

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 34785 of 2023

Applicant :- Dev Yadav

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

Counsel for Applicant :- Deepak Kumar, Deena Nath, Sunita Dhusia

Counsel for Opposite Party :- G.A., Himanshu Yadav

Hon'ble Rajeev Misra, J.

1. Heard Mr. D.N. Joshi, the learned counsel for applicant, the learned A.G.A. for State and Mr. Himanshu Yadav, the learned counsel representing first informant.

2. Perused the record.

3. This application for bail has been filed by applicant-Dev Yadav, seeking his enlargement on bail in Case Crime No. 540 of 2017, under Sections 363, 366, 342, 394, 506, 328, 376D IPC and Sections 5/6 POCSO Act, Police Station-Gursahayganj, District-Kannauj during the pendency of trial.

4. At the very outset, the learned A.G.A. submits that notice of present application for bail has been served upon first informant-opposite party 4 on 12.08.2023. 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 for bail.

5. Present application for bail came up for orders on 21.09.2023 and this Court passed the following order:-

"Heard Mr. D.N. Joshi, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant Dev Yadav seeking his enlargement on bail in Case Crime No.540 of 2017, under Sections 363, 366, 342, 394, 506, 328, 376-D IPC and Section 5/6 Pocso Act, police station Gursahaygang, district Kannauj, during the pendency of trial.

At the very outset, learned A.G.A. submits that notice of the present application for bail has been served upon first informant-opposite party-4 on 12.08.2023. 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 for bail.

After some arguments, it transpires from the record that the court below while rejected the bail application of the applicant has recorded a finding that the only document regarding the date of birth of the prosecutrix is her admission form of Class-X.

By virtue of the provisions contained in Section 94 of The Juvenile Justice (Care and Protection of Children) Act, 2015, the said certificate cannot be relied upon for determining the age of the prosecutrix as per the date of birth of the prosecutrix recorded therein. Similar view has been taken by the Supreme Court in P. Yuvprakash Vs. State Represented by Inspector of Police 2023 SCC Online (SC) 846.

Since the charge-sheet has been submitted therefore, Investigating Officer is directed to conduct further investigation in the matter after obtaining leave of the court in terms of Section 173(8) CrPC. Investigating Officer shall examine the record of the institution where the prosecutrix had first studied and shall endeavour to discover the date of birth of the prosecutrix as recorded in the school records of the said institution. The said exercise shall be completed within a period of three weeks from today. The copy of the supplementary case diary shall also be transmitted to this Court by Investigating Officer through the learned A.G.A. before the next date fixed.

Put up again as fresh on 12.10.2023."

6. Pursuant to above order dated 21.09.2023, the learned A.G.A. has filed a compliance affidavit, which is on record. Along with compliance affidavit, School Leaving Certificate of the prosecutrix, which was first attended by her, has been brought on record. The date of birth of the prosecutrix recorded therein is 01.01.2002.

7. Record shows that in respect of an incident, which is alleged to have occurred on 07.04.2017, a delayed FIR dated 08.04.2017 was lodged by first informant-Ikrar Khan (father of the prosecutrix) and was registered as Case Crime No. 540 of 2017, under Sections 363, 366 IPC and Sections 7/8 POCSO Act, Police Station-Gursahayganj, District-Kannauj. In the aforesaid FIR, 4 persons namely - (1) Jainuddin, (2) Ruksar, (3) Jameel and (4) Nagma have been nominated as named accused.

8. The gravamen of the allegations made in the FIR is to the effect that named accused enticed away the minor daughter of the first informant i.e. the prosecutrix aged about 14 years. The FIR further records that the prosecutrix took away gold and silver jewelry kept in the house as well as Rs. 52 thousand cash.

9. After above-mentioned FIR was lodged, Investigating Officer

proceeded with statutory investigation of concerned case crime number in terms of Chapter-XII Cr.P.C. The prosecutrix was recovered on 16.04.2017. Thereafter, the statement of the prosecutrix was recorded under Section 161 Cr.P.C., which is on record at page 27 of the paper book. The prosecutrix in her aforesaid statement has stated that she is aged about 19 years. She accompanied Chandan out of her own free will. She is in love with Chandan and solemnized marriage with Chandan on 08.04.2017 at Naraina (Haryana). Thereafter, the prosecutrix was requested for her internal medical examination. The Doctor, who examined the prosecutrix, did not find any injury on her body so as to denote commission of deliberate or forceful sexual assault. Certain samples were taken from the body of the prosecutrix for pathological examination. However, the result of the same is in negative. As per the USG report of the prosecutrix, nothing abnormal was detected. As per the medical opinion, the prosecutrix is said to be aged about 18 years. Thereafter, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. Same is on record at page 29 of the paper book. The prosecutrix in her aforesaid statement has implicated 3 persons namely (1) Chandan Yadav, (2) Dev Yadav and (3) Dheeru Yadav. In her aforesaid statement, the prosecutrix has alleged that her modesty was deliberately dislodged aforesaid accused. Investigating Officer further examined the first informant and other witnesses under Section 161 Cr.P.C. Witnesses so examined have supported the FIR. On the basis of above and other material collected by Investigating Officer during course of investigation, he came to the conclusion that complicity of 3 persons namely (1) Chandan Yadav, (2) Dev Yadav and (3) Dheeru Yadav is established in the crime in question. He, accordingly, submitted the charge sheet dated 12.07.2017 whereby applicant Dev Yadav has been charge sheeted under Sections 363, 366, 342, 394, 506, 328, 376D IPC and Sections 5/6 POCSO Act whereas, Chandan Yadav and Dheeru Yadav have also been charge sheeted under the same Sections.

10. Learned counsel for applicant submits that after the commencement of the trial, three other persons namely (1) Ranjeet Singh, (2) Dev Yadav and (3) Dheeru Yadav were summoned under Section 319 Cr.P.C. vide order dated 02.12.2021 passed by Special Judge, POCSO Act/Additional District and Sessions Judge, Kannauj in Special Sessions Trial No. 52 of 2017 (State Vs. Chandan and Others).

11. Learned counsel for applicant thus submits that co-accused Ranjeet Singh, who was summoned under Section 319 Cr.P.C. by

court below has been enlarged on bail by this Court vide order dated 19.10.2022 passed in Criminal Misc. Bail Application No. 2438 of 2022 (Ranjeet Singh Vs. State of U.P. and 3 Others). For ready reference, the same is reproduced hereinunder:-

"Heard learned counsel for the applicant and learned A.G.A. for the State and perused the material on record.

By means of this application, the applicant, Ranjeet Singh, who is involved in Case Crime No. 540 of 2017, under Sections 363, 366, 328, 376-D, 342, 394, 506 IPC and Section 3/4 POCSO Act, P.S. Gursahaiganj, District Kannauj and is in jail since 19.05.2022, is seeking enlargement on bail during the trial.

It is submitted by learned counsel for the applicant that similarly placed co-accused, Chandan Yadav @ Chandar, has already been enlarged on bail by this Court by order dated 20.11.2017 passed in Criminal Misc. Bail Application No. 31329 of 2017. He has further submitted that since the role of the applicant is identical to that of co-accused, Chandan Yadav @ Chandar, who has already been enlarged on bail, he is also entitled to be enlarged on bail on the ground of parity.

The prayer for bail has vehemently been opposed by learned A.G.A.

Considering the submissions made by learned counsel for the applicant as well as learned A.G.A., this Court is of the view that the applicant has made out a case for grant of bail on the ground of parity.

In view of the above, let the applicant be released on bail on his executing a personal bond and furnishing two sureties each in the like amount to the satisfaction of the court concerned with the following conditions :-

- 1. The applicant will continue to attend and co-operate in the trial pending before the court concerned on the date fixed after release.*
- 2. He will not tamper with the witnesses.*
- 3. He will not indulge in any illegal activities during the bail period.*

It is further directed that the identity, status and residence proof of the sureties be verified by the authorities concerned before he is accepted.

In case of breach of any of the above conditions, the trial court will be at liberty to cancel the bail."

12. Another charge sheeted accused Chandan Yadav has also been enlarged on bail by this Court vide order dated 20.11.2017 passed in Criminal Misc. Bail Application No. 31329 of 2017 (Chandan Yadav @ Chandar Vs. State of U.P.). The same is extracted hereinunder:-

"Heard learned counsel for the applicant, learned Additional Government Advocate and perused the record of the case.

Learned counsel for the applicant submitted that prosecutrix under Section 161 Cr.P.C has given statement in favour of the applicant and did not accused him of committing rape. However, under Section 164 Cr.P.C. statement, she has taken somersault and has accused the present applicant along with other co-accused persons for the offence of rape. The opinion of the doctor regarding medical examination is also wavering. It is next submitted that the applicant is facing detention since 16.4.2017.

Learned counsel for the applicant further submitted that if the applicant is released on bail, he will not misuse the liberty of bail and shall cooperate in the early disposal of the case.

Per contra, learned A.G.A. opposed the application for bail.

Keeping in view the nature of the offence, evidence, complicity of the accused, severity of punishment and submissions of the learned counsel for the parties, I am of the view that the applicant has made out a case for bail.

Let the applicant Chandan Yadav @ Chandar involved in Sessions Trial No. 52 of 2017 arising out of Case Crime No. 540 of 2017, under Sections 363, 366, 328, 376-D, 342, 394, 506 IPC and Section 3/4 POCSO Act, P.S. Gursahaiganj, District Kannauj be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions;

(i)The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not pressurise/intimidate the prosecution witness.

(iii)The applicant will appear before the trial court on the date fixed.

In case of breach of any of the above conditions, the court below shall be at liberty to cancel the bail."

13. Learned counsel for applicant then submits that as per the medical opinion, the prosecutrix is aged about 18 years. As per the statement of the prosecutrix under Section 161 Cr.P.C., she has solemnized marriage with Chandan. However, in her subsequent statement under Section 164 Cr.P.C., the prosecutrix has departed from her previous statement and has alleged that named accused Chandan and 2 others dislodged her modesty. With reference to above, the learned counsel for applicant submits that the case of present applicant is similar to named accused Chandan Yadav. However, Chandan Yadav has already been enlarged on bail by this Court vide order dated 20.11.2017. On the above premise, he, therefore, contends that applicant is also liable to be enlarged on bail on the ground of parity.

14. 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 13.03.2023. As such, he has undergone more than 7 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 the 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.

15. Per contra, the learned A.G.A. and the learned counsel representing first informant have opposed the prayer for bail. 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.

16. 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 applicant is a charge sheeted accused inasmuch as, the charge sheet has been submitted against applicant and 2 other accused on 12.07.2017, charge sheeted co-accused Chandan Yadav has already been enlarged on bail, as per the statement of the prosecutrix under Section 164 Cr.P.C., the role of dislodging the modesty of the prosecutrix has been assigned to all the three accused, as such, applicant is also liable to be enlarged on bail on the ground of parity, the allegations with regard to dislodging the modesty of the prosecutrix has emerged for the first time in her statement under Section 164 Cr.P.C., the embellishment that has emerged in the subsequent statement remains unexplained up to this stage, the clean antecedents of applicant inasmuch as, the applicant has no criminal history to his credit except the present one, the period of incarceration undergone inasmuch as, the applicant is in jail since 13.03.2023, 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.

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

18. Let the **applicant-Dev Yadav**, 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.

19. 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 :- 19.10.2023

Vinay