

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 28610 of 2023

Applicant :- Hazrat Ali@ Hazzu

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

Counsel for Applicant :- Kaushlendra, Kamlesh Kumar Tiwari

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

Heard Mr. Kamlesh Kumar Tiwari, the learned counsel for applicant and the learned A.G.A. for State.

Perused the record.

This application for bail has been filed by applicant Hazrat Ali@ Hazzu seeking his enlargement on bail in Case Crime No. 255 of 2023, under Sections 376D, 504, 506 IPC and 5/6 POCSO Act, Police Station- Compiarganj, District- Gorakhpur during the pendency of trial.

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

Record shows that in respect of an incident which is alleged to have occurred on 19.4.2023, a belated F.I.R. dated 22.4.2023 was lodged by first informant Kharjeena (mother of the prosecutrix) and was registered as Case Crime No. 255 of 2023, under Sections 376D, 504, 506 IPC and 5/6 POCSO Act, Police Station- Compiarganj, District- Gorakhpur. In the aforesaid F.I.R. two persons namely, Computer Gupta and Haju Ali have been nominated as named accused.

The gravamen of the allegations made in the F.I.R. is to the effect that named accused dislodged the modesty of the prosecutrix deliberately, whereas co-accused Haju Ali made a video of the said occurrence.

After aforesaid F.I.R. was lodged, Investigating Officer proceeded

with statutory investigation of concerned case crime number in terms of chapter XII Cr.P.C. Thereafter the statement of the prosecutrix was recorded under section 161 Cr.P.C. Same is on record at page 26 of the paper book. The prosecutrix in her aforesaid statement has further alleged that named accused Haju Ali made a bite on her cheek while another co-accused Computer Gupta deliberately dislodged her modesty. Thereafter the prosecutrix was requested for her medical examination. The prosecutrix in her statement before the Doctor who medically examined her has rejoined her previous statement under section 161 Cr.P.C. However, the Doctor who examined the prosecutrix did not find any injury on her body so as to denote commission of deliberate sexual assault. However, with regard to the private part of the prosecutrix, the Doctor opined as follows:-

"Old Torn Healed"

Certain samples were taken from the body of the prosecutrix for pathological examination. However, the result of the same is in negative. Ultimately, the statement of the prosecutrix was recorded under section 164 Cr.P.C, wherein she has partially rejoined her statement under section 161 Cr.P.C. During course of investigation, Investigating Officer examined first informant and other witnesses under section 161 Cr.P.C. Witnesses so examined have supported the F.I.R. On the basis of above and other material collected by Investigating Officer, during course of investigation he came to the conclusion that complicity of named accused is established in the crime in question. He, accordingly submitted the charge sheet dated 10.6.2023, whereby applicant and co-accused Computer Gupta have been charge sheeted under sections 376D, 504, 506 IPC and 5/6 POCSO Act.

Learned counsel for the applicant submits that though the applicant is named and charge sheeted accused, yet he is liable to be enlarged on bail. With reference to medico legal report of the prosecutrix, he submits that medical evidence does not support the ocular version of the occurrence. The Doctor who medically examined the prosecutrix did not find any signs on the body of the prosecutrix so as to denote commission of deliberate sexual assault. It is next contended that the prosecutrix in her statements under section 161 Cr.P.C, before the Doctor and ultimately, under section 164 Cr.P.C. has remained inconsistent. The allegation regarding commission of rape upon prosecutrix by the applicant has emerged in the statement of the prosecutrix under section 164 Cr.P.C. for the first time. He, therefore, contends that no prosecution of applicant can be maintained simply on the basis of

the statements of prosecutrix, inasmuch as when the statements of the prosecutrix referred to above are taken as a whole, they do not fall in the category of impeccable evidence, As such, applicant is liable to be enlarged on bail.

Even otherwise, applicant is a man of clean antecedents inasmuch as he has no criminal history to his credit except the present one. Applicant is in jail since 22.4.2023. As such, he has undergone more than six months of incarceration. 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 remains crystalized yet 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. It is thus urged 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.

Per contra, the learned A.G.A. has opposed the prayer for bail. He submits that since applicant is a named as well as charge sheeted accused, therefore he does not deserve any indulgence by this Court. Attention of the Court was invited to the document regarding medical determination of age of the prosecutrix wherein her age has been opined to be below 16 years. Learned A.G.A. submits that since the prosecutrix is below 16 years of age and the complicity of applicant has emerged in statements of the prosecutrix, referred to above also therefore no sympathy be shown in favour of applicant by this Court. To buttress his submission he has relied upon the judgement of Supreme Court in **X(Minor) Vs/State of Jharkhand and Anr., 2022 Live Law (SC) 194**. It is thus urged that no good ground exists to enlarge the applicant on bail.

According to the learned A.G.A. as per the scheme of the Codes (Cr.P.C) the statement under section 164 Cr.P.C. has to be given credence over the statement under section 161 Cr.P.C.

Having heard the learned counsel for applicant, the learned A.G.A. for State, 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 though the Doctor who examined the prosecutrix has opined that no such signs were found on the body of the prosecutrix so as to denote the commission of sexual assault upon prosecutrix but the opinion expressed by Doctor with regard to private part of the prosecutrix clearly demonstrate that her modesty was dislodged, the prosecutrix is

said to be below 16 years of age, prosecutrix in her statement under section 161 Cr.P.C. as well as under section 164 Cr.P.C. has attributed the role of dislodging the role of modesty, while in the statement recorded under section 161 Cr.P.C., the prosecutrix has attributed the role of aggravated sexual assault to applicant but in the statement under section 161 Cr.P.C. has assigned the role of penetrative sexual assault to applicant, as per material on record, applicant cannot be said to be innocent, there is nothing on record to show that prosecution of applicant is false or malicious, therefore irrespective of the varied submissions urged by the learned counsel for applicant in support of the present application for bail, but without making any comment on the merits of the case, this Court does not find any good ground to enlarge the applicant on bail.

As a result, the present application fails and is liable to be rejected.

It is accordingly **rejected**.

The original documents submitted before the Court below be sent to the Court below.

Order Date :- 8.11.2023

Arshad