

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 40208 of 2023

Applicant :- Babu @ Tapan

Opposite Party :- State of U.P.

Counsel for Applicant :- Anil Kumar

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Anil Kumar Shukla, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. This application for bail has been filed by applicant-Babu @ Tapan, seeking his enlargement on bail in Case Crime No. 228 of 2020, under Sections 364-A, 302, 201, 34 IPC, Police Station-Banna Devi, District-Aligarh during the pendency of trial.

4. Record shows that in respect of an incident, which is alleged to have occurred on 15.05.2020, a prompt FIR dated 15.05.2020 was lodged by first informant-Dharmendra Singh (father of the deceased) and was registered as Case Crime No. 228 of 2020, under Sections 364-A IPC, Police Station-Banna Devi, District-Aligarh. In the aforesaid FIR, an unknown person has been arraigned as solitary accused.

5. At the very outset, the learned counsel for applicant contends that co-accused-Shivam Kumar has already been enlarged on bail by this Court vide order dated 20.09.2023 passed in Criminal Misc. Bail Application No. 7501 of 2021 (Shivam Kumar Vs. State of U.P.). For ready reference, the order dated 20.09.2023 is reproduced hereinunder:-

"1. On 11.8.2023, learned AGA was directed to obtain the instruction whether the alleged hairs and buttons recovered from the deceased has been sent for DNA examination or not.

2. Sri Suresh Bahadur Singh, learned AGA submits that as per his instruction the alleged recovered hairs and buttons could not be sent for DNA examination.

3. *Heard Sri Sanjay Pathak, learned counsel for the applicant; Sri Kumar Beenu Singh, learned counsel for the informant and Sri Suresh Bahadur Singh, learned AGA-I for the State-respondent.*
4. *The instant application has been filed seeking release of the applicant on bail in Case Crime No. 228 of 2020, under Sections 364A/302/201/34 IPC, Police Station Banna Devi, District Aligarh, during pendency of the trial in the court below.*
5. *FIR of the present case was lodged against the unknown person under sections 364-A IPC and according to the FIR, son of the informant aged about 16 years had gone from his house after informing that he is going for a photo-shoot and at about 13:10 hours on the mobile phone of Mayank Agarwal, the clerk of Bank of Baroda from the mobile of the son of the informant, a ransom call was received and caller informed to Mayank Agarwal that he kidnapped the son of the informant and he demanded Rs. Ten lacs.*
6. *Learned counsel for the applicant submitted that applicant was not named in the FIR and during investigation, he was made accused in the present matter through the statement of the daughter of the informant who stated that son of the informant while departure from home informed that applicant called him for photo-shoot.*
7. *He further submitted that thereafter applicant was arrested and it is alleged that he confessed his guilt and on his pointing out, dead body of the son of the informant was recovered which was lying near the river.*
8. *He further submitted that except these two witnesses, there is no cogent other evidence against the applicant on record.*
9. *He further submitted that if deceased before departure from the home informed to his family members that on call of the applicant, he is going for photo-shoot then definitely, name of the applicant would have been surfaced in the FIR and therefore, it appears that subsequently a false story has been cooked up due to the reason that applicant used to go on photo-shoot alongwith the deceased and other accused persons.*
10. *He further submitted that the alleged dead body was recovered upon the place which is accessible to all and therefore, merely on the basis of recovery of the dead body on the pointing out of the applicant, it cannot be said that applicant committed the murder of the deceased.*
11. *He further submitted that applicant is having no criminal history and he is in jail in the present matter since 16.5.2020 i.e. for more than three years, therefore, he may be released on bail.*
12. *Per contra, learned AGA as well as learned counsel for the informant opposed the prayer for bail but could not dispute the arguments on fact advanced by learned counsel for the applicant.*
13. *I have heard learned counsel for the parties and perused the record of the case.*

14. Considering the fact that it is a case of circumstantial evidence and except the evidence disclosed by learned counsel for the applicant, there is no other evidence appears to be on record against the applicant and he is in jail in the present matter since 16.5.2020 i.e. for more than three years and he is having no criminal history, in my view, applicant is entitled to be released on bail.

15. Accordingly, without expressing any opinion on the merits of the case, the instant bail application is allowed.

16. Let the applicant-Shivam Kumar, be released on bail in the aforesaid case on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions:-

(i) The applicant shall appear before the trial court on the dates fixed, unless his personal presence is exempted.

(ii) The applicant shall not directly or indirectly, make inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or any police officer or tamper with the evidence.

(iii) The applicant shall not indulge in any criminal and anti-social activity.

17. In case of breach of any of the above condition, the prosecution will be at liberty to move an application before this Court for cancellation of the bail of the applicant.

18. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial."

6. On the above premise, the learned counsel for applicant submits that the case of present applicant is on better footing than co-accused Shivamf Kumar who has already been enlarged on bail. The complicity of applicant in the crime in question has emerged in the confessional statement of aforementioned co-accused Shivam Kumar. Except for above, there is no other incriminating circumstance against applicant. According to the learned counsel for applicant, present case is a case of circumstantial evidence, therefore, there is no eye witness of the occurrence. The complicity of an accused in a case based on circumstantial evidence has to be inferred in accordance with the parameters laid down by the Apex Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622 (Paragraph 152)**. However, none of the parameters laid down in aforementioned judgment are satisfied against applicant up to this stage. Moreover, the confessional statement of accused is inadmissible in evidence.

7. 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 jail since 16.05.2022. As such, he has undergone more than 5 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 applicant stands crystallized. However, up to this stage, no such circumstance has emerged necessitating the custodial arrest of the applicant during the pendency of trial. On the above premise, he submits 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.

8. Per contra, the learned A.G.A. has 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.

9. Having heard, the learned counsel for applicant, 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 co-accused Shivam Kumar has already been enlarged on bail, the case of present applicant is on better footing than co-accused Shivam Kumar inasmuch as, the only incriminating circumstance that has emerged against applicant is the confessional statement of co-accused Shivam Kumar, the confessional statement of an accused is prima-facie inadmissible in evidence, the clean antecedents of applicant, 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 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 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, applicant has made out a case for bail.

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

11. Let the **applicant-Babu @ Tapan**, be released on bail in the aforesaid case crime number 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) THE APPLICANT 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 APPLICANT 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 APPLICANT 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 APPLICANT FAILS 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 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 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.

12. 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 :- 3.11.2023

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