

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 41020 of 2023

Applicant :- Raju Batham @ Hariom

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

Counsel for Applicant :- Akash Mishra

Counsel for Opposite Party :- G.A.,Aditya Kumar Rai

Hon'ble Rajeev Misra,J.

1. Heard Mr. Akash Mishra, 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-Raju Batham @ Hariom, seeking his enlargement on bail in Case Crime No. 159 of 2023, under Sections 354, 323, 506, 341, 342, 376-D IPC and Sections 5G/6 POCSO Act, Police Station-Saifai, District-Etawah during the pendency of trial.

4. At the very outset, the learned A.G.A. contends that notice of present application for bail has been served upon first informant-opposite party 2 on 09.09.2023. However, in spite of service of notice, no one has put in appearance on behalf of first informant-opposite party 2 to oppose this application for bail.

5. Record shows that in respect of an incident, which is alleged to have occurred on 27.07.2023, a prompt FIR dated 27.07.2023 was lodged by first informant-Vineet Gupta and was registered as Case Crime No. 159 of 2023, under Sections 354, 323, 506, 341, 342 IPC, Police Station-Saifai, District-Etawah. In the aforesaid FIR, 2 persons namely (1) Raju Batham (applicant herein) and (2) Pushpendra Yadav have been nominated as named accused.

6. At the very outset, the learned counsel for applicant submits that co-accused Shailendra Kumar and Vivek Shakya have already been enlarged on bail by this Court vide order dated 30.10.2023 passed in Criminal Misc. Bail Application No. 45679 of 2023 (Shailendra Kumar And Another VS. State of U.P. and 3 Others). For ready reference, the order dated 30.10.2023 is reproduced hereinunder:-

"1. Sri Kamlesh Singh, learned counsel for the applicants submits that due to mistake in the prayer clause of the instant bail application, section 5 Cha has been mentioned in place of section 5 Chha and therefore, they may be permitted to make necessary correction in the prayer clause, during the course of the day.

2. In view of the above, learned counsel for the applicants is permitted to make necessary correction in the prayer clause of the instant bail application during the course of the day, itself.

3. Sri Aditya Kumar Rai, Advocate submitted that he has filed his power on behalf of the informant in the office of this Court on 28.10.2023 but his name could not be shown in the cause list.

4. Heard Sri Kamlesh Singh, learned counsel for the applicants; Sri Ajai Kumar Rai, learned counsel for the informant and Sri Amar Nath Vishwakarma, learned Brief Holder for the State-respondent.

5. The instant application has been filed seeking release of the applicants on bail in Case Crime No. 159 of 2023, under Sections 354, 323, 506, 341, 342, 376D IPC & Section 5 Chha/6 POCSO Act, Police Station Safai, District Etawah, during pendency of the trial in the court below.

6. FIR of the present case was lodged against two persons (non applicants) and according to the FIR on 27.7.2023 at about 7 am when daughter of the informant was going to school then on the way nominated accused Raju intercepted her and forcibly took her in his house and outraged her modesty.

7. It is further mentioned in the FIR that in the house of co-accused Raju another co-accused Pushpendra Yadav was also present and he also outraged her modesty and when his daughter resisted then they threatened to kill her brother Gagan.

8. Learned counsel for the applicants submitted that the applicants were neither named in the FIR nor in the statement of the victim recorded under section 161 Cr.P.C. and from perusal of the statement of the victim recorded under section 161 Cr.P.C. it appears that she stated that co-accused Pushpendra has taken her at his home and pressurized her to make conversation with co-accused Raju and thereafter he dropped her but when her statement under section 164 Cr.P.C. was recorded after six days then victim changed her earlier version and stated that applicants and co-accused Pushpendra and others committed rape with her and this fact clearly suggests that victim is not a reliable witness.

9. He further submitted that only being friends of co-accused Pushpendra and Raju, applicants have been roped in the present matter.

10. He further submitted that applicants are having no criminal history and they are in jail in the present matter since 11.8.2023.

11. Per contra, learned AGA as well as learned counsel for the informant opposed the prayer for bail and submitted that victim is minor girl aged

about 16 and half year and she in her statement recorded under section 164 Cr.P.C. categorically stated that applicants and two others have committed rape upon her.

12. They further submitted that even according to the doctor, possibility of sexual assault cannot be ruled out and her injury report also suggests that it is a case of sexual assault but both could not dispute the fact that in the statement of victim under section 161 Cr.P.C. applicants were not even named and in her statement under section 161 Cr.P.C. she did not even make any allegation of rape and only stated that co-accused Pushpendra had taken her to his house where he pressurized her to make conversation with co-accused Raju and thereafter he dropped her at her house.

13. They further could not dispute the fact that applicants are having no previous criminal history.

14. I have heard learned counsel for the parties and perused the record of the case.

15. Although, from the perusal of the record, it appears that victim is even below 18 years old girl and she in her statement recorded under section 164 Cr.P.C. made allegation of gang rape against the applicants and two others and her medical examination report also indicates that it may be a case of sexual assault and rape but there are material contradictions in the statements of the victim recorded under sections 161 Cr.P.C. and 164 Cr.P.C. and in the statement recorded under section 161 Cr.P.C. she did not even disclose the name of the applicant and only disclose the name of nominated accused persons Raju and Pushpendra and against them also she did not make any allegation of rape and only stated that co-accused Pushpendra had taken her at his house and pressurized her to make conversation with co-accused Raju and thereafter Pushpendra himself dropped her at her house.

16. Further applicants are having no previous criminal history to their credit and they are in jail in the present matter since 11.8.2023.

17. Therefore, considering the facts and circumstances of the case, discussed above, in my view, applicants are entitled to be released on bail.

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

19. Let the applicants, Shailendra Kumar and Vivek Shakya- 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 applicants shall appear before the trial court on the dates fixed, unless their personal presence is exempted.

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

or tamper with the evidence.

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

20. 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 applicants.

21. 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.

Order Date :- 30.10.2023"

7. It is next contended that though applicant is a named as well as charge sheeted accused inasmuch as, the charge sheet has been submitted against applicant along with 3 others on 03.09.2023 yet he is liable to be enlarged on bail. The prosecutrix in her statement under Section 161 Cr.P.C. has not implicated the applicant in the crime in question. The complicity of applicant and other accused in the crime in question has surfaced only in the subsequent statement of the prosecutrix recorded under Section 164 Cr.P.C. On the above premise, it is urged that the prosecutrix has been inconsistent in her statements under Sections 161/164 Cr.P.C. Even otherwise, the role of dislodging the modesty of the prosecutrix has been assigned to all the 4 accused, in which, 2 of the charge sheeted co-accused have already been enlarged on bail. He, therefore, contends that there is no such distinguishing feature on the basis of which, the case of present applicant could be so distinguished from aforementioned charge sheeted but bailed out co-accused so as to deny bail to the present applicant. He, therefore, contends that in view of above and for the facts and reasons recorded in the bail order of aforementioned co-accused, applicant is also liable to be enlarged on bail on the ground of parity.

8. 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 03.08.2023. As such, he has undergone more than 3 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.

9. Per contra, the learned A.G.A. has opposed the prayer for bail. 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.

10. 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 2 of the charge sheeted accused namely Shailendra Kumar and Vivek Shakya have already been enlarged on bail, the role of deliberately dislodging the modesty of the prosecutrix by committing rape upon her has been alleged against all the 4 charge sheeted accused, as such, the case of present applicant is similar and identical to aforementioned charge sheeted but bailed out co-accused, the learned A.G.A. could not point out any such circumstance from the record distinguishing the case of present applicant from aforementioned charge sheeted but bailed out co-accused so as to deny bail to present applicant, 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.

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

12. Let the **applicant-Raju Batham @ Hariom**, 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.

13. 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

Vinay