

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 35697 of 2023

Applicant :- Sonu

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

Counsel for Applicant :- Saurabh Tripathi

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Saurabh Tripathi, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. This application for bail has been filed by applicant-Sonu seeking his enlargement on bail in Case Crime No. 41 of 2020, under Sections 376-D, 306 IPC and Sections 4/5 POCSO Act, Police Station-Bahilpurwa, District-Chitrakoot during the pendency of trial.

4. At the very outset, the learned A.G.A. submits that notice of present application for bail has already been served upon opposite party 2 on 02.08.2023. However, in spite of service of notice, no one has put in appearance on behalf of opposite party 2 to oppose this application for bail.

5. Record shows that in respect of an incident, which is alleged to have occurred on 20.08.2020, a delayed FIR dated 17.10.2020 was lodged by first informant-Shiv Vijay (father of the prosecutrix/deceased) and was registered as Case Crime No. 41 of 2020, under Sections 147, 376-D, 302, 504, 506 IPC and Section 8 POCSO Act, Police Station-Bahilpurwa, District-Chitrakoot. In the aforesaid FIR, 4 persons namely (1) Sonu (applicant herein), (2) Lovkush, (3) Lalman and (4) Pankaj Pandey, S.H.O. of the Police Station have been nominated as named accused whereas, 3 unknown persons have been arraigned as accused.

6. It is apposite to mention here that aforesaid FIR came to be registered subsequent to the order passed by concerned Magistrate on the application under Section 156(3) Cr.P.C. filed by the applicant/first informant.

7. The gravamen of the allegations made in the FIR is to the

effect that daughter of the first informant namely Madhuri (deceased) went missing on 22/23.08.2020. Subsequently, a missing person report was lodged at the concerned Police Station on 23.08.2020. Subsequently, the dead body of the deceased i.e. daughter of the first informant was discovered which was hanging on a tree.

8. 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 inquest (Panchyatnama) of the body of deceased was conducted on 23.08.2020. In the opinion of the witnesses of inquest (Panch witnesses), the nature of death of deceased was categorized as suicidal and the cause of death of deceased was said to be hanging. Thereafter, the post mortem of the body of deceased was conducted on the same day. In the opinion of Autopsy Surgeon, who conducted autopsy of the body of deceased, the cause of death of deceased was opined as Asphyxia as a result of ante-mortem hanging. The Autopsy Surgeon found following ante-mortm injuries on the body of deceased:-

"Ligature mark present on half of the neck just below the mandible size 25 x 1 cm brownish in colour directed upper and backward and 5 cm below left ear and 2 cm below right ear gap of 5 cm of posterior surface of neck right side behind the ear margin congested base parchent like hyoid bone are not fracture.

2. Laceration over chin of size 2 cm x 0.5 cm 1 cm below margin irregular.

Hymen easily two finger direction of vaginal. No any external sign of incurred around vagina medial aspect of thigh (2 vaginal slide prepared for examination expert of forensic)."

9. Certain samples were taken from the body of deceased for pathological examination. The clothes of the deceased were also recovered and sent to FSL laboratory for chemical examination.

10. During course of investigation, Investigating Officer examined first informant and various witnesses under Section 161 Cr.P.C. namely - (1) Ansar Khan, (2) Babua, (3) Pawan, (4) Puranmani Tripathi, (5) Chhotu Yadav, (6) Lovkush Yadav, (7) Rajendra Yadav, (8) Rajesh Yadav, (9) Phool Yadav and (1) Babbu. The complicity of applicant and other accused emerged in the statements of aforesaid witnesses. On the basis of above,

Investigating Officer arrested named accused Sonu, Lovkush and Lalman.

11. At the very outset, the learned counsel for applicant contends that co-accused Lavkush has been enlarged on bail by this Court vide order dated 03.11.2022 passed in Criminal Misc. Bail Application No. 26882 of 2022 (Lavkush Vs. State of U.P. and 3 Others). For ready reference, the order dated 03.11.2022 is reproduced hereinunder:-

"The matter has been ordered to be listed peremptorily today as fresh.

When the case was taken up learned counsel for the applicant submitted that the informant has filed his counter affidavit but learned counsel for the informant has not accepted written notice in the matter for being present in Court when the case is taken up and refused to accept it. An endorsement to this effect had been mentioned on the said notice and has been placed before the Court which is taken on record.

The informant counsel had appeared earlier in the bail application of Lalman the co-accused having similar role as the applicant and opposed the bail but the same was granted vide order dated 19.10.2022 passed in Criminal Misc. Bail Application No. 26893 of 2022.

Heard learned counsel for the applicant and learned A.G.A. for the State.

The informant counsel has filed counter affidavit in the matter but he is not present inspite of notice.

The present application under Section 439 Cr.P.C. has been filed seeking bail in FIR/ Case Crime No. 41 of 2020, under Sections- 376-D, 306 I.P.C. and 4/5 P.O.C.S.O. Act, Police Station- Bahilpurwa, District- Chitrakoot.

The prosecution case in nutshell is that the father of the victim had given an application at the Police Station -Bahilpurwa, District - Chitrakoot on 23.08.2020 that his minor daughter aged 17 years was found hanging on a tree from 15-20 meters of his house. This was detected in the morning. Accordingly, a GD entry was made. Subsequently, on 16.09.2020 an application under Section 156(3) Cr.P.C. was filed alleging gang rape and murder by the applicant along with two others, namely, Sonu and Lalman and three unknown persons. In the F.I.R. it is mentioned that three days after the incident i.e. hanging of the minor girl, his brother Ghanshyam had informed him that he had come out of his house in the night when he saw Sonu, Lalman, Lavkush and three unknown persons standing near a 'Sahjan' tree and they were talking about killing some one. Based on it, the informant stated that he was sure that these very persons had ganged rape his daughter and killed her. He mentioned the injuries detected at the time the body of the deceased was brought down from the tree.

The contention of applicant's counsel is that initially the application was filed informing the police about suicide having been committed by the

deceased. Even from the injuries detected from the body of the deceased they were such as would come while hanging the tree in the process of committing suicide. He has invited the attention of the Court to the statement of the Doctor before the police at Page 55 of the bail application in this regard, wherein, he has stated that it was clearly a case of suicide. As regards the bleeding from the private part of the deceased he has explained that it was menstrual blood, a fact which he had been mentioned in the postmortem report. The Doctor has stated that there was no other external injury which could point that the girl has been physically abused or beaten up. Based on it, learned counsel for the applicant submitted that it was a case of suicide but almost a month after giving the aforesaid application i.e. on 16.09.2020, the father filed an application under Section 156(3) Cr.P.C. alleging gang rape and murder by the applicant and two other accused. The contention of the applicant's counsel is that the girl was in love with one of the co-accused Sonu. In this very context he has invited the attention of the Court to DNA Report annexed at Page 105 which clearly says that the DNA samples of the deceased matched with that of Sonu but did not match with that of Lavkush and Lalman the other co-accused. Based on it, he says that story setup by the prosecution of gang rape is apparently belied and it corroborates the assertion of the applicant that it is a case of suicide. At best the accused Sonu could be made liable, but, as far as the applicant is concerned, he has been falsely implicated. He has further submitted that as regards the criminal history of the applicant, there are two criminal cases against him and in another case the applicant was subjected to process under Section 110 Cr.P.C. All of these are of the year 2010. Moreover, out of the two, one is an NCR and the other also is trivial offence under Section 232, 506 IPC which have been explained in Para 3 of the affidavit filed in support of the bail application. Learned counsel for the applicant has also invited the attention of the Court to the statement of Ghanshayam who is said to have informed the informant about having seen the applicant and other co-accused in the night preceding the incident wherein he has stated that he was herding stray cattle towards the village in the night, whereas, in the F.I.R. it is mentioned that he had gone out to ease himself. Moreover, the learned counsel for the applicant submitted that it is quite unnatural that if such information was provided by the brother of the informant three days after the incident, then, the application under Section 156(3) Cr.P.C. should have been filed much latter on 16.09.2020. Learned counsel for the applicant has also placed before the Court an order dated 19.10.2022 by which Lalman the co-accused having similar role has been granted bail by this Court.

Learned A.G.A. has opposed the bail application. However, he could not deny the DNA Report annexed at Page No. 105 of the bail application.

Considering the submissions noticed hereinabove, as it is not a case of direct evidence and F.I.R. has been lodged after a month on an application under Section 156(3) Cr.P.C. and initially an application dated 23.08.2020 mentioning suicide was given and the DNA Report does not implicate the applicant herein but only one of the accused -Sonu and as the co-accused having similar role Lalman has already been ordered to be enlarged on bail, therefore, there is merit in the submissions of the learned counsel for the applicant and as the charge sheet has already been filed on 19.01.2022, accordingly, the Court is of the opinion that the applicant, who is in jail

since 18.01.2022, is entitled to be enlarged on bail.

Accordingly, the application for bail is allowed.

Let the applicant, namely, Lavkush be released on bail in the above case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of Court concerned with the following conditions :-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates 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 counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) 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 him in accordance with law.

It is made clear that the observations made in this order are limited to the purpose of determination of this bail application and will in no way be construed as an expression on the merits of the case. The Trial Court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything in this order.

Order Date:- 03.11.2022"

12. Another co-accused Lalman has also been enlarged on bail by this Court vide order dated 19.10.2022 passed in Criminal Misc. Bail Application No. 26893 of 2022 (Lalman Vs. State of U.P. and Another). For ready reference, the same is extracted hereinunder:-

"Heard learned Counsel for the applicant, learned counsel for the first informant as well as learned A.G.A. and perused the record.

The accused- applicant is involved in Case Crime No. 41 of 2020, under Section 376-D, 306 I.P.C. and section 4/5 POCSO Act, Police Station

Bahilpurwa, District- Chitrakoot.

It is submitted by the learned counsel for the applicant that the father of the deceased informed the police vide application dated 23.8.2020 that her daughter had committed suicide and later on, on the basis of an application under section 156(3) Cr.P.C. dated 16.9.2020, a first information report was lodged in the police station concerned on 17.10.2020 that it was not a suicide but it was a case of gang rape and murder by three named persons Sonu, Lavkush and Lalman. The dead body of the deceased was found hanging upon a tree. It has also come in the first information report that after three days of the incident, the brother of the first informant Ghanshyam informed him that on the fateful night of the incident at 1.00 'O' clock, in mid night, he had gone for defecation. He saw that the accused persons Sonu, Lavkush and Lalman were standing near the domestic tree (sahjan) where the dead body of the victim was found hanging and they were talking about the murder of someone.

On the basis of this FIR, the investigation was done. As per inquest report, some injury was found on the left knee of the deceased, swelling was found below her chin and her vagina was found bleeding. As per post mortem report, except the ligature mark, no other injury is found on the person of the deceased. The cause of death of the deceased as per post mortem report was asphyxia as a result of ante mortem hanging. The first informant and his wife both have reiterated the version of the FIR in their respective statements. The statement of doctor was recorded twice. In his statements, he has stated that it was not a case of rape, it was a case of suicide. The blood found was of menses and injuries might be caused when the girl was climbing upon the tree for suicide. As per the doctor, the injuries of thrashing and assault happen to be different type of injuries. It was further clarified in the second statement of the doctor that it was a case of suicide only because in case of murder saliva could not be found dribbling out from mouth of the deceased.

Firstly, at the request of the first informant, the investigation was transferred from one Circle Officer to another Circle Officer and again from one district to another district. Later on, on the request of Human Right Commission, the case was transferred to C.B.C.I.D. wherein the statements of the witnesses were recorded afresh. C.D.R. of the mobile of accused Sonu is on record. According to this C.D.R., the deceased was in talking terms with co accused Sonu. In the additional statement of the first informant, he has admitted this fact that his daughter used to talk with Sonu. In his statement, the first informant has admitted the relations of his daughter with Sonu only. He stated that the girl might have gone on the call of Sonu, where Sonu might have called Lavkush and Lalman. His daughter might have opposed Lavkush and Lalman. At this, Sonu along with Lavkush and Lalman might have committed rape on his daughter and with fear that the offence would be disclosed, they might have murdered his daughter, hanged her dead body upon a tree to save their skin. This additional statement of the first informant is completely hypothetical.

In FSL report nothing adverse was found against the applicant. FSL report regarding clothes (salwar of the deceased) was also summoned. As per this report semen was found on the salwar of the deceased and as per DNA

report semen of Sonu was found and the specimen semen of the present applicant could not match with the sample semen.

Further the attention of the court was drawn towards the statement of witness Ghanshyam wherein, he has stated that when after chasing away the cattle from his field, he was coming back to his village, he found 5-7 persons including Sonu and lavkush standing in front of the house of the Galhu. Wherein in the FIR, the first informant has stated that his brother Ghanshyam had seen the present applicant and co accused Sonu and Lalman talking about the murder of someone. This fact of planning murder is missing in the statement of Ghanshyam. There is no criminal history to the credit of the applicant. He is in jail from 18.1.2022, hence, the prayer for bail is made.

Per contra learned counsel for the first informant opposed the prayer for bail and argued that one person cannot commit the murder of the deceased. It is a job of 2-3 persons. The present applicant is a friend of Sonu who was having relations with the deceased. It is further argued that at the request of Sonu the present applicant might have helped him in committing murder of the deceased. It is further submitted that the applicant could be arrested by the police on 18.1.2022 only while the incident is dated 17.10.2020 and it was done only when this court imposed a fine of Rs. 1000/- on the Investigating Officer regarding his laxity in filing the charge sheet. Only on strict order of this court, including imposition of fine on the Investigating Officer, the chargesheet could be filed and the accused could be arrested.

From perusal of the record, it is clear that as per the post mortem report, it was a case of hanging and the doctor in his statements has denied the committal of rape with the deceased. He has also stated this case to be a case of suicide and specifically denied that it was a case of murder. So far as DNA report is concerned, the spots of semen are found on clothes of the deceased. As per DNA report, specimen of DNA did not match with the sperm or semen of the present applicant. There is no, prima facie, evidence on record to show the involvement of the applicant in the offence. The case of this accused applicant is distinguishable with that of co accused Sonu. The applicant is in jail from 18.1.2022.

Having heard the submissions of learned counsel for the parties, considering the seriousness of the charge and the severity of punishment in case of conviction and the nature of supporting evidence, prima facie satisfaction of the Court and without expressing any opinion on the merit of the case, I find it to be a case of bail.

The bail application is allowed.

Let the applicant Lalman, who is involved in aforesaid crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions.

1. The applicant will attend and co-operate the trial proceedings pending before the court concerned on the dates fixed after release.

2. He will not tamper with the witnesses.

3. He will not indulge in any illegal activities during the bail period.

The identity, status and residential proof of sureties will be verified by the court concerned and in case of breach of any of the above conditions, the court below shall be at liberty to cancel the bail and send the applicant to prison.

It is clarified that the observations, if any, made in this order are strictly confined to the disposal of this bail application and must not be construed to have any reflection on the ultimate merits of the case.

In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

Order Date :- 19.10.2022"

13. On the above premise, the learned counsel for applicant contends that case of present applicant is similar and identical to aforementioned co-accused who have already been enlarged on bail. There is no such distinguishing feature on the basis of which, case of present applicant could be so distinguished from aforementioned bailed out co-accused so as to deny him bail. He, therefore, submits that in view of above and for the facts and reasons recorded in the bail orders of aforementioned co-accused, applicant is also liable to be enlarged on bail. It is then contended that present case is a case of suicidal death and not murder. Up to this stage, no such circumstance has emerged on the basis of which, it could be conclusively concluded that applicant has abetted, instigated or conspired in the commission of crime in question. No instigation can be inferred against applicant from his conduct. Moreover, it cannot be said that the deceased committed suicide on account of an immediate act of applicant.

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 03.05.2021. As such, he has undergone more than 2 years and 5 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.

15. *Per contra*, the learned A.G.A. has opposed the prayer for bail. He submits that since the applicant is a named and charge-sheeted accused, therefore, he does not deserve any indulgence by this Court. According to the learned A.G.A. the clothes of the prosecutrix were recovered and sent to FSL laboratory for chemical examination, human sperm was found on the 'Salwar' of the deceased and also in the vaginal slide of the deceased. The same is clearly established from the YSTR/DNA Profile of present applicant. The same is evident from the document occurring at page 122 of the paper book. Learned A.G.A. further contends that as per the CDR report of the mobile phones of the applicant and the deceased, the applicant and the deceased were in constant conversation with each other, which fact has not been denied by the applicant. As such, the deceased committed suicide on account of an immediate act of applicant inasmuch as, her modesty was dislodged by applicant. The deceased was a young girl aged about 17 years. Therefore, the case of present applicant is clearly distinguishable from other bailed out co-accused. As such, no parity can be claimed by the applicant from aforementioned bailed out co-accused.

16. When confronted with above, the learned counsel for applicant could not overcome the same.

17. Having heard, the learned counsel for applicant, the learned A.G.A. for State, upon perusal of record, evidence, nature and gravity of offence, complicity of accused, accusations made coupled with the fact that prima-facie the modesty of the prosecutrix was dislodged by the applicant, which fact stands established from the YSTR/DNA Profile of the applicant, the document in respect of which is on record at page 122 of the paper book, the deceased and the accused were in constant conversation with each other, which fact is established from the CDR report of the mobile phones of the applicant and the deceased, prima-facie, the deceased appears to have committed suicide on account of an immediate act of applicant, the judgments of this Court and the Supreme Court in **(i). Sarvesh Vs. State of U.P. 2018 ADJ Online 0163, (ii). Kanchan Sharma Vs. State of U.P. and Another 2021 SCC OnLine SC 737, (iii). Mirza Iqbal alias Golu and Another Vs. State of U.P. and Another 2021 SCC OnLine SC 1251, (iv) Mariano Anto Bruno and Another Vs. Inspector of Police 2022 SCC OnLine SC 1387, & (v) Kashibai and Others Vs. State of Karnataka, 2023 SCC OnLine SC 575**, 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 comments on the merits of the case, this Court does not find any good or sufficient ground to enlarge the applicant on bail.

18. As a result, present application for bail fails and is liable to be rejected.

19. It is accordingly **rejected**.

Order Date :- 28.10.2023

Vinay