

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 31534 of 2023

Applicant :- Rahul Gupta

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

Counsel for Applicant :- Ashish Kumar Pandey, Nandini Mishra

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

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

Perused the record.

Present application for bail came up for orders on 5.10.2023 and this court passed the following order:

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

2. Perused the record.

3. Instant bail application has been filed by applicant-Rahul Gupta seeking his enlargement on bail in Case Crime No. 0166 of 2023 under Sections 354, 376(3) I.P.C. and 5/6 POCSO Act, Police Station-Ecotech-3,, District-Gautambudh Nagar, during the pendency of trial.

4. At the very outset, the learned A.G.A. submits that notice of present bail application has been served upon first informant/opposite party-4. However, in spite of service of notice, no one has put in appearance on behalf of first informant/opposite party-4 to oppose this application.

5. After some arguments, it transpires from record that age of the prosecutrix has been determined on the basis date of birth of the prosecutrix mentioned in her Adhar Card. The same is manifestly illegal. By virtue of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, the date of birth of the prosecutrix mentioned in any of the documents recognised under Sections 94 (1) (a) and 94 (1) (b) of the aforesaid Act alone can be taken into consideration for determining the age of the prosecutrix.

6. The learned A.G.A. contends that charge-sheet has already been submitted against applicant on 27.06.2023.

7. In view of above, Investigating Officer is directed to submit an application before court concerned in terms of Section 173 (8) Cr.P.C. seeking the permission of court concerned to conduct further investigation. Thereafter, Investigating Officer shall endeavour to find out the date of birth of the prosecutrix recorded in the institution which was first attended by her. Apart from above, it would be open to the Investigating Officer to collect any other document which may be inconsonance with the aforesaid provision.

8. Let necessary exercise shall be undertaken by the Investigating Officer within three weeks from today.

9. Copy of supplementary case diary shall also be transmitted to this Court through the learned A.G.A. before the next date fixed.

10. Matter shall accordingly reappear as fresh on 01.11.2023. "

Subsequent to above order dated 5.10.2023, the medical determination of age of the prosecutrix was conducted. The same has been brought on record by learned A.G.A. in Court today. As per the said certificate, the prosecutrix is said to be aged about 16 years.

Record shows that in respect of an incident which is alleged to have occurred on 10.4.2023, a belated F.I.R. dated 29.4.2023 was lodged by Pushpendra Kumar (father of the prosecutrix) and was registered as Case Crime No. 0166 of 2023, under section 354, 376(3), 506 IPC and 5/6 POCSO Act, Police Station- Ecotech 3, District- Gautambudh Nagar. In the aforesaid F.I.R. applicant has been nominated as solitary named accused.

The gravamen of the allegations, made in the F.I.R. is to the effect that named accused i.e. applicant herein caught hold of the hand of the prosecutrix and thereafter dragged her for dislodging her modesty.

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 prosecutrix was recorded under section 161 Cr.P.C. Copy of same is on record at page 24 of the paper book. The prosecutrix in her aforesaid statement has supported the F.I.R. It is apposite to mention here that the prosecutrix in her aforesaid statement has not alleged that the applicant dislodged her modesty deliberately and forcibly. Thereafter the prosecutrix was requested for her internal medical examination. The Doctor who examined the prosecutrix, however, did not find any signs on her body so as to denote commission of deliberate sexual assault. Ultimately, the statement of the prosecutrix was recorded under section 164 Cr.P.C. The same is on record at page 30 of the paper book. The prosecutrix in her aforesaid statement has departed from her previous statement under section 161 Cr.P.C and has come up with a new story which is alien to the F.I.R. During course of investigation, Investigating Officer examined first informant and other witnesses under section 161 Cr.P.C. Witnesses so examined have substantially 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 applicant is established in the crime in question. He, accordingly submitted the charge sheet dated 27.6.2023, whereby applicant has been charge sheeted under sections 354, 376(3), 506 IPC and 5/6 POCSO Act.

Learned counsel for applicant submits that though the applicant is

a named as well as charge sheeted accused, yet he is liable to be enlarged on bail. According to learned counsel for applicant, the medical evidence does not support the ocular version of the occurrence, inasmuch as no signs were found on the body of the prosecutrix so as to denote commission of forcible and deliberate sexual assault upon the prosecutrix. It is then contended by learned counsel for applicant that though the F.I.R. is not the encyclopedia of the prosecution case but it must disclose the basic prosecution case. To buttress his submission, the learned counsel for applicant has relied upon following judgements of Supreme Court **Manoj and Ors. Vs. State of Maharashtra (1999) 4 SCC 268; Subhash Kumar Vs. State of Uttarakhand (2009) 6 SCC 641; Achhar Singh Vs. S.O. M.P. (2021) 5 SCC 543** With reference to above, it is urged that the prosecutrix in her subsequent statement under section 164 Cr.P.C. has not only departed from her previous statement under section 161 Cr.P.C. but also from the prosecution story as unfolded in the F.I.R. Departure so made remains unexplained, up to this stage. Attention of the Court was then invited to the judgement of Supreme Court in **Phool Singh Vs. State of M.P. (2022) 2 SCC 74**. On the basis of above, learned counsel for applicant contends that prosecution of an accused for an offence of rape and sexual assault can be maintained even in the absence of medical evidence. However, in such a circumstance, the statement of the prosecutrix must be clear, categorical and consistent. Statements of the prosecutrix when taken as a whole and analyzed in the light of above, the do not fall in the category of impeccable evidence, It is thus urged that no conviction of applicant is possible on the basis of same.

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 30.4.2023. As such, he has undergone more than six months of incarceration. 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 trial. Police report in terms of Section 173 (2) Cr.P.C. has already been submitted against applicant, as such, the entire evidence sought to be relied upon by During prosecution against applicant stands crystalized. However, upto this stage, no such, circumstances has emerged necessitating the custodial arrest of applicant during the pendency of trial. It is then 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 trial.

Per contra, the learned A.G.A has opposed this application 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. Ultimately, the prosecutrix in her statement under section 164 Cr.P.C., has clearly implicated the applicant for dislodging her modesty. As such, no sympathy be shown in favour applicant.

When confronted with above, learned counsel for applicant has referred to the statement of the prosecutrix recorded under section 164 Cr.P.C. and on basis thereof he contends that prosecutrix was in consensual relationship with the applicant.

Having heard the learned counsel for applicant, the learned A.G.A. for State, upon perusal of material brought on record, as well as complicity of applicant, accusation made coupled with the fact that the medical evidence does not support the ocular version of the occurrence inasmuch as the Doctor who examined the prosecutrix did not find any signs on her body so as to denote commission of deliberate sexual assault upon the prosecutrix, as per the statement of the prosecutrix she was having consensual relationship with the applicant, in the F.I.R. giving rise to present application, no allegations with regard to dislodging the modesty of the prosecutrix has been made, prosecutrix in her statement under section 161 Cr.P.C. has supported the F.I.R., prosecutrix in her said statement has not come out with allegations that her modesty was dislodged by applicant, departure made by the prosecutrix in her subsequent statement under section 164 Cr.P.C. remains unexplained, as per medical opinion, the prosecutrix is aged about 16 years, the period of incarceration undergone, the clean antecedents of applicant, police report in terms of Section 173 (2) Cr.P.C. has already been submitted against applicant, as such, the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized, yet inspite of above, the learned A.G.A. could not point out any such circumstance from the record necessitating custodial arrest of applicant during 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 comment on the merits of the case, the applicant has made out a case for bail.

Accordingly the bail application is **allowed**.

Let the applicant **Rahul Gupta** 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 :- 16.11.2023

Arshad