

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 41338 of 2023

Applicant :- Vikky

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

Counsel for Applicant :- Pramod Kumar Singh,Parvat Singh

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

Heard Mr. Lalit Srivastava, Advocate holding brief of Mr. Parvat Singh, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant Vikky seeking his enlargement on bail in Case Crime No.281 of 2023, under Sections 363, 366, 376 IPC and Section 3/4 Pocso Act, police station Kotwali Nagar, district Bulandshahar, during the pendency of trial.

At the very outset, learned A.G.A. submits that notice of the present application for bail has been served upon first informant-opposite party-2 on 19.09.2023. 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.

Perused the record.

Record shows that in respect of an incident which is alleged to have occurred on 20.03.2023, a delayed first information report dated 11.04.2023 was lodged by first informant-Kamlesh (mother of the prosecutrix) and was registered as Case Crime No.0281 of 2023, under Sections 363, 366 IPC, police station Kotwali Shahar, district Bulandshahar. In the aforesaid F.I.R., the applicant Vikky has been nominated as solitary named accused.

The gravamen of the allegations made in the first information report is to the effect that the named accused Vikky enticed away the minor daughter of first informant i.e. prosecutrix namely 'X' aged about 17 years.

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 prosecutrix was recovered on 10.04.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 CrPC, which is on record at page 32 of the paper book. The

prosecutrix in her aforesaid statement has not supported the F.I.R. To the contrary, the prosecutrix stated that she is in love with the applicant and she herself went to the applicant and thereafter accompanied him to other places. She has further stated that no such act was committed by the applicant so as to dislodge her modesty. The prosecutrix further stated that on previous occasion also she had joined the applicant out of her own sweet will and on account of which Case Crime No.371 of 2022, under Section 363 IPC was lodged against applicant. 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 under Section 161 CrPC. However, the Doctor, who medically examined her, did not find any injury on her body so as to denote deliberate or forcible sexual assault. However, with regard to the private part of the prosecutrix, the Doctor has opined as follows :-

"Hymen - Raptured."

Ultimately, the statement of the prosecutrix was recorded under Section 164 CrPC, which is on record at page 60 of the paper book. The prosecutrix in her aforesaid statement has reiterated her previous statement recorded under Section 161 CrPC. No allegation of any kind has been made by the prosecutrix against the present applicant. The genesis of the said statement is to the effect that the prosecutrix herself accompanied the applicant willingly.

During the course of investigation, Investigating Officer recovered the certificate of the Principal of the Institution where the prosecutrix had studied. As per the records of the said institution, the date of birth of the prosecutrix recorded therein is 18.10.2005. The occurrence giving rise to the present criminal proceeding has occurred on 20.03.2023. As such, the prosecutrix was aged about 17 years and 05 months on the date of occurrence. Investigating Officer further examined the first informant and other witnesses under Section 161 CrPC. The witnesses so examined have supported the FIR. On the basis of above and other material collected by the Investigating Officer during the course of investigation, he came to the conclusion that the complicity of applicant is fully established in the crime in question. Accordingly, he submitted the charge-sheet dated 06.08.2023, whereby applicant Sumit has been charge-sheeted under Sections 363, 366, 376 IPC and Section 3/4 PocsO Act.

Learned counsel for the applicant contends that though the applicant is a named/charge-sheeted accused, inasmuch as, the charge-sheet has been submitted against applicant on 06.08.2023 yet he is liable to be enlarged on bail. With reference to the statements of the prosecutrix recorded under

Sections 161/164 CrPC, the learned counsel for applicant contends that it is evident that the prosecutrix herself came to the applicant and thereafter accompanied the applicant to various other places. On the above premise, it is thus urged that applicant cannot be said to be guilty of either kidnapping, abducting or enticing the prosecutrix. She is a willing and consenting party. As such, no offence under Sections 363, 366 IPC can be said to have been committed by the applicant. With reference to the medical report of the prosecutrix, the learned counsel for applicant contends that no signs were found by the Doctor who medically examined the prosecutrix on her body so as to denote commission of deliberate or forceful sexual assault. As such, the medical evidence does not support the charge-sheet under Section 376 IPC and Section 3/4 Pocso Act. Referring to the statement of the prosecutrix under Section 164 CrPC, he contends that the prosecutrix in her aforesaid statement has stated in unequivocal terms that no illegal act (forceful dislodging modesty of the prosecutrix) was performed by the applicant. On the above premise, he therefore contends that as per the material on record the charge-sheet cannot be sustained. As such, applicant is liable to be enlarged on bail.

Even otherwise, applicant is a man of clean antecedents having no criminal history to his credit except the present one. The applicant is in jail since 04.08.2023. As such, he has undergone more than three and half months of incarceration. The police report under Section 173 (2) CrPC i.e. the charge-sheet has been submitted against the applicant, therefore the entire evidence sought to be relied upon by prosecution against applicant stands crystalized. However, up to this stage, no such circumstance has emerged on the basis of which it can be said that custodial arrest of applicant is absolutely necessary during the pendency of trial. It is thus contended by the learned counsel for applicant 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 vehemently opposed the prayer for bail. He submits that since the applicant is a named/charge-sheeted accused therefore, he does not deserve any indulgence by this court. As per the material on record since the prosecutrix is below 18 years of age therefore her consent, if any, is immaterial. As per the medical opinion qua the private part of the prosecutrix the learned A.G.A. contends that medical evidence clearly shows that the modesty of the prosecutrix was dislodged. It is thus urged that no sympathy be shown by this Court in favour of applicant. However, he could not dislodge the factual and legal submissions urged by the learned counsel for the 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 as per the statements of the prosecutrix recorded under Section 161/164 CrPC prima facie she is a willing and consenting party, she herself came and join the applicant as such applicant cannot be held to be guilty of either kidnapping or abducting the prosecutrix for dislodging her modesty, therefore no offence under Sections 363, 366 IPC can be said to have been committed by applicant, the prosecutrix in her statements referred to above has not alleged that her modesty was dislodged by the applicant forcibly or deliberately therefore no offence under Section 376 IPC and Section 3/4 Pocso Act can be said to have been made out against applicant, in spite of the fact that the charge-sheet has been submitted against applicant and therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized, yet the learned A.G.A. could not point out any such incriminating circumstance from the record necessitating the custodial arrest of the applicant during the pendency of trial, the judgement of 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 merit of the case, the applicant has made out a case for bail.

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

Let the applicant **Vikky**, 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 :- 28.11.2023.

Rks.