

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 40355 of 2023

Applicant :- Loha Alias Satish Kushwaha

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Pankaj Kumar Yadav

Counsel for Opposite Party :- G.A.,Jitendra Rpsad
Kushwaha,Nikhil Shukla

Hon'ble Rajeev Misra,J.

1. Heard Mr. Pankaj Kumar Yadav, the learned counsel for applicant, the learned A.G.A. for State and Mr. Nikhil Shukla, the learned counsel representing first informant.
2. Perused the record.
3. This application for bail has been filed by applicant-Loha alias Satish Kushwaha, seeking his enlargement on bail in Case Crime No. 149 of 2023, under Sections 147, 323, 504, 506, 452, 354D, 376 IPC and Section 67A I.T. Act, Police Station-Kotwali Padrauna, District-Kushinagar during the pendency of trial.
4. Record shows that in respect of an incident, which is alleged to have occurred on 15.02.2023, a delayed FIR dated 17.02.2023 was lodged by the prosecutrix-Madhu Kushwaha and was registered as Case Crime No. 149 of 2023, under Sections 147, 323, 504, 506, 452, 354D IPC, Police Station-Kotwali Padrauna, District-Kushinagar. In the aforesaid FIR, 5 persons namely - (1) Loha @ Satish (applicant herein), (2) Monakka Kushwaha, (3) Dara @ Dharmendra, (4) Shivprakash and (5) Rajesh have been nominated as named accused.
5. 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/first informant was recorded under Section 161 Cr.P.C. The prosecutrix in her aforesaid statement has departed from the basic prosecution story as unfolded in the FIR. It is now alleged that one of the named accused Loha Alias Satish Kushwaha i.e. applicant herein is alleged to have snapped obscene photographs of the prosecutrix and on basis thereof, terrorized the prosecutrix to

maintain physical relations with her and ultimately, succeeded in establishing physical relations with the prosecutrix. The prosecutrix was subjected to medical examination. From the perusal of the case diary, it is apparent that the Doctor, who medically examined the prosecutrix did not find any injury on her body so as to denote commission of deliberate sexual assault. However, with regard to the private part of the prosecutrix, the Doctor has opined as follows:-

"Hymen - Old, Healed Torn"

6. Certain samples were taken from the body of the prosecutrix for pathological examination. However, the result of the same are in negative.

7. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. wherein the prosecutrix has reiterated her previous statement under Section 161 Cr.P.C.

8. It is apposite to mention here that in the occurrence giving rise to present criminal proceedings, 2 other persons namely Sudarshan Kushwaha and Puja Kushwaha sustained injuries. Their injury reports are on record at pages 28 and 29 of the paper book.

9. On the basis of above and other material collected by Investigating Officer during course of investigation, he came to the conclusion that complicity of only 2 of the named accused namely Loha @ Satish Kushwaha and Monakka Kushwaha is established in the crime in question. He, accordingly, submitted the charge sheet dated 06.07.2023 whereby applicant Loha @ Satish Kushwaha has been charge sheeted under Sections 147, 323, 504, 506, 452, 354D, 376 IPC and Section 67A I.T. Act whereas, co-accused Monakka Kushwaha has been charge sheeted under Sections 323, 504 IPC.

10. Learned counsel for applicant submits that in respect of the same occurrence, which occurred on 15.02.2023, an FIR from the side of applicant was lodged on 16.02.2023 which was registered as Case Crime No. 323, 504, 506, 452, 325, 427 IPC, Police Station-Kotwali Padrauna, District-Kushinagar. In the aforesaid FIR, 4 persons namely (1) Sudarshan, (2) Baliram, (3) Meera and (4) Madhu have been nominated as named accused.

11. On the above premise, he submits that the occurrence is admitted to the parties, as cross FIRs have been lodged from both the sides. It is then contended that though the FIR is not the

encyclopedia of the prosecution case but it must be disclosed the basic prosecution case. To buttress his submission, he has relied upon the following judgments of Supreme Court in **(i). Manoj and Others Vs. State of Maharashtra, (1999) 4 SCC 268, (ii). Subhash Kumar Vs. State of Uttarakhand, (2009) 6 SCC 641** and **(iii). Achhar Singh Vs. State of M.P. (2021) 5 SCC 543**. On the above premise, he contends that the prosecutrix herself lodged the FIR. However, the allegations with regard to snapping of obscene photographs of the prosecutrix and thereafter, deliberately dislodging the modesty of the prosecutrix are conspicuous by its absence in the FIR. The prosecutrix in her statements under Sections 161/164 Cr.P.C. has departed from the basic prosecution case as unfolded in the FIR. However, no explanation has come forward from the prosecutrix with regard to the aforesaid departure. On the above premise, the learned counsel for applicant contends that the statements of the prosecutrix under Sections 161/164 Cr.P.C. are, therefore, unworthy of credit and therefore, liable to be ignored by this Court at this stage.

12. 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 26.06.2023. As such, he has undergone more than 4 months of incarceration. The police report in terms of Section 173(2) Cr.P.C. 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.

13. Per contra, the learned A.G.A. for State and the learned counsel representing first informant have vehemently opposed the prayer for bail. They submit that since applicant is a named as well as charge sheeted accused, therefore, he does not deserve any indulgence by this Court. The prosecutrix in her statements under Sections 161/164 Cr.P.C. has clearly implicated the applicant for having dislodging her modesty deliberately and forcibly. As such, no sympathy be shown by this Court in favour of applicant. However, they could not dislodge the factual and legal submissions urged by the learned counsel for applicant with reference to the record at this stage.

14. Having heard, the learned counsel for applicant, the learned A.G.A. for State, the learned counsel representing first informant,

upon perusal of record, evidence, nature and gravity of offence, accusations made, complicity of accused and coupled with the fact that the FIR giving rise to present criminal proceedings was lodged by the prosecutrix herself, in the FIR, no allegation has been made by the prosecutrix regarding the fact that obscene photographs of the prosecutrix were snapped by present applicant nor there is any allegation that on the basis of above, the applicant forcibly and deliberately dislodged the modesty of the prosecutrix, the prosecutrix has departed from the basic prosecution story as unfolded in the FIR in her statements under Sections 161/164 Cr.P.C., though FIR is not the encyclopedia of the prosecution case but it must be disclosed the basic prosecution case, however, the departure so made by the prosecutrix from the basic prosecution case remains unexplained up to this stage, 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. and the learned counsel representing first informant 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. and the learned counsel representing first informant 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.

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

16. Let the **applicant-Loha Alias Satish Kushwaha**, 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.

17. 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 :- 2.11.2023

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