

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 36715 of 2023

Applicant :- D.K. Alias Dharmendra

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

Counsel for Applicant :- Yatish Kumar Dwivedi

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

Heard Mr. Yatish Kumar Dwivedi, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant D.K. Alias Dharmendra seeking his enlargement on bail in Case Crime No.27 of 2023, under Sections 363, 366, 506, 109 IPC, Section 17/4 Pocso Act, Section 3/25 Arms Act and Section 3(2)5 SC/ST Act, police station Madhaugarh, district Jalaun, during the pendency of trial.

Perused the record.

At the very outset, the learned A.G.A. submits that notice of present bail application has been served upon the first informant-opposite party-2 on 19.08.2023. However, in spite of service of notice, no one has put in appearance on behalf of first informant-opposite party-2 to oppose the application for bail.

Record shows that in respect of an incident which is alleged to have occurred on 04.02.2023, a delayed FIR dated 21.02.2023 was lodged by first informant, namely, Smt. Rekha Devi (mother of the prosecutrix) and was registered as Case Crime No.0027 of 2023, under Sections 363, 366 IPC, police Madhaugarh, district Jalaun. In the aforesaid FIR, two persons, namely, Manish Kushwaha and Umesh have been nominated as named accused.

At the very outset, the learned counsel for applicant submits that after completion of investigation of aforementioned case crime number in terms of Chapter XII CrPC, Investigating Officer has submitted charge-sheet dated 25.04.2023, whereby both the named accused have been charge-sheeted under Sections 363, 366, 376 IPC, Section 3/4 Pocso Act and Section 3(2)5 SC/ST Act.

According to the learned counsel for applicant, named and charge-sheeted co-accused Manish has already been enlarged on bail by this Court vide order dated 17.07.2023 passed in

Criminal Misc. Bail Application No.28829 of 2023 (Manish Vs. State of U.P. and 3 others). For ready reference, the order dated 17.07.2023 is reproduced herein-under :-

"Ms. Sujata Chaudhary, learned AGA contends that the police authorities in compliance of the directions issued by this Court in Criminal Misc. Bail Application No. 46998 of 2020 (Junaid Vs State of U.P. and another) reported at 2021 (6) ADJ 511 and with a view to implement the provisions of POCSO Act, 2012 read with POCSO Rules, 2020, have served the bail application upon the victim/legal guardian as well as upon the CWC.

By means of the bail application the applicant has prayed to be enlarged on bail in Case Crime No.27 of 2023 at Police Station-Madhogarh, District-Jalaun under Sections 363, 366, 376 IPC and Section 3/4 of the POCSO Act. The applicant is in jail since 26.02.2023.

The bail application of the applicant was rejected by the learned trial court on 01.04.2023.

The following arguments made by Shri Lakshaman Singh, learned counsel on behalf of the applicant, which could not be satisfactorily refuted by Ms. Sujata Chaudhary, learned AGA from the record, entitle the applicant for grant of bail:

1. Learned counsel for the applicant contests the minority of the victim as depicted in the prosecution case.
2. The victim was wrongly shown as a minor of 16 years in the F.I.R. only to falsely implicate the applicant under the stringent provisions of the POCSO Act and cause his imprisonment.
3. Learned counsel for the applicant contests the age of the victim set out in the prosecution case in light of the judgement of this Court in Monish Vs. State of U.P. and others (Criminal Misc. Bail Application No. 55026 of 2021) and on the following grounds:
 - (i) There are material contradictions in the age of the victim as recorded in various prosecution documents.
 - (ii) The age of the victim was incorrectly got registered in the school records by the victim's parents to give her an advantage in life. The school records disclosing her age as 16 years months are unreliable.
 - (iii) The victim in her statement under Section 161 Cr.P.C. has asserted that she is 16 years of age.
 - (iv) No medical examination to determine the correct age of the victim as per the latest scientific criteria and medical protocol by eminent doctors from a reputed institution was got done by the prosecution as it would establish the majority of the victim and falsify the prosecution case. The victim is in fact a major.
5. The victim and the applicant were intimate.
6. The F.I.R. is the result of opposition of the victim's family to the said relationship.
7. The victim in her statement under Section 164 Cr.P.C. has admitted to intimacy with the applicant. She has asserted that she eloped with the applicant to Gwalior and got married to him of her own volition. Their marriage has been consummated and they stayed together in Gwalior for 19 days.

8. The victim in her statement under Section 164 Cr.P.C. has further asserted that she wants to live with her husband (applicant herein).

9. No allegation of abduction, wrongful detention and commission of rape has been made by the victim against the applicant in her statements under Sections 161 Cr.P.C. and Section 164 Cr.P.C.

10. The victim was present at various public places but never raised an alarm nor did she resist the applicant. The conduct of the victim shows that she was a consenting party.

11. Medical evidence to corroborate commission of rape by the applicant with the victim has not been produced by the prosecution.

12. Prosecution evidence does not connect the applicant with the offence.

13. The applicant does not have any criminal history apart from this case. However, learned AGA contends that the applicant has a criminal history of some more cases. Rejoining this issue, learned counsel for the applicant contends that the applicant is in jail. He is financially destitute and does not have an effective paurokar. Hence details of the cases could not be obtained and stated in the bail application. However, relying on the records available with the learned AGA and the instructions received from his client, learned counsel for the applicant submits that the applicant belongs to the economically poor strata of the society and is a convenient scapegoat for the police authorities. The applicant was falsely framed in the said cases. The said cases do not have any bearing on the instant bail application.

14. The applicant is not a flight risk. The applicant being a law abiding citizen has always cooperated with the investigation and undertakes to cooperate with the court proceedings. There is no possibility of his influencing witnesses, tampering with the evidence or reoffending.

In the light of the preceding discussion and without making any observations on the merits of the case, the bail application is allowed.

Let the applicant-Manish 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 below. The following conditions be imposed in the interest of justice:-

(i) The applicant will not tamper with the evidence or influence any witness during the trial.

(ii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted."

Subsequently, aforementioned charge-sheeted co-accused was implicated under Section 3 (2)5 SC/ST Act. Thereafter, the aforesaid accused has also been enlarged on bail under Section 3 (2)5 SC/ST Act vide order of date passed in connected bail application i.e. Criminal Misc. Bail Application No.38484 of 2023 (Manish Kushwaha @ Munesh Vs. State of U.P. and 3 others).

According to the learned counsel for the applicant, the prosecutrix has solemnized marriage with co-accused Manish Kushwaha. As such, the criminality if any alleged against the

charge-sheeted accused stands washed of. On the above premise, he therefore contends that no useful purpose shall be served in prolonging the custodial arrest of the applicant. The applicant has criminal history of nine cases. However, the same has been sufficiently explained in paragraph 19 of the affidavit filed in support of the bail application. Applicant is in custody since 26.02.2023. As such, he has undergone more than eight months of incarceration. The police report under Section 173 (2) CrPC has already been submitted. As such the entire evidence sought to be relied upon by the prosecution against the applicant stands crystalized. However, up to this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. He, therefore, contends 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.

Per contra, the learned A.G.A. has vehemently 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. However, the learned A.G.A. could not dislodge the factual and legal submissions urged by the learned counsel for applicant with reference to the record at this stage.

Having heard the learned counsel for applicant, the learned A.G.A. for State, upon perusal of material brought on record, nature and gravity of offence, evidence, complicity of the accused, accusation made and coupled with the fact that co-accused Manish has already been enlarged on bail vide order dated 17.07.2023, subsequently co-accused was charge-sheeted under Section 3 (2)5 SC/ST Act wherein he has also been enlarged on bail by this Court vide order of date passed in connected bail application, the prosecutrix has solemnized marriage with co-accused Manish therefore the criminality if any alleged against the charge-sheeted accused stands washed of, the criminal history of the applicant has sufficiently been explained, the issue as to whether an accused is entitled to be enlarged on bail or not even if he has criminal history is no longer res-integra and has now been set at rest by a three Judges' Bench judgement of the Supreme Court in **Brijmani Devi Vs. Pappu Kumar and Another (2022) 4 SCC 497**, the police report under Section 173 (2) CrPC i.e. charge-sheet has already been submitted as such the entire evidence sought to be relied upon by the prosecution against the applicant stands crystalized, yet in spite of above the learned A.G.A. could not point out any such incriminating circumstance from the record necessitating the custodial arrest of applicant during the proceeding of trial, the period of incarceration undergone, 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, the applicant has made out a case for bail.

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

Let the applicant **D.K. Alias Dharmendra**, involved in aforesaid case crime number, be released on bail on his furnishing a personal bond with 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 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 counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under section 229-A I.P.C.

(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., 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, in accordance with law, under section 174-A I.P.C.

(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 him 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 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 :- 31.10.2023.

Rks.