

**Court No. - 65**

**Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 12907 of 2022

**Applicant :-** Deepak Gaur

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

**Counsel for Applicant :-** Santosh Kumar Mishra, Rajesh Kumar Dubey

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

**Hon'ble Rajeev Misra, J.**

1. Heard Mr. Rajesh Kumar Dubey along with Mr. Santosh Kumar Mishra, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. At the very outset, the learned A.G.A. contends that notice of present application for bail has been served upon first informant-opposite party 2 on 15.03.2022. However, in spite of service of notice, no one has put in appearance on behalf of first informant-opposite party 2 to oppose this application for bail.

4. This repeat application for bail has been filed by applicant-Deepak Gaur, seeking his enlargement on bail in Case Crime No. 131 of 2019, under Sections 363, 366, 376 IPC and Sections 3/4 POCSO Act, Police Station-Bhaluani, District-Deoria during the pendency of trial i.e. Sessions Trial No. 40 of 2020 (State Vs. Deepak Gaur) under Sections 363, 366, 376 IPC and Sections 3/4 POCSO Act.

5. The first bail application of applicant was rejected by this Court vide order dated 03.08.2021 passed in Criminal Misc. Bail Application No. 11570 of 2020 (Deepak Gaur Vs. State of U.P. and Another). For ready reference, the same is reproduced hereinunder:-

*"Heard Sri Gautam, learned counsel appearing for the applicant, Sri Sanjay Kumar Mishra, learned Advocate appearing for the informant and learned A.G.A.*

*This bail application has been filed by the applicant to enlarge him on bail in case crime no. 131 of 2019, under Sections 363, 366, 376 IPC and*

***Learned counsel for the applicant submits that the applicant is innocent and has not committed the present offence. It is further argued that incident is said to have taken place on 27.08.2019. FIR was lodged on 20.09.2019 for the offence 363 IPC only by one Rajwanti Devi, mother of the victim at belated stage. It is argued that victim is aged about 18 years. She stayed along with the applicant at her own freewill and consent. Offence of rape is not made out. At this juncture, learned counsel appearing for the applicant referred to the contents of the FIR, statement of the informant and victim recorded under Section 161 and also statement of the victim recorded under Section 164 Cr.PC. Learned counsel for the applicant further emphasised upon the statement of the informant and victim recorded on subsequent occasion and argued that there is major contradiction in the statements of the victim and the informant. No prima facie case is made out. Learned counsel appearing for the applicant also referred to the statement of the victim made before the Doctor concerned and further argued that no prima facie case is made out. Applicant is in jail since 10.01.2020. Learned counsel for the applicant placed reliance on the judgment of the Apex Court reported in 2018 LawSuit(SC) 1364 (Suhani and another Vs. State of U. P. and others).***

***Learned A.G.A. and learned counsel for the informant argued that a prima facie case is made out against the applicant. If entire prosecution case is taken into consideration then also victim was minor. Her consent cannot be construed as free consent. Thus, referring to the statement of the victim recorded under Section 161 and 164 Cr.P.C. it is also argued that physical relation was established by the applicant with the victim against her wishes. She was enticed away by the applicant and kept with him for many days inducing her to many. It is also argued that future of the girl is ruined. A prima facie case is made out.***

***I have considered the rival submissions and have also gone through the entire record.***

***If the law laid down in Suhani and another (Supra) is compared with the facts and evidence of the present matter no benefit could be extended to the applicant at this stage as victim girl is minor. The court is of the opinion that applicant has not made out a case for bail.***

***Having considered the rival submissions, going through the entire record and also taking into consideration the contents of the FIR as well as statement of the victim recorded under Section 164 Cr.P.C., the court is of the opinion that applicant has not made out a case for bail.***

***Bail Application is hereby rejected.***

***Order Date :- 3.8.2021"***

5. Learned counsel for applicant submits that subsequent to the order dated 03.08.2021, the first informant PW-1 Rajbanti Devi deposed before court below but has not supported the FIR. She has

been declared hostile. The prosecutrix has also deposed before court below as PW-2, she has also not supported the FIR and has been declared hostile. On the above premise, the learned counsel for applicant submits that since the first informant and the prosecutrix in their deposition before court below have not supported the FIR, therefore, no useful purpose shall be served in prolonging the custodial arrest of the applicant. He, therefore, contends that applicant be enlarged on bail.

6. Even though, applicant has criminal history of 2 cases but the same are not so grievous and heinous in nature so as to deny bail to applicant. Referring to the three Judges Bench judgment of Supreme Court in **Brijmani Devi Vs. Pappu Kumar and Another, (2022) 4 SCC 497**, he submits that an accused cannot be denied bail simply on the basis of criminal history. It is thus urged that even though applicant has criminal history of one case yet he is liable to be enlarged on bail. Applicant is in jail since 10.01.2020. As such, he has undergone more than 3 years and 9 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 necessitating the custodial arrest of the 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.

7. Per contra, the learned A.G.A. has opposed the prayer for bail. He submits that applicant has criminal history of 2 cases, therefore, he does not deserve any indulgence by this Court. However, the learned A.G.A. could not dislodge the factual and legal submissions urged by the learned counsel for applicant with reference to the record at this stage.

8. Having heard, the learned counsel for applicant, the learned A.G.A. for State, upon perusal of record, evidence, nature and gravity of offence, accusations made, complicity of accused and coupled with the fact that first informant PW-1 and the prosecutrix pW-2 have deposed before court below, however, in their statement in chief/examination in chief, they have not supported the FIR, consequently, they have been declared hostile, in view of above, no useful purpose shall be served in prolonging the custodial arrest of applicant, the explained criminal history of the applicant, the three judges Bench judgment in **Brijmani Devi (Supra)**, the period of incarceration undergone, the police report

in terms of Section 173(2) Cr.P.C. has already been submitted, therefore, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized, yet in spite of above, the learned A.G.A. could not point out any such circumstance from the record necessitating the custodial arrest of applicant during the pendency of trial, therefore, irrespective of the objections raised by the learned A.G.A. in opposition to the present application for bail, but without making any comments on the merits of the case, applicant has made out a case for bail.

9. Accordingly, the bail application is **allowed**.

10. Let the **applicant-Deepak Gaur**, be released on bail in the aforesaid case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

(i) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT THAT HE/SHE SHALL NOT SEEK ANY ADJOURNMENT ON THE DATE 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/HER COUNSEL. IN CASE OF HIS/HER ABSENCE, WITHOUT SUFFICIENT CAUSE, THE TRIAL COURT MAY PROCEED AGAINST HIM/HER UNDER SECTION 229-A IPC.

(iii) IN CASE, THE APPLICANT MISUSES THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE HIS/HER PRESENCE PROCLAMATION UNDER SECTION 82 CR.P.C., MAY BE ISSUED AND IF APPLICANT FAILS TO APPEAR BEFORE THE COURT ON THE DATE FIXED IN SUCH PROCLAMATION, THEN, THE TRIAL COURT SHALL INITIATE PROCEEDINGS AGAINST HIM/HER, IN ACCORDANCE WITH LAW, UNDER SECTION 174-A IPC.

(iv) 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 THE HIM/HER IN ACCORDANCE WITH LAW.

(v) THE TRIAL COURT MAY MAKE ALL POSSIBLE

EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANT.

11. However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his bail so granted by this Court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

**Order Date :- 27.10.2023**

Vinay