

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 36093 of 2023

Applicant :- Azim

Opposite Party :- State of U.P.

Counsel for Applicant :- Hasan Parvej

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Hasan Parvej, 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-Azim seeking his enlargement on bail in Case Crime No. 134 of 2023 under Sections 363, 366, 376 (2) (n) I.P.C. and sections 5L/6 POCSO Act, Police Station-Meerganj, District-Bareilly, during the pendency of trial.

4. At the very outset, the learned A.G.A. submits that notice of present application for bail has been served upon first informant/opposite party-2 on 17.08.2023. However, in spite of service of notice, no one has put in appearance on behalf of first informant/opposite party-2 to oppose this application for bail.

5. Record shows that in respect of an incident, which is alleged to have occurred on 16.05.2023, a delayed F.I.R. dated 22.05.2023 was lodged by first informant Afsana (mother of the prosecutrix) and was registered as Case Crime No. 134 of 2023 under Sections 363 I.P.C. Police Station-Meerganj, District-Bareilly. In the aforesaid F. I.R., applicant-Azim has been nominated as solitary

named accused.

6. The gravamen of the allegations made in the F.I.R is to the effect that named accused Azim i.e. applicant herein, enticed away the daughter of the first informant namely X, aged about 17 years. The F.I.R. further records that named accused-Azim is already married and is the father of four children.

7. After aforementioned F.I.R. 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 22.05.2023., Thereafter, statement of prosecutrix under Section 161 Cr.P.C. was recorded by the Investigating Officer. The same is on record at page 30 of the paper book. The prosecutrix in her aforesaid statement has not supported the F.I.R. To the contrary, the prosecutrix has stated that she was in love with applicant. The prosecutrix wanted to marry with applicant. However, upon disclosure made by her to her mother regarding aforesaid intention, her mother declined to the said request. The prosecutrix has further stated that she, therefore, herself went to applicant on 16.05.2023 and thereafter willingly accompanied the applicant to Ajmer Sharif. When interrogated by the Investigating Officer, the prosecutrix has stated that physical relations were established between the parties on 2-3 occasions but upon the consent of the prosecutrix herself. No deliberate or forceful act was committed by applicant upon her to dislodge her modesty. Subsequently, the prosecutrix was requested for her internal medical examination. However, the prosecutrix refused for her internal medical examination. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C., which is on record at page 40 of the paper book. The prosecutrix in her

aforesaid statement has departed from her previous statement recorded under Section 161 Cr.P.C. She has now stated that no wrongful act was committed by applicant upon the prosecutrix.

8. During course of investigation, Investigating Officer obtained Certificate from the Head Teacher, Composite School Haldikhurd (1-8), Block-Meerang Bareilly regarding date of birth of prosecutrix. As per said certificate, the date of birth of the prosecutrix as recorded in the school record is 19.06.2005. The occurrence giving rise to present criminal proceedings occurred on 25.06.2023. As such, the prosecutrix was aged about 17 years and 11 months. During course of investigation, Investigating Officer examined other witnesses including uncle (Chacha) of the prosecutrix under Section 161 Cr.P.C.. Witnesses so examined have substantially supported the F.I.R. On the basis of above and other material collected by him 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 25.06.2023 whereby applicant has been charge-sheeted under Sections 363, 366, 376 (2) (n) I.P.C. and sections 5L/6 POCSO Act.

9. Learned counsel for applicant submits that though the applicant is a named as well as charge-sheeted accused yet he is liable to be enlarged on bail. With reference to the material on record, he contends that 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 statement of the prosecutrix recorded under Section 161 Cr.P.C., it is urged by the learned counsel for applicant that applicant cannot be said to be guilty of an offence under Sections 363 and 366 I.P.C. inasmuch as the prosecutrix was neither enticed away, abducted or kidnapped

by the applicant. The prosecutrix herself came to the applicant and thereafter, accompanied him to Ajmer Sharif. As such, the prosecutrix is a willing and consenting party. It is next contended that the prosecutrix in her statement under Section 161 Cr.P.C. has stated that physical relations were established between the parties upon the consent of the prosecutrix but has departed from the same in her subsequent statement under Section 164 Cr.P.C. With reference to the scheme of the Code i.e (Cr.P.C.), learned counsel for applicant submits that the subsequent statement of the prosecutrix i.e. under Section 164 Cr.P.C. has to be given credence over the statement under Section 161 Cr.P.C. Since the prosecutrix in her subsequent statement has not alleged any adverse conduct against applicant, therefore, applicant is liable to be enlarged on bail.

10. Attention of the Court was then invited to the judgement of Supreme Court in **Phool Singh Vs. State of Madhya Pradesh, (2022) 2 SCC 74** wherein the Apex Court has observed that prosecution of an accused for an offence of rape or sexual assault can be maintained even in 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 and consistent i.e. devoid of ambiguity and inconsistency. In the light of above, it is urged by the learned counsel for applicant that when the statements of the prosecutrix as noted above are examined as a whole, it is evident that the same are inconsistent and contradictory. Therefore the same do not fall in the category of impeccable evidence. Apart from above, it is urged by learned counsel for applicant that as per certificate obtained by the Investigating Officer from the Head Teacher of the institution where the prosecutrix had studied, the date of birth of

the prosecutrix as recorded in the school record is 19.06.2005. The occurrence giving rise to present criminal proceedings is alleged to have occurred on 16.05.2023. As such the prosecutrix was aged about 17 years, 11 months and 3 days on the date of occurrence. However, the document regarding the date of birth of the prosecutrix recovered by the Investigating Officer cannot be relied upon for determining the age of the prosecutrix as per the date of birth of the prosecutrix recorded therein inasmuch as, the age of the prosecutrix can be determined only with reference to her date of birth recorded in any such document which is recognized under Section 94 (2) (i) and 94 (2) (ii) of the Juvenile Justice (Care and Protection of Children) Act, 2015. There is no medical opinion regarding the age of the prosecutrix either. Parties are Muslim and there is no prohibition for a married muslim from marrying another woman during subsistence of the first marriage. On the above premise he submits that applicant is liable to be enlarged on 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 custody since 25.06.2023. As such, he has undergone approximately five months of incarceration. Police report (charge-sheet) in terms of Section 173 (2) Cr.P.C. has already been submitted against applicant, therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystallised. However, upto this stage, no such incriminating circumstance has emerged on the record 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.

12. Per contra, the learned A.G.A. has opposed the present bail application. He contends that since applicant is a named as well as charge-sheeted accused therefore he does not deserve any indulgence by this Court. However, he could not dislodge the factual and legal submissions urged by 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 consideration of material on record, evidence, gravity and nature of offence, accusations made as well as complicity of applicant 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, with reference to the statement of the prosecutrix recorded under Section 161 Cr.P.C., applicant cannot be said to be guilty of an offence under Sections 363 and 366 I.P.C. inasmuch as the prosecutrix was neither enticed away, abducted or kidnapped by the applicant, the prosecutrix herself came to the applicant and thereafter, accompanied him to Ajmer Sharif, the prosecutrix is prima-facie a willing and consenting party, the inconsistency in the statement of prosecutrix recorded under Section 161/164 Cr.P.C. as noted above, the same having not been explained, therefore they do not fall in the category of impeccable evidence, the prosecutrix in her subsequent statement under Section 164 Cr.P.C. has not implicated the applicant in the crime in question, by virtue of the scheme incorporated in the Code (Cr.P.C.), the statement under Section 164 Cr.P.C. has to be given credence over the statement under Section 161 Cr.P.C., the judgement of the Supreme Court in **Phool Singh (supra)**, the charge sheet having been submitted therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized, yet inspite 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 course of trial, the clean antecedents of applicant, 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 expressing any opinion on the merits of the case, applicant has made out a case for bail.

14. Accordingly, present application for bail is **allowed**.

15. Let the applicant-**Azim** involved in aforesaid case crime number 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 with the following conditions which are being imposed in the interest of justice:-

(i) Applicant will not tamper with prosecution evidence.

(ii) Applicant will abide the orders of court, will attend the court on every date and will not delay the disposal of trial in any manner whatsoever.

(iii) Applicant will not indulge in any unlawful activities.

(iv) Applicant will not misuse the liberty of bail in any manner whatsoever.

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

Order Date :- 23.11.2023

YK