

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 43219 of 2023

Applicant :- Chand Mohammad

Opposite Party :- State of U.P.

Counsel for Applicant :- Ashutosh Kumar Pandey

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Ashutosh Kumar Pandey, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. Instant application for bail has been filed by applicant-Chand Mohammad seeking his enlargement on bail in Case Crime No. 268 of 2023 under Sections 376 (2) (F), 323, 506 I.P.C., Police Station- Mugalsarai, District-Chandauli, during the pendency of trial.

4. Record shows that an F.I.R. dated 14.08.2023 was lodged by first informant Smt. Shahnaj (mother of the prosecutrix) and was registered as Case Crime No. 268 of 2023 under Sections 376, 323, 506 I.P.C., Police Station- Mugalsarai, District-Chandauli, In the aforesaid F.I.R. applicant-Chand Mohammad has been nominated as solitary named accused.

5. The gravamen of the allegations made in the F.I.R. is to the effect that Afsana, the daughter of first informant, blessed with daughter, resides with the first informant as her husband has died. The husband of the first informant namely Chand Mohammad has repeatedly dislodged the modesty of the daughter of first informant

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6. After aforementioned F.I.R. was lodged, the Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter XII Cr.P.C. Thereafter statement of the prosecutrix was recorded by the Investigating Officer under Section 161 Cr.P.C, which is on record at page 20 of the paper book. The prosecutrix in her aforesaid statement, has fully supported the F.I.R. Subsequent to above, the prosecutrix was requested for her internal medical examination. However, the same was refused by her. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. copy of which is on record at page 23 of the paper book. However, the prosecutrix in her aforesaid statement, has departed from her previous statement under Section 161 Cr.P.C. and has now not supported the F.I.R..

7. During course of investigation, Investigating officer examined first informant and other witnesses under Section 161 Cr.P.C. However, witnesses so examined have substantially supported the F.I.R. On the basis of above and other material collected by the Investigating Officer during course of investigation, he came to the conclusion that complicity of applicant is fully established in the crime in question. Accordingly, Investigating Officer, submitted the charge sheet dated 28.09.2023 whereby applicant has been charge sheeted under Sections 376 (2) (F), 323, 506 I.P.C.

8. Learned counsel for applicant contends that though the applicant is the father of the prosecutrix, a named and charge sheeted accused yet he is liable to be enlarged on bail. There is no medical evidence to support the ocular version of the occurrence inasmuch as prosecutrix herself refused for her internal medical examination. It is next contended that the prosecutrix in her subsequent statement under Section 164 Cr.P.C. has departed from

her previous statement under Section 161 Cr.P.C. and has now supported the F.I.R.. According to the learned counsel for applicant, as per scheme of the Code (Cr.P.C.) statement of the prosecutrix recorded under Section 164 Cr.P.C. has to be given credence over the statement under Section 161 Cr.P.C.. Drawing a parallel between the two statements i.e. statements under Sections 161/164 Cr.P.C., the prosecutrix in her aforesaid statements has not remained clear, categorical and consistent qua occurrence, He therefore submits that in view of above, no credence can be attached to the aforesaid statements of the prosecutrix. It is then contended that prosecution of an accused for an offence of rape and sexual assault can be maintained even in the absence of medical evidence and on the solitary statement of the prosecutrix. However, in such a circumstance, the statement of the prosecutrix must be clear, categorical and consistent i.e. devoid of ambiguity. When the statements of the prosecutrix referred to above are taken as a whole and examined in the light of above then they do not fall in the category of impeccable evidence as they suffer from vice of contradiction which remains unexplained upto this stage. To buttress his submissions, he has relied upon the judgement of Supreme Court in **Phool Singh Vs. State of Madhya Pradesh, (2022) 2 SCC 74.**

9. Even otherwise applicant is a man of clean antecedents inasmuch he has no criminal history to his credit except the present one. Applicant is in jail since 15.08.2023. As such, he has undergone more than three and a half months of incarceration. The police report (charge-sheet) in terms of Section 173 (2) Cr.P.C. has already been submitted against applicant, therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystallised. Upto this stage, no such circumstance has

emerged on record necessitating the custodial arrest of applicant during the pendency of trial. On the above premise, the learned counsel for applicant 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.

10. Per contra, the learned A.G.A. for State has vehemently opposed the prayer for bail. He submits that since the applicant is father of the prosecutrix, a named as well as charge-sheet accused, therefore he does not deserve any indulgence by this Court. Criminality committed by applicant is immoral. As such, 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 applicant with reference to the record at this stage.

11. Having heard the learned counsel for applicant, the learned A.G.A. for State, upon consideration of material on record, evidence, gravity and nature of offence, accusations made as well as complicity of applicant coupled with the fact that there is no medical evidence to support the ocular version of the occurrence inasmuch as the prosecutrix herself refused for her internal medical examination, as per the scheme of the Code (Cr.P.C.) statement of the prosecutrix recorded under Section 164 Cr.P.C. has to be given credence over the statement under Section 161 Cr.P.C., the prosecutrix in her subsequent statement under Section 164 Cr.P.C. has not remained clear, categorical and consistent qua the occurrence inasmuch as she has departed from her previous statement under Section 161 Cr.P.C., therefore no credence can be attached to the aforesaid statements of the prosecutrix, the prosecution of an accused for an offence of rape and sexual assault can be maintained even in the absence of medical evidence and on

the solitary statement of the prosecutrix, however, in such a circumstance, the statement of the prosecutrix must be clear, categorical and consistent, when the statements of the prosecutrix as recorded under Section 161 Cr.P.C. and under Section 164 Cr.P.C. are taken as a whole then they do not fall in the category of impeccable evidence, as they suffer from vice of contradiction which remains unexplained upto this stage, therefore, no credence can be attached to the same, the judgement of the Supreme Court in **Phool Singh (Supra)**, police report (charge-sheet) in terms of Section 173 (2) Cr.P.C. has already been submitted against applicant, therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystallised. 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, the clean antecedents of applicant, the period of incarceration undergone, therefore irrespective of the objections raised by learned A.G.A. in opposition to the present application for bail but without expressing any opinion on the merits of the case, applicant has made out a case for bail.

12. Accordingly, present application for bail is **allowed**.

13. Let the applicant-**Chand Mohammad** involved in aforesaid case crime number be released on bail 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) Applicant will not tamper with prosecution evidence.

(ii) Applicant will abide the orders of court, will attend the court

on every date and will not delay the disposal of trial in any manner whatsoever.

(iii) Applicant will not indulge in any unlawful activities.

(iv) Applicant will not misuse the liberty of bail in any manner whatsoever.

14. The identity, status and residential proof of sureties will be verified by court concerned and in case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail of applicant and send him to prison

Order Date :- 2.12.2023

YK