

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 34463 of 2023

Applicant :- Husain Ali @ Partner

Opposite Party :- State Of U.P.And 4 Others

Counsel for Applicant :- Dinesh Kumar Singh

Counsel for Opposite Party :- G.A.,Anand Kumar Tiwari

Hon'ble Rajeev Misra,J.

1. Heard Mr. Dinesh Kumar Singh, the learned counsel for applicant, the learned A.G.A. for State and Mr. Pradeep Kumar Tiwari, Advocate, holding brief of Mr. Anand Kumar Tiwari, the learned counsel representing first informant-opposite party 3.
2. Compliance affidavit filed by the learned A.G.A. in Court today, is taken on record.
3. Perused the record.
4. This application for bail has been filed by applicant-Husain Ali @ Partner, seeking his enlargement on bail in Case Crime No. 91 of 2023, under Section 376 IPC and Sections 3/4 POCSO Act, Police Station-Jaitpura, District-Varanasi during the pendency of trial.
5. Record shows that an FIR dated 18.04.2023 was lodged by first informant-Pappu Rajbhar (father of the prosecutrix) and was registered as Case Crime No. 91 of 2023, under Sections 376, 306 IPC and Sections 3/4 POCSO Act, Police Station-Jaitpura, District-Kashi (Commissionerate Varanasi). In the aforesaid FIR, applicant-Husain Ali @ Partner has been nominated as solitary named accused.
6. The gravamen of the allegations made in the FIR is to the effect that named accused Husain Ali @ Partner i.e. applicant herein was dislodging the modesty of the prosecutrix i.e. the minor daughter of the first informant when she was aged about 15 years. The FIR further records that in December, 2022, named accused enticed away the daughter of first informant and thereafter by extending false promise of marriage, repeatedly and continuously dislodged her modesty. Ultimately, the applicant is alleged to have resiled from the promise so extended to the prosecutrix. As per the prosecution story as unfolded in the FIR, the prosecutrix is alleged to have committed suicide on account of above.

7. After above-mentioned FIR was lodged, the inquest (*Panchayatnama*) of the body of deceased was conducted. In the opinion of the witnesses of inquest (*Panch witnesses*), nature of the death of deceased could not be categorized nor the cause of death of deceased could be specified. Thereafter, the post mortem of the body of deceased was conducted. The Autopsy Surgeon, who conducted autopsy of the body of deceased, opined that the cause of death of deceased could not be ascertained. Accordingly, viscera of the deceased was preserved. However, no external ante-mortem injury was found on the body of deceased. According to the learned A.G.A., as per the viscera report dated 03.11.2023, no foreign chemical compound was found in the body parts of deceased sent for chemical examination.

8. Learned counsel for applicant contends that the prosecutrix is no longer alive. Therefore, in the absence of the prosecutrix, the offence under Sections 3/4 POCSO Act and Section 376 IPC cannot be examined with reference to the statement of the prosecutrix. As per the medical evidence, applicant cannot be said to have dislodged the modesty of the prosecutrix by committing deliberate sexual assault. There is no eye witness of the occurrence. Applicant has been falsely implicated in the crime in question on the basis of hearsay evidence. He, therefore, contends that in view of above, applicant is liable to be enlarged on bail.

9. 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 20.04.2023. As such, he has undergone more than 7 and 1/2 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 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.

10. Per contra, the learned A.G.A. and the learned counsel representing first informant have vehemently opposed the prayer for bail. They submit that since applicant is a named as well as charge sheeted accused, therefore, he does not deserve any indulgence by this Court. However, they could not dislodge the factual and legal submissions urged by the learned counsel for applicant with reference to the record at this stage.

11. Having heard, the learned counsel for applicant, the learned A.G.A. for State, the learned counsel representing first informant ,

upon perusal of record, evidence, nature and gravity of offence, accusations made, complicity of accused and coupled with the fact that as per the medical opinion, no specific cause of death of deceased could be ascertained, the prosecutrix is no longer alive, therefore, there cannot be any statement of the prosecutrix in support of the prosecution story up to this stage, the learned A.G.A. and the learned counsel representing first informant could not point out any independent witness of the occurrence/occurrences giving rise to present criminal proceedings, as per the narration contained in the FIR, the incident occurred in December, 2022 when the prosecutrix is alleged to have been enticed away by the applicant but the FIR was lodged in April, 2023 i.e. after a gap of 4 months, as such, there is delay in the FIR, however, no explanation has been offered for explaining the delay in lodging the FIR, since no explanation has been offered either in the FIR nor in the statement of the first informant under Section 161 Cr.P.C. for lodging the FIR with delay, therefore, in view of the law laid down by the Apex Court in **P. Rajagopal And Ors. Vs. The State of Tamil Nadu, AIR 2019 SC 2866** (paragraph 8), therefore, prima-facie the prosecution of applicant itself cannot be maintained, the clean antecedents of applicant, 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. and the learned counsel representing first informant 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. and the learned counsel representing first informant 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.

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

13. Let the **applicant-Husain Ali @ Partner**, 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.

14. 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 :- 12.12.2023

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