

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 22908 of 2023

Applicant :- Rohit Thakur

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

Counsel for Applicant :- Vikash Chandra Tiwari, Nitin Sharma

Counsel for Opposite Party :- G.A., Dinesh Kumar Rai, Dinesh Kumar Rai

Hon'ble Rajeev Misra, J.

Heard Mr. Nitin Sharma, the learned counsel for applicant, the learned A.G.A. for State and Mr. Dinesh Kumar Rai, the learned counsel for first informant.

Present application came up for orders on 30.5.2023 and this Court passed the following order:

"Heard Mr. Nitin Sharma, the learned counsel for applicant, the learned A.G.A. for State and Mr. Dinesh Kumar Rai, the learned counsel representing first informant/opposite party 2.

This is a repeat application for bail filed by applicant seeking his enlargement on bail in Case Crime No. 77 of 2022, under Sections 376, 506 IPC and Section 5 (j) (ii)/6 of POCSO Act and Section 3 (2) 5 of SC/ST Act, Police Station Kakod, District Bulandshahr during the pendency of trial.

The first bail application of applicant was rejected, vide order dated 25.11.2022 passed in Criminal Misc. Bail Application No. 26835 of 2022 (Rohit Thakur Vs. State of U.P. and 3 others). For ready reference, same is reproduced herein under:-

"Heard Mr. Anoop Kumar Pandey, the learned counsel for applicant and the learned A.G.A. for State.

This Application for bail has been filed by applicant, Rohit Thakur seeking his enlargement on bail in Case Crime No. 77 of 2022 under Sections 376, 506 I.P.C. and Section 5(II)/16 of POCSO Act and Section 3(2) of S.C./S.T. Act, P.S. Kakod, District Bulandshahr during the pendency of trial.

Perused the record.

Record shows that an F.I.R. dated 16.04.2022 was lodged by first informant, Mange Ram (father of the prosecutrix) and was registered as

Case Crime No. 0077 of 2022 under Sections 376, 506 I.P.C. and Section 5j(ii) and 6 of POCSO Act and 3(2)(v) of S.C./S.T. Act, P.S. Kakod, District Bulandshahr. In the aforesaid F.I.R., applicant, Rohit Thakur has been nominated as solitary named accused.

The gravamen of the allegations made in the F.I.R. is to the effect that the prosecutrix, Chanchal, daughter of the first informant disclosed to her mother that on account of applicant, she came in family way. The age of embryo was said to be around six months. Named accused dislodged modesty of the prosecutrix in spite of the repeated denial of her.

After lodging of aforesaid F.I.R., Investigating Officer proceeded with the statutory investigation of aforesaid case crime number in terms of Chapter 12 of Cr.P.C. He first examined the first informant under Section 161 Cr.P.C. who has supported the F.I.R. He thereafter examined the prosecutrix under Section 161 Cr.P.C. who has not only supported the F.I.R. but has also described the sequence of events. Thereafter the prosecutrix was medically examined. The prosecutrix in her statement before the doctor has only rejoined her earlier version under Section 161 Cr.P.C. but has also given more details of the occurrence therein. Thereafter the statement of prosecutrix was recorded under Section 164 Cr.P.C. wherein she has rejoined her aforementioned statement recorded earlier. Thereafter Investigating Officer examined other witnesses also who have supported the F.I.R. In the medical examination of the prosecutrix, as per U.S.G. Report, age of the fetus was 27 weeks old. On the basis of above and other material collected by Investigating Officer during course of investigation, he opined to submit the charge-sheet. Accordingly, he submitted charge-sheet dated 3.6.2022 whereby applicant has been charge-sheeted under Sections 376, 506 I.P.C. and Section 5(II)/16 of POCSO Act and Section 3(2) of S.C./S.T. Act.

On the aforesaid premise, at the very outset, learned A.G.A. stated that prosecutrix is a young girl of tender age about 17 years on the date of lodging of F.I.R. whose modesty has been dislodged by applicant. The prosecutrix has come in family way. As such applicant does not deserve any indulgence by this Court and present application for bail is liable to be rejected.

When confronted with above, learned counsel for the applicant could not overcome the same.

Having heard the learned counsel for applicant, the learned A.G.A. for state, upon perusal of material brought on record, nature of offence, evidence, complicity of the accused, accusation made and coupled with the fact that the prosecutrix is below 18 years of age, on account of the act of applicant, prosecutrix is in a family way for the last seven months, prosecutrix in her statement recorded under Section 161/164 Cr.P.C. has clearly implicated the applicant in crime in question, there being nothing on record to infer false and malicious prosecution of applicant, but without commenting on the merits of the case, this Court does not find any good ground to enlarge the applicant on bail.

Accordingly, present bail application fails and is liable to be rejected.

It is, accordingly, rejected."

Notice on behalf of opposite party 1 has been accepted by the learned A.G.A.

Mr. Dinesh Kumar Rai, Advocate, has put in appearance on behalf of opposite party 2.

They pray for and are granted four weeks time to file their respective counter affidavits. Applicant will have one week thereafter to file rejoinder affidavit.

Learned A.G.A. shall bring on record the report of the D.N.A. profile of the child, which has been conducted pursuant to order passed by this Court.

List on 10.7.2023. "

On the matter being taken up, learned A.G.A. submits that order dated 30.5.2023, passed by this court has already been complied with, inasmuch as the D.N.A. test report of child is already on record as Annexure-2 to the counter affidavit filed by State.

Learned counsel for applicant submits that as per the said D.N.A. report, the D.N.A. profile of new born child does not match with the father. As such, applicant is not the biological father of child. In view of above, no offence as alleged can be said to have been committed by applicant.

Even otherwise applicant is man of clean antecedents inasmuch as he has no criminal history to his credit except the present one. Applicant is in jail since 17.4.2022. As such, he has undergone more than one year and five months of incarceration. The police report in terms of section 173 (2) Cr.P.C has already been submitted and therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized. Up to this stage, no such circumstance has emerged, necessitating the custodial arrest of applicant during the pendency of trial. He, therefore, contends that applicant is liable to be enlarged on bail. In case applicant is enlarged on bail he shall not misuse the liberty of bail.

Per contra, the learned A.G.A. and learned counsel for first informant have opposed the prayer for bail. They submit that sanctity of D.N.A. report is still subject to trial evidence. As such, applicant does not deserve any indulgence by this Court.

In rejoinder, learned counsel for applicant invited the attention of

Court to section 293 Cr.P.C. and on basis thereof he submits that FSL report is exempted from being proved in trial.

When confronted with above, learned counsel for applicant could not overcome the same.

Having heard the learned counsel for applicant, the learned A.G.A. for State, the learned counsel for first informant upon perusal of material brought on record, evidence, nature and gravity of offence as well as complicity of applicant, accusation made coupled with the fact that as per D.N.A. report of new born child, the applicant is not the biological father of the new born child, therefore, prima facie, offence complained of is not committed by applicant, therefore, irrespective of the objections raised by the learned A.G.A. and the learned counsel for first informant in opposition to the present application for bail, the clean antecedents of applicant, the period of incarceration undergone but without making any comment on the merits of the case, applicant has made out a case for bail.

Accordingly, the bail application is **Allowed**.

Let the applicant Rohit Thakur, 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 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.

However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his/her 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 :- 17.10.2023

Arshad