

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 38993 of 2023

Applicant :- Hariom

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

Counsel for Applicant :- Shelendra Kumar, Kamendra Singh Jadaun

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

Heard Mr. Shelendra Kumar Badhotia, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant Hariom seeking his enlargement on bail in Case Crime No.208 of 2023, under Sections 452, 323, 506, 376 IPC and Section 16/17 Pocso Act, police station Raya, district Mathura, 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-4 on 28.08.2023. However, in spite of service of notice, no one has put in appearance on behalf of first informant-opposite party-4 to oppose the application for bail.

Record shows that in respect of an incident which is alleged to have occurred on 20.06.2023, a delayed first information report dated 21.06.2023 was lodged by first informant, namely, Dharmendra (father of the prosecutrix) and was registered as Case Crime No.0208 of 2023, under Sections 452, 376, 323, 506 IPC and Section 3/4 Pocso Act, police station Raya, district Mathura. In the aforesaid F.I.R., three persons, namely, Shivam @ Bhola, Hariom (applicant herein) and Amit have been nominated as named accused.

The gravamen of the allegations made in the first information report is to the effect that all the three named accused entered the house of the prosecutrix in the afternoon of 20.06.2023. Thereafter, named accused Shivam deliberately and forcibly dislodged the modesty of the prosecutrix, namely, 'X', whereas the other two named accused are said to be standing on guard.

After aforesaid first information report was lodged, Investigating Officer proceeded with statutory investigation of concerned Case Crime number in terms of Chapter XII CrPC. The statement of the prosecutrix was recorded under Section 161 CrPC, which is on record at page 41 of the paper book. The prosecutrix in her aforesaid statement has fully supported the F.I.R. Thereafter, the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor has rejoined her previous statement under Section 161

CrPC. The Doctor, who medically examined the prosecutrix, however did not find any injury on her body so as to denote commission of deliberate or forcible sexual assault. However, with regard to the private part of the prosecutrix he has opined as follows :-

"Hymen perineum : Old, torned healed"

Ultimately, the statement of the prosecutrix was recorded under Section 164 CrPC, which is on record at page 54 of the paper book. The prosecutrix in her aforesaid statement has not only rejoined her previous statement as noted above but has also detailed the manner of occurrence.

During the course of investigation, Investigating Officer recovered the High School mark-sheet/certificate of the prosecutrix, wherein her date of birth is recorded as 07.09.2006. The occurrence giving rise to the present criminal proceeding is alleged to have occurred on 20.06.2023. As such, the prosecutrix was aged sixteen years nine months and thirteen days on the date of occurrence. Investigating Officer also examined the first informant and other witnesses under Section 161 CrPC, who have substantially supported the F.I.R. On the basis of above and other material collected by the Investigating Officer during the course of investigation, he came to the conclusion that complicity of all the three named accused is established in the crime in question. Accordingly, he submitted the charge-sheet dated 22.07.2023, whereby applicant and co-accused Amit have been charge-sheeted under Sections 452, 323, 506, 376 IPC and Section 16/17 Pocso Act, whereas another named accused Shivam has been charge-sheeted under Sections 452, 323, 506, 376 IPC and Section 3/4 Pocso Act.

Learned counsel for the applicant contends that though the applicant is a named as well as charge-sheeted accused, yet he is liable to be enlarged on bail. As per the statements of the prosecutrix recorded under Section 161/164 CrPC, the offence of rape is alleged to have been committed by co-accused Shivam. As such, the case of the present applicant is distinguishable from named/charge-sheeted co-accused Shivam. It is then contended that applicant has been charge-sheeted under Section 16/17 of Pocso Act which means abetment. In the submission of the learned counsel for applicant, abetment is a question of fact and, therefore, subject to trial evidence. Up to this stage, there is nothing on record to show that the applicant is guilty of dislodging the modesty of the prosecutrix deliberately or forcibly. As such, no offence under Section 376 IPC as complained of is made out against the applicant.

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 custody since 15.07.2023. As such, he has undergone more than three months of incarceration. The police report in terms of Section 173 (2) CrPC has already been submitted. As such, the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized. However, up to this stage, no such circumstance has

emerged necessitating the custodial arrest of applicant during the pendency of trial. It is thus urged that the 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. for State has vehemently opposed the prayer for bail. He submits that since applicant is a named/charge-sheeted accused therefore, he does not deserve any indulgence by this court. The criminality committed by the named/charge-sheeted accused is joint and common therefore, the same is incapable of separation and segregation. As such, no exception can be carved out in the case of present applicant. He, therefore, contends that no sympathy be shown by this Court in favour of the applicant. However, he 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, coupled with the fact that the prosecutrix in her statements under Section 161/164 CrPC has implicated named/charge-sheeted co-accused Shivam for deliberately and forcibly dislodging her modesty as such the case of present applicant is distinguishable from named/charge-sheeted co-accused Shivam, the applicant is alleged to have abetted in the commission of crime, abetment is a question of fact and therefore subject to trial evidence, the police report under Section 173 (2) CrPC i.e. charge-sheet has already been submitted, therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized, yet in spite of above the learned A.G.A. could not point out from the record any such circumstance necessitating the custodial arrest of the applicant during the pendency of trial, the judgement of the Supreme Court in **Sumit Subhashchandra Gangwal and another Vs. State of Maharashtra and another, 2023 Livelaw SC 373 (Paragraph 5)**, the clean antecedents of the 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 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 **Hariom**, 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 :- 17.10.2023.

Rks.