

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 38101 of 2023

Applicant :- Mithlesh Kumar

Opposite Party :- State of U.P.

Counsel for Applicant :- Deepak Mishra, Pankaj Kumar Gupta

Counsel for Opposite Party :- G.A.

Connected with

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 22756 of 2023

Applicant :- Deshraj Saroj

Opposite Party :- State of U.P.

Counsel for Applicant :- Deepak Mishra

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

1. Heard Mr. Pankaj Kumar Gupta, the learned counsel for applicant-Mithlesh Kumar, Mr. Deepak Mishra, the learned counsel for applicant-Deshraj Saroj and the learned A.G.A. for State.

2. Perused the record.

3. These applications for bail have been filed by applicants-Mithlesh Kumar and Deshraj Saroj, seeking their enlargement on bail in Case Crime No. 37 of 2023, under Sections 366, 376(1) & 506 IPC, Police Station-Manjhanpur, District-Kaushambi during the pendency of trial.

4. Record shows that in respect of an incident, which is alleged to have occurred on 31.01.2023, a delayed FIR dated 04.02.2023 was lodged by first informant-Smt. Nathiya (mother of the prosecutrix) and was registered as Case Crime No. 37 of 2023, under Sections 366, 376(1) & 506 IPC and Sections 3/4 POCSO Act, Police Station-Manjhanpur, District-Kaushambi. In the aforesaid FIR, 3 persons namely (1) Mithlesh Kumar, (2) Deshraj (applicants herein) and (3) Achchey have been nominated as named accused.

5. The gravamen of the allegations made in the FIR is to the effect that named accused initially kidnapped the daughter of the first informant i.e. the prosecutrix and carried her away on a two wheeler. The FIR further records that named accused Mithlesh

Kumar deliberately dislodged the modesty of the prosecutrix by committing rape upon her. The FIR further states that named accused intended to sell the prosecutrix to one Achchey. It is at this juncture, that the prosecutrix somehow or the other freed herself from the clutches of the named accused.

6. 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., which is on record at page 21 of the paper book. The prosecutrix in her aforesaid statement has supported the FIR to the extent that the prosecutrix was kidnapped by the named accused Mithlesh Kumar and Deshraj Saroj and carried away on a motorcycle. Thereafter, her modesty was deliberately dislodged in the mustard field by named accused Mithlesh. The prosecutrix was thereafter 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 medically examined the prosecutrix, did not find any injury on her person so as to denote commission of deliberate or forceful sexual assault. Certain samples were taken from the body of the prosecutrix for pathological examination. However, the results of the same are in negative. Ultimately, the Doctor, who medically examined the prosecutrix, opined as follows:-

"Opinion - No opinion can be made about sexual intercourse as slide is negative for live or dead spermatozoa and age of pt. is about 20-25 years as per CMO Kaushambi."

7. As per the medical determination of age, the prosecutrix is said to be aged about in between 20 to 25 years. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. Same is on record at page 39 of the paper book. The prosecutrix in her aforesaid statement has rejoined her previous statement as noted above.

8. During course of investigation, Investigating Officer examined the first informant and other witnesses under Section 161 Cr.P.C. Witnesses so examined have also 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 named accused is fully established in the crime in question. He, accordingly, submitted the charge sheet dated 27.02.2023 whereby 2 of the named accused i.e. Mithlesh and Deshraj Saroj i.e. applicants herein have been charge sheeted under Sections 366, 376(1) & 506 IPC.

9. Learned counsel for applicants contend that though applicants are named as well as charge sheeted accused yet they are liable to be enlarged on bail. Applicants are innocent and they have been falsely implicated in the crime in question. The prosecutrix is major. The medical evidence does not support the ocular version of the occurrence. There is no evidence to show as to how the applicants reached where the prosecutrix had gone to attend the call of nature. The statement of the prosecutrix as well as the other witnesses recorded under Section 161 Cr.P.C. is completely silent on the aforesaid aspect. It is thus urged that applicants who are Jeeja and Sala have been falsely implicated in the crime in question on account of an ulterior motive. In the FIR giving rise to present criminal proceedings, the age of the prosecutrix has been mentioned as 16 years whereas as per the medical opinion, the prosecutrix is said to be aged about 20 to 25 years. It is thus urged that the allegations made in the FIR are false and concocted only to falsely implicate the present applicants on account of malice.

10. Even otherwise, applicants are men of clean antecedents inasmuch as, they have no criminal history to their credit except the present one. Applicants are in jail since 05.02.2023. As such, they have undergone more than 9 and 1/2 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 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, they submit 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.

11. Per contra, the learned A.G.A. has opposed the prayer for bail. He submits that the prosecutrix in her statements under Section 161/164 Cr.P.C. has clearly implicated the applicants for committing the crime in question. As such, the prosecutrix has remained clear, categorical and consistent qua the criminality committed by the named accused i.e. applicants herein. He, therefore, contends that since applicants are named/charge sheeted accused, therefore, they do not deserve any indulgence by this Court. Even otherwise, the prosecutrix, as per the medical opinion, is aged about 20 to 25 years. The prosecutrix being an unmarried young girl and the applicants being guilty of kidnapping the prosecutrix and thereafter dislodging her modesty deliberately, do no merit any sympathy of this Court. As such, the bail application is liable to be rejected.

12. When confronted with above, the learned counsel for applicants invited the attention of the Court to the statements of the prosecutrix recorded under Sections 161 Cr.P.C., before the Doctor and under Section 164 Cr.P.C. with reference to above, it is urged that the prosecutrix in her aforesaid statement has not remained clear, categorical and consistent qua the manner of occurrence. Furthermore, the complicity of the other named accused namely Achchey has not been found to be established in the crime in question which clearly shows that false allegations have been made in the FIR.

13. Having heard, the learned counsel for applicants, 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 as per the medical opinion, the prosecutrix is aged about 20 to 25 years, as such, she is major, the absence of any injury on the body of the prosecutrix so as to denote commission of deliberate or forceful sexual assault goes to show the bona-fide of the applicants, the final opinion given by the Doctor, who medically examined the prosecutrix is against the prosecutrix, the statements of the prosecutrix as noted above when taken as a whole cannot be said to be of impeccable character because of the inherent contradictions in the same, 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.

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

15. Let the **applicants-Mithlesh Kumar and Deshraj Saroj**, 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 APPLICANTS 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 APPLICANTS 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 APPLICANTS 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 APPLICANTS FAIL 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 APPLICANTS 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 APPLICANTS ARE 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 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 :- 24.11.2023

Vinay