

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 35974 of 2023

Applicant :- Mahboob Alam@ Saleem

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

Counsel for Applicant :- Diwan Saifullah Khan

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Diwan Saifullah Khan, 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-Mahboob Alam @ Saleem, seeking his enlargement on bail in Case Crime No. 138 of 2019, under Sections 363, 376 IPC and Sections 3/4 POCSO Act, Police Station-Adampur, District-Varanasi during the pendency of trial.

4. Office has submitted a report dated 28.10.2023 stating therein that as per the service report received from the concerned C.J.M., the family of the prosecutrix has left the last known address. However, their current address is not traceable. As such, the first informant-opposite party 2 could not be served.

5. Learned A.G.A. has also filed an affidavit of compliance to the similar effect.

6. Record shows that in respect of an incident, which is alleged to have occurred on 10.06.2019, a delayed FIR dated 12.06.2019 was lodged by first informant-Tara (mother of the prosecutrix) and was registered as Case Crime No. 138 of 2019, under Sections 363 IPC, Police Station-Adampur, District-Varanasi. In the aforesaid FIR, an unknown person has been arraigned as solitary accused.

7. The gravamen of the allegations made in the FIR is to the effect that daughter of the first informant i.e. the prosecutrix aged about 14 years has gone missing since 10.06.2019 from 05:00 P.M.

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 prosecutrix was recovered on 19.06.2019. Thereafter, the statement of the prosecutrix was recorded under Section 161 Cr.P.C. Same is on record at page 29 of the paper book. The prosecutrix in her aforesaid statement has not supported the FIR. No allegation with regard to commission of rape upon her has been levelled either. Thereafter, the prosecutrix was requested for her internal medical examination. However, the same was refused by the prosecutrix. As per the medical opinion, the prosecutrix is said to be aged about 16 and 1/2 years to 17 and 1/2 years. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. Same is on record at page page 43 of the paper book. The prosecutrix in her aforesaid statement has departed from her previous statement under Section 161 Cr.P.C. and for the first time has alleged that her modesty was deliberately dislodged by the applicant at his home.

9. During course of investigation, Investigating Officer examined first informant and other witnesses also 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 applicant is fully established in the crime in question. He, accordingly, submitted the charge sheet dated 16.01.2020 whereby applicant has been charge sheeted under Sections 363, 376 IPC and Sections 3/4 POCSO Act.

10. Learned counsel for applicant contends that applicant is innocent. He is not named in the FIR. Even though, applicant is a charge sheeted accused yet he is liable to be enlarged on bail. There is no medical evidence to support the charge sheet inasmuch as, the prosecutrix has herself refused for her internal medical examination. With reference to the statements of the prosecutrix recorded under Sections 161/164 Cr.P.C., the learned counsel for applicant contends that the prosecutrix has not remained clear, categorical and consistent in her aforesaid statements. The departure made by the prosecutrix in her subsequent statement under Section 164 Cr.P.C. from her previous statement under Section 161 Cr.P.C. remains unexplained up to this stage. Attention of the Court was then invited to the judgment of the Supreme Court in **Phool Singh Vs. State of M.P. (2022) 2 SCC 74**. ON the basis of above, the learned counsel for applicant contends that the prosecution of an accused for an offence of rape and sexual assault can be maintained even in the absence of medical evidence and on the solitary statement of the prosecutrix. However, in such a

circumstance, the statement of the prosecutrix must be clear, categorical, consistent and unambiguous. On basis thereof, he contends that when the statements of the prosecutrix referred to above, are taken as a whole and the aforesaid test is applied to the same, it is evident that the same do not fall in the category of impeccable evidence. On the above premise, he thus contends that no prosecution of the applicant can be maintained on the basis of aforesaid statements. According to the learned counsel for applicant, the applicant was arrested on 09.01.2020 and the charges were framed against applicant vide framing of charge order dated 07.09.2022. However, right from the date of the submission of the charge sheet i.e. 16.01.2020, neither the prosecutrix nor the first informant have appeared before court below. To lend support to his submission, reliance is placed upon the order sheet of the trial pending before court below, copy of which is on record at page 7 of the supplementary affidavit filed in support of the present application for bail.

11. 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 09.01.2020. As such, he has undergone more than 3 years and 9 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 incriminating 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.

12. Per contra, the learned A.G.A. has opposed the prayer for bail. He submits that since applicant is a charge sheeted accused, therefore, he does not deserve any indulgence by this Court. The prosecutrix is a young girl aged about 16 and 1/2 to 17 and 1/2 years whose modesty has been dislodged deliberately by the applicant. The said fact is clearly established as per the statement of the prosecutrix recorded under Section 164 Cr.P.C. However, he could not dislodge the factual and legal submissions urged by the learned counsel for applicant with reference to the record at this stage.

13. Having heard, the learned counsel for applicant, the learned A.G.A. for State, upon perusal of record, evidence, nature and gravity of offence, accusations made, complicity of accused and

coupled with the fact that there is no medical evidence to support the charge sheet inasmuch as, the prosecutrix has herself refused for her internal medical examination, the prosecution of an accused for an offence of rape and sexual assault can be maintained even in the absence of medical evidence but on the solitary statement of the prosecutrix, when the statements of the prosecutrix referred to above are examined as a whole, the same cannot be said to be of impeccable character, the prosecutrix has not remained clear, categorical and consistent in her aforesaid statements, the embellishment, contradiction and exaggeration occurring in the subsequent statement of the prosecutrix under Section 164 Cr.P.C. remains unexplained up to this stage, the applicant is in jail since 09.01.2020, as such, he has undergone more than 3 years and 10 months of incarceration, the charge sheet has been submitted against applicant on 16.01.2020, the framing of charge order passed against applicant on 07.09.2022, however, neither the prosecutrix nor the first informant have been co-operating with the trial, since the date of the submission of the charge sheet dated 16.01.2022, 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. 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. 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.

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

15. Let the **applicant-Mahboob Alam@ Saleem**, 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.

16. 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 :- 6.11.2023

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