

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 36219 of 2023

Applicant :- Mohammad Arif

Opposite Party :- State of U.P.

Counsel for Applicant :- Kripa Shanker Yadav, Manish Dev

Counsel for Opposite Party :- G.A.

Connected with

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 37762 of 2023

Applicant :- Sharafat

Opposite Party :- State of U.P.

Counsel for Applicant :- Ambreen Masroor, Sadrul Islam Jafri, Sr. Advocate

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

Heard Mr. Manish Dev Srivastava, the learned counsel for applicant- Mohammad Arif, Mr. N.I. Jafri, the learned Senior Counsel assisted by Mr. Sadrul Islam Jafri along with Ms. Ambreen Masroor, the learned counsel for applicant- Sharafat and the learned A.G.A. for State.

Perused the record.

These applications for bail have been filed by applicants- Mohammad Arif and Sharafat, seeking their enlargement on bail in Case Crime No. 47 of 2023, under sections 452, 376-D, 323, 504, 506 I.P.C, Police Station- Milak, District- Rampur during the pendency of trial.

Record shows that in respect of an incident which is alleged to have occurred on 22.2.2023, a delayed F.I.R. dated 1.4.2023 was lodged by first informant/prosecutrix Ameer Jaha and was registered as Case Crime No. 47 of 2023, under sections 452, 376-D, 323, 504, 506 I.P.C, Police Station- Milak, District- Rampur. In the aforesaid F.I.R. two persons namely, Sharafat and Mohammad Arif i.e. applicants herein have been nominated as named accused, whereas one unknown person has been arraigned as an accused.

The gravamen of the allegations made in the F.I.R. is to the effect that named accused dislodged the modesty of the prosecutrix. The F.I.R. further records that obscene photographs were also snapped and were sent to the husband of the prosecutrix.

After aforementioned F.I.R. was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms Chapter XII Cr.P.C. The statement of the prosecutrix was recorded under section 161 Cr.P.C. Same is on record at page 19 of the paper book. The prosecutrix in her aforesaid statement has supported the F.I.R. She has categorically stated that both the named accused forcibly and deliberately dislodged her modesty. The complicity of an unknown person has also surfaced in the aforesaid statement of prosecutrix.

Thereafter the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor who medically examined her has rejoined her previous statement under section 161 Cr.P.C. However, the Doctor who examined the prosecutrix, did not find any signs on her body so as to denote commission of deliberate sexual assault. With regard to the private part of prosecutrix, the Doctor has opined as follows:

"Absent, represented as old healed tag"

Certain samples were taken from the body of prosecutrix for pathological examination. However, supplementary medico legal report of the prosecutrix shows negative result.

Ultimately, the statement of the prosecutrix was recorded under section 164 Cr.P.C, wherein the prosecutrix has rejoined her earlier statement recorded under section 161 Cr.P.C.

During course of investigation, Investigating Officer recovered the audio clip from the mobile phone of the husband of the prosecutrix. On the basis of above and other material collected by Investigating Officer during course of investigation he came to the conclusion that complicity of named accused is established in the crime in question. He, accordingly submitted the charge sheet dated 10.6.2023, whereby both the named accused have been charge sheeted under Sections 452, 376-D, 323, 504, 506 I.P.C.

Learned counsel for applicants contend that though the applicants are named and charge sheeted accused but they are innocent. As such, they are liable to be enlarged on bail. With

reference to the F.I.R. it is alleged that occurrence is alleged to have occurred on 22.2.2023, whereas, the F.I.R. was lodged on 1.4.2023 i.e. almost after a period of 40 days. As such, the F.I.R. is highly belated. However, neither in the F.I.R. nor in the statement of first informant any explanation has been offered regarding delay in lodging the F.I.R. Reference in this regard is made to the judgment of Supreme Court in **P. Rajagopal Vs. State of Tamilnadu, AIR 2019 SC 2866**, learned counsel for applicants contend that since the delay in lodging the F.I.R. has not been explained, the prosecution of applicants itself cannot be maintained. Reference has also been made to the judgement of Supreme Court in **Mandar Deepak Pawar VS. State of Maharashtra and Another, 2022 Live Law (SC) 649**.

Attention of the Court was then invited to the document at page 59 of the paper book, pertaining to applicant Sharafat. The said document relates to the Police enquiry on the complaint made by prosecutrix herself. However, noting adverse has been emerged in the said proceedings. On the aforesaid premise, it is urged by learned counsel for applicants that present criminal proceedings are not only malicious but also a false. Applicants are being falsely prosecuted on account an extraneous consideration. Section 65 (b) of the Evidence Act was obtained from the husband of the prosecutrix with regard to the audio clip from whose mobile phone the alleged audio clip was recovered.

Even otherwise, applicant Mohammad Arif is a man of clean antecedents inasmuch as he has no criminal history of his credit except the present one. Applicant- Sharafat has criminal history of four cases, which has been duly explained in paragraph 29 of the affidavit filed in support of his bail application. At this juncture, the learned A.G.A. submits that applicant Sharafat has criminal history of one more case i.e. Case No. 494 of 2017, under section 3/25 Arms Act, Police Station- Milak, District Rampur. With reference to above, the learned counsel for applicants have placed reliance upon judgment of Supreme Court in **Brijmani Devi Vs. Pappu Kumar and Another Vs. (2022) 4 SCC 497**, and on basis of above, he submits that an accused cannot be denied bail simply on the ground of criminal history. Applicant- Mohammad Arif is in jail since 5.6.2023, whereas applicant- Sharafat is in jail since 18.5.2023. As such, they have undergone sufficient period of incarceration. 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 remains crystalized. However, no such circumstance is on the record, necessitating the custodial arrest of applicants during the pendency of trial. It is thus urged 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 trial.

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. He next submits that complicity of the applicants in the crime in question is fully established as per the statement of the prosecutrix recorded under section 161 Cr.P.C.. There is no such material on record to infer the innocence of the applicants or false and malicious prosecution of applicant. He, therefore, contends that no sympathy be shown by this Court in favour of applicants. However, he could not dislodge the factual and legal submissions urged by learned counsel for applicants with reference to the record at this stage.

Having heard the learned counsel for applicants, the learned A.G.A. for State, upon perusal of material brought on record, evidence, nature and gravity of offence as well as complicity of applicants, accusation made coupled with the fact that, the Doctor who examined the prosecutrix, however, did not find any signs on her body so as to denote commission of deliberate sexual assault upon the prosecutrix, as such the medical evidence does not support the ocular version, the occurrence is alleged to have occurred on 22.2.2023, whereas, the F.I.R. was lodged on 1.4.2023 i.e. almost for a period of 40 days, as such, the F.I.R. is highly belated, however, neither in the F.I.R. nor in the statement of first informant any explanation has been offered regarding delay in lodging the F.I.R., therefore prima facie the prosecution of applicant itself cannot be maintained, the judgement of Supreme Court in **P. Rajagopal (Supra)**, one of the applicant i.e. Sharafat has criminal history of four cases, however, an accused cannot be denied bail only on the ground of criminal history as per the three judges Bench in **Brijmani Devi Vs. Pappu Kumar and Another Vs. (2022) 4 SCC 497**, as per the document occurring at page 59 of the paper book of applicant Sharafat, prima facie the innocence of applicant is established, 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 remains crystalized yet 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, therefore irrespective of the objection raised by the learned A.G.A. in opposition to the present application for bail but without making any comment on the merits of the case, the applicants have made out a case for bail.

Accordingly the bail applications are **allowed**.

Let the applicants **Mohammad Arif** and **Sharafat** be released on bail in the aforesaid case crime number on 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.

However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his/her 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 :- 8.11.2023

Arshad