**External Examination –**

*Reddish abrasion over both chests Size- 2.5 cm × 2 cm each.  
Reddish abrasion 2 cm × 1 cm over dorsal aspect of Rt. Hand at the time of examination.*

**Internal Examination –**

*Lacerated wound 2 cm × 0.5 cm × muscle deep over lower part of vagina at 6 O' clock position.*

*Reddish contusion over inner part of vagina at the time of examination.*

*Hymen represented by old healed tags.*

14. Learned counsel for the informant has also stated that the said injuries indicate the resistance by the victim at the time of commissioning of the said offence with her. Learned counsel has also stated that in the ossification test report of the victim, it has been observed that *sternal end of clavicle bone epiphysis appeared but not fused* which indicates that the age of the victim is below 18 years and, thus, corroborated by her age certificate.

15. Learned AGA has also opposed the prayer for bail and has stated that the learned Special Judge at the stage of taking cognizance has summoned the exonerated accused persons Jaiveer Chauhan and Kovind Chauhan as well. Thus, the bail application of the applicant deserves to be rejected.

**CONCLUSION**

16. It is true that the Investigating Officer has exonerated the other named accused persons in the final report (charge-sheet) filed against the applicant only. It has been indicated in the said final report that the conversations between the applicant and the victim indicate proximity between the two. The final report has been filed owing to the age of the victim falling below 18 years, the legal age of the consent.

17. For the sake of verbiage, only the relevant part of the definition of rape is being discussed hereinafter. The offence of rape is defined u/s 375 IPC as sexual intercourse under the circumstances falling under any of the following seven descriptions –

*First.*– Against her will.

*Secondly.*– Without her consent.

*Thirdly.*– ....

...

18. It is not without reason that both the phrases are put in separately in the definition of rape. Consent can be obtained by putting someone in fear or under pressure or by persuasive influence or other more subtle methods.

19. It is not without reason that the word “consent” is prefixed with “without” and the word “willingness” is prefixed with “against”.

20. The age of the victim is just above 17 years, her date of birth being 10.09.2002. Thus, the consent, if any, pales into insignificance. In addition to it even if, as suggested by the learned counsel for the applicant, the consent is presumed, willingness was absent as is amply indicated by the medical examination report of the victim. The nature, the seat of injury just deflates the claim of defence that it was not rape.

21. The Courts are under duty to deal with cases of such nature with utmost responsibility and sensitivity. It is impudent to look for expression willingness or unwillingness. The act was resisted by her is too obvious by the medical report and that brings the act within the definition of rape as it was against her will. It is true that the liberty of the applicant is at stake but the Courts have to look into the larger interest of the society as well and even the interest of the victim/accuser has also to be taken into consideration as of late even the role of the victim has been accorded a wider view in light of the amendment in the Cr.P.C. by adding the definition of victim u/s 2(*wa*).

22. Considering the rival submissions adduced by the learned counsel for the parties, the facts of the case, evidence adduced and also considering the nature of offence, I do not find it a fit case for granting bail to the applicant.

23. Accordingly, the application is found devoid of merits and is **dismissed**.

24. The Trial Court is expected to expedite the trial of the case and conclude it in accordance with law, preferably within a period of one year from the date of this order, if there is no other legal impediment.

25. It is also made clear that observations made in dismissing the 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 and evidence on record.

**Order Date :- 29.11.2022**  
Siddhant

**(Justice Krishan Pahal)**