

**Court No. - 65**

**Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 34712 of 2023

**Applicant :-** Shiv Kumar Sharma

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

**Counsel for Applicant :-** Kamlesh Kumar Tiwari

**Counsel for Opposite Party :-** G.A.,Mani Ram Verma,Sudhir Kumar Agarwal

**Hon'ble Rajeev Misra,J.**

Heard Mr. Kamlesh Kumar Tiwari, the learned counsel for applicant, the learned A.G.A. for State and Mr. Sudhir Kumar Agarwal, the learned counsel representing first informant-opposite party-2.

This application for bail has been filed by applicant Shiv Kumar Sharma seeking his enlargement on bail in Case Crime No.328 of 2023, under Sections 363, 366, 376, 323, 342 IPC and Section 3/4 Pocso Act, police station Chiluatal, district Gorakhpur, during the pendency of trial.

Perused the record.

Record shows that in respect of an incident which is alleged to have occurred on 16.05.2023 a delayed first information report dated 02.07.2023 was lodged by first informant, namely, Gulabi Devi (grand-mother of the prosecutrix) and was registered as Case Crime No.0328 of 2023, under Sections 376, 363 IPC and Section 3/4 Pocso Act, police station Chiluatal, district Gorakhpur. In the aforesaid F.I.R., applicant Shiv Kumar Sharma has been nominated as solitary named accused.

The gravamen of the allegations made in the first information report is to the effect that on 16.05.2023 at around 9.30 a.m. named accused i.e. applicant is alleged to have enticed away the minor grand-daughter of the first informant i.e. prosecutrix aged about 13 years on the false promise of marriage. The FIR further records that named accused deliberately dislodged the modesty of the prosecutrix by committing rape upon her. Ultimately, the prosecutrix upon finding an opportunity on 17.05.2023, returned to her home.

After aforementioned first information report was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter XII CrPC. The statement of the prosecutrix was recorded under Section 161 CrPC, which is on record at page 22 of the paper book.

The prosecutrix in her aforesaid statement has supported the prosecution story as unfolded in the FIR. The prosecutrix has further stated that the applicant pressurized the prosecutrix to contact him on telephone and it is on account of this allurements that the prosecutrix accompanied the applicant. However, the modesty of the prosecutrix was deliberately dislodged by the applicant. Subsequent to above, the prosecutrix was requested for her internal medical examination. In her statement before the Doctor, who medically examined her, the prosecutrix has rejoined her previous statement recorded under Section 161 CrPC. However, the Doctor who medically examined the prosecutrix did not find any injury on her body so as to denote commission of sexual assault. However, with regard to the private part of the prosecutrix, the Doctor has opined as follows :-

**"Hymen - Torn and old healed."**

As per the medical opinion, the prosecutrix is said to be aged about 15 years. Ultimately, the statement of the prosecutrix was recorded under Section 164 CrPC, which is on record at page 36 of the paper book. The prosecutrix in her aforesaid statement has rejoined her previous statement under Section 161 CrPC. During course of investigation, Investigating Officer recovered a certificate issued by the Principal of the institution from where the prosecutrix had studied upto Class-IV. As per the said certificate, the date of birth of the prosecutrix is 12.01.2011. The occurrence giving rise to the present criminal proceedings is alleged to have occurred on 16.05.2023. As such, the prosecutrix was aged about 12 years 04 months and 11 days on the date of occurrence. Investigating Officer on the basis of above and other material collected by him during the course of investigation came to the conclusion that complicity of applicant is fully established in the crime in question. He, accordingly, submitted the charge-sheet dated 20.07.2023, whereby applicant has been charge-sheeted under Sections 363, 366, 376, 323, 342 IPC and Section 3/4 PocsO Act.

Learned counsel for the applicant contends that though the applicant is a named as well as charge-sheeted accused yet he is liable to be enlarged on bail. He submits that the prosecutrix went missing on 16.05.2023 from 9.30 a.m. but returned to her home after four and half hours on the same day. In view of above, the recital contained in the statement of the prosecutrix under Section 164 CrPC that she returned home on the next day is false. On the above premise, he therefore submits that no credence can be attached either to the statement of the prosecutrix under Section 161 CrPC or 164 CrPC. Apart from above, there is delay of one and half months in lodging the FIR. However, neither in the FIR nor in

the statement of the first informant the delay in lodging the FIR has been sufficiently explained. Referring to the judgement of the Apex Court in **P. Rajagopal Vs. The State of Tamil Nadu AIR 2019 SC 2866 (paragraph 8)**, learned counsel for applicant contends that since the delay in lodging the FIR has not been explained, the prosecution of the applicant itself cannot be maintained.

Even otherwise, applicant is a man of clean antecedents having no criminal history to his credit except the present one. The applicant is in jail since 03.07.2023. As such, he has undergone more than three months of incarceration. The police report in terms of Section 173 (2) CrPC has already been submitted. As such, the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized. However, up to this stage, no such circumstance has emerged necessitating the custodial arrest of the applicant during the pendency of trial. It is thus urged by the learned counsel for applicant 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. and the learned counsel for first informant have vehemently opposed the prayer for bail. They submit that since the applicant is a named as well as charge-sheeted accused therefore, he does not deserve any indulgence by this court. They submit that it is true that there is delay in lodging of FIR but considering that the prosecutrix is a young girl of tender age, as per the certificate issued by the Principal of the institution she is aged 12 years 04 months and 11 days and according to the medical opinion, she is about 15 years of age therefore, the delay in lodging the FIR would not be fatal to the prosecution of the applicant in the facts and circumstances of the case. Reference was then invited to the statements of the prosecutrix recorded under Section 161/164 CrPC wherein the prosecutrix has clearly and categorically alleged that her modesty was deliberately dislodged by the applicant. The medical opinion given by the Doctor, who medically examined the prosecutrix, with regard to her private part clearly corroborates the ocular version of the occurrence as occurring in the aforesaid statements of the prosecutrix. Attention of the Court was then invited to the judgement of the Apex Court in **X (Minor) Vs. State of Jharkhand 2022 Livelaw (SC) 194** and on basis thereof it is urged that since the prosecutrix is below 16 years of age therefore, no sympathy be shown by this court in favour of applicant. As such, the present application for bail is liable to be rejected.

When confronted with above, the 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 representing first informant, upon perusal of material brought on record, nature and gravity of offence, evidence, complicity of the accused, accusation made, coupled with the fact that the prosecutrix in her statements under Section 161/164 CrPC has fully supported the FIR, the prosecutrix is a young girl aged about 12 years 04 months and 11 days whose modesty was dislodged by applicant, up to this stage there is nothing on record to infer malicious or false prosecution of the applicant, considering the facts and circumstances of the case and the age of the prosecutrix as well as the nature and gravity of offence but irrespective of the varied submissions urged by the learned counsel for applicant in support of the present application for bail, this Court does not find any new good or sufficient ground to enlarge the applicant on bail.

This application for bail thus fails and is liable to be rejected.

It is accordingly **rejected**.

**Order Date :- 3.11.2023.**  
Rks.