

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 38760 of 2023

Applicant :- Brijesh Yadav

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

Counsel for Applicant :- Bal Ram Gupta

Counsel for Opposite Party :- G.A., Pankaj Sharma, S.N. Singh

Hon'ble Rajeev Misra, J.

Learned counsel for applicant has filed a supplementary affidavit, whereas the learned counsel representing first informant has filed counter affidavit in Court today, which are taken on record.

Heard Mr. Bal Ram Gupta, the learned counsel for applicant, the learned A.G.A. for State and Mr. Pankaj Kumar Mishra, the learned counsel representing first informant opposite party 2.

This bail application has been filed by the applicant Brijesh Yadav seeking his enlargement on bail in Case Crime No. 174 of 2023, under Sections 328, 376, 504, 506, 354, 384 IPC and Sections 7/8 POCSO Act, P.S. Friends Colony, District Etawah, during the pendency of trial.

Record shows that in respect of an incident, which is alleged to have occurred on 26.06.2023, a delayed F.I.R. dated 28.06.2023 was lodged by first informant Smt. Sapna and was registered as Case Crime No. 174 of 2023, under Sections 328, 376, 504, 506, 354, 384 IPC and Sections 7/8 POCSO Act, P.S. Friends Colony, District Etawah. In the aforesaid F.I.R., applicant Brijesh Yadav has been nominated as named accused, whereas an unknown person has also been arraigned as an accused.

After above mentioned 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 statement of the victim Smt. Sapna was recorded under Section 161 Cr. P. C., wherein she has supported the F.I.R. Thereafter, the statement of the prosecutrix i.e. minor was recorded under Section 161 Cr. P. C., wherein also she has supported the F.I.R. However, this prosecutrix has disclosed that her age is 17 years. Thereafter, the victim namely Sapna was medically examined. The Doctor who medically examined her did not find any injury on her body so as to denote the commission of deliberate or forceful sexual assault.

However, with regard to the private part of the victim, the Doctor has opined as follows:-

"Hymen old, healed, torned"

Certain samples were taken from the body of this victim for pathological examination. However, the result of the same are as follows:-

"Pathology report Vaginal smear of Sapna W/o Pawan Kumar on microscopic examination shares no spermatozoa"

The final opinion expressed by the Doctor regarding the victim is worth mentioning which is as under:-

"There are no signs of use of force/forceful penetration of Vagina however final opinion P.S. reserved pending on the availability of FSL, reports sexual violence can't be ruled out."

Ultimately, the statement of the victim was recorded under Section 164 Cr. P. C., wherein also she has rejoined her previous statement under Section 161 Cr. P. C. The statement of the prosecutrix (child) was recorded under Section 161 Cr. P. C., which is on record at page 28 of the paper book. The said prosecutrix in her aforesaid statement has supported the F.I.R. However, no allegation regarding commission of rape has been alleged by the prosecutrix against applicant. Thereafter, minor prosecutrix was requested for her internal medical examination, which was refused by her. Ultimately, the statement of the prosecutrix (child) was recorded under Section 164 Cr. P. C., which is on record at page 40 of the paper book. The prosecutrix (child) has rejoined her previous statement. On the basis of above and other material collected by the Investigating Officer, he came to the conclusion that complicity of applicant is established in the crime in question. He, accordingly, submitted the charge sheet dated 5.7.2023, whereby applicant has been charge sheeted under Sections 328, 376, 504, 506, 354, 384 IPC and Sections 7/8 POCSO Act.

Learned counsel for applicant contends that though applicant is a named and charge sheeted accused yet he is liable to be enlarged on bail. As per the medical evidence, the offence as complained of against the victim/first informant Sapna is not made out. With reference to the statement of the prosecutrix minor under Sections 161/164 Cr. P. C., it is urged that no offence under Sections 7/8 POCSO Act is made out against applicant, as there was no element of bad touch in the act of applicant against prosecutrix (minor). Attention of the Court was then invited to the document occurring

at page 47 of the paper book i.e. C.D. Parcha No. 8, wherein the Investigating Officer has collected call details of the applicant and the prosecutrix. On the above premise, the learned counsel for applicant contends that the applicant and the prosecutrix were acquainted to each other since long. It appears that they were in some consensual relationship. On the above premise, the learned counsel for applicant contends that applicant is liable to be enlarged on bail.

Even otherwise, the applicant is a man of clean antecedents having no criminal history to his credit except the present one. The applicant is in jail since 29.06.2023. As such, he has undergone more than 4 months of incarceration. The police report in terms of Section 173 (2) Cr. P. C. i.e. charge sheet has already been submitted. Therefore, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized. However, upto this stage no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. It is thus urged 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. and the learned counsel representing first informant have vehemently opposed the prayer for bail. They submit that since applicant is a charge sheeted accused, therefore, he does not deserve any indulgence by this Court. However, they could not dislodge the factual/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, the learned counsel representing first informant, 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 prima facie no offence under Sections 7/8 POCSO Act is made out against applicant and there was no act of bad touch committed by the applicant with the prosecutrix minor, the medical evidence does not support the charge sheet in respect of the victim, as per the document occurring at page 48 of the paper book, the applicant and the victim appear to be in consensual relationship, the clean antecedents of applicant, the period of incarceration undergone, the police report in terms of Section 173 (2) Cr. P. C. i.e. charge sheet has already been submitted, therefore, the entire evidence sought to be relied upon by the prosecution against applicant 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 applicant during the pendency of trial, therefore, irrespective of objections raised by the learned A.G.A. and the learned counsel representing first informant in opposition to the 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 **Brijesh Yadav** 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 :- 6.11.2023/HSM