

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 41090 of 2023

Applicant :- Akshay

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

Counsel for Applicant :- Keshari Nath Tripathi

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

Heard Mr. Pramod Kumar Singh, Advocate, holding brief of Mr. Keshari Nath Tripathi, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant Akshay seeking his enlargement on bail in Case Crime No. 97 of 2023, under Sections 363, 366A, 376 IPC and Sections 3/4 POCSO Act, 2012, P.S. Nagal, District Saharanpur, during the pendency of trial.

Perused the record.

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 4 on 7.9.2023. In spite of service of notice, no one has put in appearance on behalf of first informant opposite party 4 to oppose this application for bail.

Record shows that in respect of an incident, which is alleged to have occurred on 08.04.2023, a delayed F.I.R. dated 12.4.2023 was lodged by first informant Mahak Singh (sister of the prosecutrix) and was registered as Case Crime No. 97 of 2023, under Sections 363 IPC, P.S. Nagal, District Saharanpur,. In the aforesaid F.I.R., two persons namely Akshay and Arjun have been nominated as named accused.

The gravamen of the allegations made in the F.I.R. is to the effect that named accused enticed away the sister of first informant namely X.

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 13.04.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 Cr. P. C. The prosecutrix in her aforesaid statement has not supported the F.I.R. To the contrary, she has stated that she herself willingly accompanied the applicant and physical relations between the parties were established upon the consent of the prosecutrix. Thereafter, the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor, who medically examined her has rejoined her previous statement recorded under Section 161 Cr. P. C. However, the Doctor, who examined the prosecutrix did not find any injury on her body so as to denote commission of deliberate or forceful sexual assault. With regard to private part of the prosecutrix, the Doctor has opined as follows:-

"Hymen Perineum Old Torn Healed Hymen"

Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr. P. C. Same is on record at page 51 of the paper book. The prosecutrix in her said statement has reiterated her earlier statement under Section 161 Cr. P. C. During course of investigation, Investigating Officer recovered the High School Certificate of the prosecutrix, wherein her date of birth has been mentioned as 11.10.2005. The occurrence giving rise to present criminal proceedings is said to have occurred on 8.4.2023. By reason of above, the prosecutrix was aged about 17 years and 5 months on the date of occurrence. On the basis of above and other material collected by Investigating Officer during the course of investigation, he came to the conclusion that complicity of applicant is established in the crime in question. He, accordingly, submitted the charge sheet dated 19.4.2023, whereby applicant has been charge sheeted, under Sections 363, 366A, 376 IPC and Sections 3/4 POCSO Act, 2012.

Learned counsel for applicant contends that though applicant is a named and charge sheeted accused, yet he is liable to be enlarged on bail. With reference to the statements of the prosecutrix referred to above he submits that the prosecutrix was neither abducted nor kidnapped by the applicant. To the contrary, the prosecutrix herself joined the applicant and thereafter accompanied him to various places. As such, no offence under Sections 363, 366A IPC can be said to have been committed by applicant

It is next contended that the prosecutrix is a willing and consenting party. Physical relations between the parties were established upon the consent of the prosecutrix. Therefore, no deliberate or forceful

sexual assault was committed upon the prosecutrix. As such, no offence under Section 376 IPC or Sections 3/4 POCSO Act, 2015, can be said to have been committed by applicant. As per the documentary evidence, the prosecutrix was aged about 17 years and 5 months on the date of occurrence.

Even otherwise applicant appellant is a man of clean antecedents inasmuch he has no criminal history to his credit except the present one. Applicant is in jail since 19.04.2023. As such, he has undergone more than 6 months of incarceration. The police report in terms of Section 173 (2) Cr. P. C. having been submitted, therefore, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized, yet 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. On the above premise, he 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. has opposed the prayer for bail. He submits that since the applicant is a named and charge sheeted accused, therefore, he does not deserve any indulgence by this Court. The learned A.G.A. further submits that since the prosecutrix was below 18 years of age on the date of occurrence, therefore, her consent, if any is immaterial. The prosecutrix is a young girl whose modesty has been dislodged. As such, no sympathy be shown by this Court in favour of applicant. However, he 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 for 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 the prosecutrix in her statement recorded under Section 161 Cr. P. C. has not supported the F.I.R., to the contrary, she has stated that she herself willingly accompanied the applicant and physical relations between the parties were established upon the consent of the prosecutrix, the prosecutrix in her statement before the Doctor, who medically examined her has rejoined her previous statement recorded under Section 161 Cr. P. C., however, the Doctor, who examined the prosecutrix did not find any injury on her body so as to denote commission of deliberate or forceful sexual assault, the clean antecedents of the applicant, the period of

incarceration undergone, the police report in terms of Section 173 (2) Cr. P. C. having been submitted, therefore, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized, yet 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 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 **Akshay** 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 :- 3.11.2023/HSM