

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 35691 of 2023

Applicant :- Saddam

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

Counsel for Applicant :- Rakesh Kumar Yadav

Counsel for Opposite Party :- G.A.

Connected with

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 38887 of 2023

Applicant :- Irfan @ Guddu

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

Counsel for Applicant :- Rakesh Kumar Yadav

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Rakesh Kumar Yadav, the learned counsel for applicants-Saddam and Irfan @ Guddu and the learned A.G.A. for State.

2. Affidavit of compliance filed by the learned A.G.A. in Court today in both the applications, are taken on record.

3. Perused the record.

4. These applications for bail have been filed by applicants-Saddam and Irfan @ Guddu, seeking their enlargement on bail in Case Crime No. 164 of 2023, under Sections 376DB, 354-B, 342, 323, 504, 506 IPC and Sections 5G/6, 5M/6, 9G/10, 9M/10 POCSO Act, Police Station-Nagara, District-Ballia during the pendency of trial.

5. In Criminal Misc. Bail Application No. 35691 of 2023 (Saddam Vs. State of U.P. and 3 Others), the Court passed the following order:-

"1. Heard Mr. Rakesh Kumar Yadav, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. Instant bail application has been filed by applicant-Rajveer Kumar seeking his enlargement on bail in Case Crime No. 264 of 2023 under Sections 376DB, 354B, 342, 323, 504, 506, I.P.C. and Sections 5g/6, 5m/6. 9g/10. 9m/10 POCSO Act, Police Station-Nagara, District-Ballia, during the pendency of trial.

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

5. After some arguments, it transpires that age of the prosecutrix has been determined on the basis of her date of birth recorded in the certificate issued by the Principal of the Institution last attended by the prosecutrix.

5. By virtue of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 as well as the judgement of Apex Court in P. Yuva Prakash Vs. State 2023 SC OnLine SC 846, the said document cannot be relied upon to conclude the age of the prosecutrix as per the date of birth of the prosecutrix recorded therein. The date of birth of the prosecutrix mentioned in any of the documents recognized under Sections 94 (1) (a) and 94 (1) (b) of the aforesaid Act alone can be taken into consideration for determining the age of the prosecutrix.

6. In view of the fact that police report in terms of Section 173 (2) Cr.P.C. has been submitted on 12.07.2023 against applicant, the Investigating Officer is directed to submit an application before court concerned in terms of Section 173 (8) Cr.P.C. seeking permission of the court to conduct further investigation. After obtaining permission of the court, Investigating Officer shall conduct further investigation to find out the date of birth of the prosecutrix recorded in the institution which was first attended by her.

7. Let the necessary exercise be completed by the Investigating Officer within three weeks.

8. Copy of supplementary case diary shall be transmitted to this Court through the learned A.G.A. before the next date fixed.

9. Matter shall accordingly re-appear as fresh on 09.11.2023"

6. Record shows that in respect of an incident, which is alleged to have occurred on 11.03.2023, a delayed FIR dated 14.05.2023 was lodged by first informant-Nagma (mother of the prosecutrix) and was registered as Case Crime No. 164 of 2023, under Sections 376AB, 354-B, 342, 323, 504, 506 IPC and Sections 5M/6 POCSO Act, Police Station-Nagara, District-Ballia. In the aforesaid FIR, 3 persons namely - (1) Saddam, (2) Irfan @ Guddu i.e. applicants herein and (3) Shamshul Nisha have been nominated as named accused.

7. It is apposite to mention here that the said FIR came to be registered pursuant to an order passed by the concerned Magistrate on the application under Section 156(3) Cr.P.C. filed by the first informant.

8. The gravamen of the allegations made in the FIR is to the effect that named accused Saddam and Irfan @ Guddu are alleged to have dislodged the modesty of the prosecutrix i.e. minor daughter of first informant namely X aged about 11 years by committing aggravated sexual assault.

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 statement of the prosecutrix was recorded under Section 161 Cr.P.C. Same is on record at page 27 of the paper book. The prosecutrix in her aforesaid statement has fully supported the FIR. Thereafter, the prosecutrix was requested for her internal medical examination. However, the prosecutrix has refused for her internal medical examination. Thereafter, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. Same is on record at page 34 of the paper book. The prosecutrix in her aforesaid statement has not fully reiterated her previous statement under Section 161 Cr.P.C. Since there was contradiction in the statements of the prosecutrix as noted above, the Investigating Officer re-examined the prosecutrix for her second statement under Section 161 Cr.P.C. The second statement of the prosecutrix is on record at page 37 of the paper book. The prosecutrix in her aforesaid second statement could not explain the contradiction appearing in her previous statement as noted above. Investigating Officer also examined the first informant who has 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 12.07.2023 whereby named accused Saddam and Irfan @ Guddu (applicants herein) have been charge sheeted under Sections 376DB, 354-B, 342, 323, 504, 506 IPC and Sections 5G/6, 5M/6, 9G/10, 9M/10 POCSO Act whereas the other named accused Shamsul Nisha has been charge sheeted under Sections 323, 504 and 506 IPC.

10. Learned counsel for applicants contend that in respect of the same incident, which is alleged to have occurred on 11.03.2023, a prompt FIR dated 11.03.2023 was lodged from the side of the applicant which was registered as Case Crime No. 78 of 2023, under Sections 323, 504, 506 IPC. In the aforesaid FIR, 4 persons

namely (1) Mohd. Mukhtar, (2) Nagma Khatoon, (3) Shaniya and (4) Ramesh Yadav (Gram Pradhan) have been nominated as named accused.

11. Subsequent to above FIR, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter-XII Cr.P.C. Subsequently, the victim Uzma (the prosecutrix) submitted an application dated 14.03.2023 before Chief Medical Officer, Ballia praying therein that she be medically examined to ascertain the injury sustained by her. It is apposite to mention here that in the said application, there is no allegation with regard to dislodging of her modesty by the named accused Saddam and Irfan @ Guddu. The said application appears to have been allowed by the Chief Medical Officer, Ballia. Accordingly, the victim Nagma i.e. the mother of the prosecutrix and Uzma i.e. the prosecutrix were medically examined. Their Medico Legal Examination Report are on record at pages 49 and 51 of the paper book, pertaining to applicant-Saddam. For ready reference, the injuries sustained by them are reproduced hereinunder:-

Injury of Uzma:-

- 1. Contusion on Lt. upper thigh on back 03 cm below from Rt. Hip joint size 04 x 02 cm.***
- 2. Contusion on Lt. upper chest 01 cm below from lateral side of Lt. clavicle size 04 x 02 cm.***
- 3. C/o pain Rt. shoulder.***
- 4. C/o Pain lower back.***
- 5. C/o pain Abdomen.***
- 6. C/o pain both thigh."***

Injury of Nagma:-

- 1. Abrasion on back of Rt. forearm 03 cm above from Rt. wrist of size about 04 x 0.8 cm.***
- 2. Abrasion on medial aspect of Lt. forearm 03 cm above from Lt. wrist of size about 02 x 0.8 cm.***
- 3. Abrasion over upper abdomen 03 cm from xiphoid forearm size about 06 x 0.8 cm.***

4. Abrasion on Abdomen 03 cm from umbilicus size about 05 x 0.8 cm.

5. Abrasion over lower abdomen 2.5 cm below from umbilicus size about 04 cm x 0.8 cm.

6. Contusion on lower back 14 cm below from angle of scapula size about 13 x 02 cm.

7. C/o pain head.

8. C/o pain Abdomen."

12. On the above premise, the learned counsel for applicants contends that present criminal proceedings have been engineered as a counter blast to the criminal proceedings initiated on behalf of applicant as is evident from the FIR dated 11.03.2023 (Case Crime No. 78 of 2023). The victim Nagma (mother of the prosecutrix) is the step mother of the applicant whereas the prosecutrix-Uzma is the step sister of the applicant. The father of the prosecutrix and the applicant is one and the same. On the above premise, it is thus urged that family dispute has been carried out in the criminal litigation. The bona-fide of the applicant is sought to be established from the fact that in the application submitted by the prosecutrix before the Chief Medical Officer, Ballia on 14.03.2023, which is on record at page 48 of the paper book, no allegation has been made with regard to commission of aggravated sexual assault upon the prosecutrix by the applicants. It is worth mentioning that the aforesaid application dated 14.03.2023 is in the hand writing of the prosecutrix herself.

13. Even otherwise, applicants are men of clean antecedents inasmuch as, they have no criminal history to their credit except the present one. Applicant-Saddam is in jail since 29.06.2023 and applicant-Irfan @ Guddu is in jail since 10.07.2023. As such, they have undergone substantial period 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 applicants stands crystallized. However, up to this stage, no such circumstance has emerged necessitating the custodial arrest of applicants during the pendency of trial. On the above premise, he submits that applicants are liable to be enlarged on bail. In case, the applicants are enlarged on bail, they shall not misuse the liberty of bail and shall co-operate with the trial.

14. Per contra, the learned A.G.A. has opposed the prayer for bail.

He submits that since applicants are named as well as charge sheeted accused, therefore, they do not deserve any indulgence by this Court. The prosecutrix in her statements under Sections 161/164 Cr.P.C. has fully supported the FIR. The prosecutrix is a young girl of tender age, i.e. aged about 11 years. Applicants are guilty of committing aggravated sexual assault upon the prosecutrix. As such, no sympathy be shown by this Court in favour of applicants. However, the learned A.G.A. could not dislodge the factual and legal submissions urged by the learned counsel for applicants with reference to the record at this stage.

15. 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 ocular version of the occurrence inasmuch as, the prosecutrix has herself refused for her internal medical examination, though the prosecutrix has supported the FIR in her statements under Sections 161/164 Cr.P.C., however, contradiction emerged in her aforesaid statements, therefore, the second statement of the prosecutrix was recorded under Section 161 Cr.P.C. which is on record at page 37 of the paper book, however, the prosecutrix in her second statement under Section 161 Cr.P.C. could not explain the contradiction that emerged in her aforementioned statements, the Apex Court in the case of ***Phool Singh Vs. State of M.P., (2022) 2 SCC 74*** has held that the prosecution of an accused for an offence of rape or 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 of impeccable character, when the aforesaid test is applied to the aforementioned statements of the prosecutrix, definitely, it cannot be said that the same fall in the category of impeccable evidence, the parties are clearly related to each other inasmuch as, the father of the prosecutrix and the applicant is the same, as per the material on record, it is evident that the occurrence on 11.03.2023, the said fact is admitted to both the parties as FIRs in respect of the said occurrence have been lodged from both the sides, subsequent to the FIR dated 13.03.2023, which was registered as Case Crime No. 78 of 2023 (lodged from the side of applicants) and the prosecutrix herself submitted the application before the Chief Medical Officer, Ballia praying therein that she and her mother be medically examined, however, in the said application, there is no averment that her modesty was dislodged by the applicants by committing aggravated sexual assault, prima-facie, therefore, there is no reason to doubt the

bona-fide of the applicants who have contended that the present criminal proceedings have been engineered as a counter blast to the criminal proceedings initiated on behalf of applicants, the clean antecedents of applicants, 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 applicants 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 applicants during the pendency of trial, the judgment of the Supreme Court in **Sumit Subhashchandra Gangwal Vs. State of Maharashtra, 2023 LiveLaw (SC) 373** (Paragraph 5), therefore, irrespective of the objections raised by the learned A.G.A. in opposition to the present application s for bail, but without making any comments on the merits of the case, applicants have made out a case for bail.

16. Accordingly, the bail applications are **allowed**.

17. Let the **applicants-Saddam and Irfan @ Guddu**, be released on bail in the aforesaid case crime number on their 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.

18. However, it is made clear that any wilful violation of above conditions by the applicants, shall have serious repercussion on their 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 :- 9.11.2023

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