

Court No. - 69

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 11364 of 2023

Applicant :- Vivek Kumar

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

Counsel for Applicant :- Sushil Dubey, Dharmendra Kumar Rajput

Counsel for Opposite Party :- G.A., Adarsh Srivastava, Reena Pal

Hon'ble Samit Gopal, J.

1. Heard Sri Dharmendra Kumar Rajput, learned counsel for the applicant, Sri Luvkush Pal, Advocate holding brief of Shri Adarsh Srivastava, learned counsel for the first informant and Sri Devendra Nath Mishra, learned counsel for the State and perused the material on record.

2. This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant- Vivek Kumar, seeking enlargement on bail during trial in connection with Case Crime No. 403 of 2022, under Sections 376 DA, 342, 506, 34 I.P.C. and Section 5 (g)/6 POCSO Act, Police Station Gulawathi, District Bulandshahr.

3. The first information report of the present case was lodged on 07.10.2022 by the informant-Surendra who is father of the victim, against the applicant Vivek, Ritik and Nitesh alleging therein that his daughter was missing from the house who was then searched and the accused persons were asked about her after which Nitesh told him that his daughter has been taken away by Ritik and Vivek to Bhodd crossing. They searched her and on the next date, i.e., 06.10.2022 at about 1.00 p.m., she was recovered. Then she told him that accused persons took her away after which Nitesh and Ritik committed rape upon her.

4. Learned counsel for the applicant argued that the applicant has been falsely implicated in the present case. It is argued that in the statement under Section 161 Cr.P.C of the victim she has stated that co-accused Nitesh and Ritik have committed rape upon her. Subsequently, in her statement under Section 164 Cr.P.C. she has stated that all of the three accused persons committed rape upon her. It is argued that the medical evidence does not support the prosecution case as the doctor conducting the medical examination of the victim did not find any external or internal injury on her body. Doctor opined that there is no sign of use of force on her. The doctor found the hymen to be intact. It is argued that co-

accused Ritik and Nitesh have been granted bail by the co-ordinate Bench of this Court vide orders dated 11.05.2023 and 17.07.2023 respectively in Criminal Misc. Bail Application No. 8544 of 2023, Ritik vs. State of U.P. and Criminal Misc. Bail Application No. 31086 of 2023, Nitesh Yadav vs. State of U.P. Copies of the orders have been produced before this Court which are taken on record. The applicant has no criminal history as stated in para 25 of the affidavit and he is in jail since 08.10.2022.

5. *Per contra*, learned counsel for the first informant and learned counsel for the State opposed the prayer for bail. It is argued that the victim in her statement under Section 164 Cr.P.C has stated of all the three accused persons including the applicant for committing rape upon her as such, the applicant is involved in the present case.

6. After having heard learned counsel for the parties and perusing the record, it is evident that in the first information report and the statement of victim recorded under Section 161 Cr.P.C., there is no allegation of rape being committed by the applicant. Subsequently, in the statement of victim under Section 164 Cr.P.C., she states of all the three accused committed rape upon her and co-accused Ritik and Nitesh Yadav has been granted bail by co-ordinate Benches of this Court.

7. Looking to the facts and circumstances of this case, the nature of evidence and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

8. Let the applicant- Vivek Kumar, 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 concerned with the following conditions which are being imposed in the interest of justice:-

i) The applicant will not tamper with prosecution evidence and will not harm or harass the victim/complainant in any manner whatsoever.

ii) The applicant will abide the orders of court, will attend the court on every date and will not delay the disposal of trial in any manner whatsoever.

(iii) The applicant shall file an undertaking to the effect that he 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.

(iv) The applicant will not misuse the liberty of bail in any manner whatsoever. 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., 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, in accordance with law, under section 174-A I.P.C.

(v) 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 and the trial court may proceed against him under Section 229-A IPC.

(vi) The trial court may make all possible efforts/endeavour and try to conclude the trial expeditiously after the release of the applicant.

9. The identity, status and residential proof of sureties will be verified by court concerned and in case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail and send the applicant to prison.

10. The bail application is **allowed**.

Order Date :- 30.10.2023

Vipasha

(Samit Gopal, J.)