

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 42525 of 2023

Applicant :- Yogesh Kumar

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

Counsel for Applicant :- Shyam Singh Somvanshi

Counsel for Opposite Party :- G.A., Santosh Kumar Singh

Hon'ble Rajeev Misra,J.

Supplementary affidavit filed by the learned counsel for applicant in Court today is taken on record.

Heard Mr. Shyam Singh Somvanshi, the learned counsel for applicant, the learned A.G.A. for State and Mr. Santosh Kumar Singh, the learned counsel representing first informant.

This application for bail has been filed by applicant Yogesh Kumar seeking his enlargement on bail in Case Crime No.105 of 2023, under Sections 363, 366, 376-D, 506 IPC and Section 5/6 Pocso Act, police station Sureer, district Mathura, during the pendency of trial.

Perused the record.

Record shows that in respect of an incident which is alleged to have occurred on 18.04.2023, a prompt first information report dated 18.04.2023 was lodged by first informant-namely, Chand (father of the prosecutrix) and was registered as Case Crime No.0105 of 2023, under Sections 363, 366, 506 IPC, police station Sureer, district Mathura. In the aforesaid F.I.R., three persons, namely, Ballo @ Pushpendra; Mahendra and Mohan have been nominated as named accused.

The gravamen of the allegations made in the first information report is to the effect that the named accused are alleged to have entered the house of the first informant and thereafter on the pointing of gun kidnapped the daughter of the first informant i.e. prosecutrix namely 'X'.

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 18.04.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 CrPC, which is on record at page 40 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 herself accompanied the named accused Pushpendra.

Subsequent to above, the prosecutrix was requested for her internal medical examination, which was refused by her. Ultimately, the statement of the prosecutrix was recorded under Section 164 CrPC, which is on record at page 41 of the paper book wherein the complicity of the applicant in the crime in question has surfaced. The genesis of the said statement is to the effect that the prosecutrix herself accompanied the applicant willingly.

During course of investigation, Investigating Officer recovered the Transfer Certificate of the prosecutrix pertaining to Class-II wherein her date of birth is recorded as 05.02.2008. The occurrence giving rise to the present criminal proceeding is alleged to have occurred on 18.04.2023. As such, the prosecutrix was aged about 15 years 02 months and 13 days on the date of occurrence. Investigating Officer further examined the first informant and other witnesses including the independent witnesses under Section 161 CrPC. The witnesses so examined have substantially 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 complicity of named accused Pushpendra and the present applicant Yogesh Kumar is fully established in the crime in question. Accordingly, he submitted the charge-sheet dated 04.08.2023, whereby applicant Yogesh Kumar and co-accused Pushpendra have been charge-sheeted under Sections 363, 366, 376-D, 506 IPC and Section 5/6 PocsO Act.

Learned counsel for the applicant contends that applicant is innocent. He has been falsely implicated in the crime in question. Though the applicant is a charge-sheeted accused yet he is liable to be enlarged on bail. Referring to the supplementary affidavit filed by the learned counsel for applicant in Court today he submits that co-accused Pushpendra has since been found to be a juvenile by the Juvenile Justice Board and has been enlarged on bail vide order dated 08.11.2023 passed by Additional Special Judge (PocsO Act), Court No.1, Mathura in Criminal (Juvenile) Appeal No.100 of 2023 (Juvenile Bp Vs. State of U.P.). It is then urged that the case of present applicant is different and is on much better footing from charge-sheeted co-accused, namely, Juvenile Pushpendra and therefore present applicant is also liable to be enlarged on bail. According to the learned counsel for applicant, applicant is not named in the FIR. The prosecutrix in her statement recorded under Section 161 CrPC has not revealed the name of the applicant in the crime in question. It is for the first time in the statement of the prosecutrix recorded under Section 164 CrPC that the complicity of applicant has surfaced in the crime in question. On the above premise, he therefore submits that implication of the applicant in the crime in question is an after thought.

Attention of the Court was invited to the judgement of the Supreme Court in **Phool Singh Vs. State of M.P. (2022) 2 SCC 74** and on basis thereof it is contended by the learned counsel for applicant that conviction of an accused for an offence of rape and sexual assault can be maintained in the absence of medical evidence and on the solitary statement of the prosecutrix. However, in such a circumstance the statement of the prosecutrix should be clear, categorical and consistent. When the aforesaid test is applied to the facts of the present case and the statements of the prosecutrix referred to above are examined as a whole then they do not fall in the category of impeccable evidence and therefore unworthy of reliance. He, therefore, submits that no prosecution of the applicant can be maintained on the basis of above.

Even otherwise, the applicant is a man of clean antecedents having no criminal history to his credit except the present one. The applicant is in jail since 25.07.2023. As such, he has undergone more than four months of incarceration. The police report under Section 173(2) CrPC has already been submitted against the applicant, therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized. However, up to this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. It is thus contended 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. and the learned counsel representing first informant have vehemently opposed the prayer for bail. They submit that since the prosecutrix is a minor girl of tender age as she was aged about 15 years 02 months and 13 days on the date of occurrence therefore the applicant does not deserve any indulgence by this Court. 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.

Having heard the learned counsel for applicant, the learned A.G.A. for State, the learned counsel representing first informant, upon perusal of material brought on record, nature and gravity of offence, evidence, complicity of the accused, accusation made, coupled with the fact that applicant is not named in the FIR, the prosecutrix in her statement under Section 161 CrPC has not implicated the applicant in the crime in question, the complicity of applicant has emerged in the subsequent statement of the prosecutrix under Section 164 CrPC, the departure so made by the prosecutrix in her subsequent statement remains unexplained up to this stage, when the statements of the prosecutrix referred to above are taken as a whole and examined in the light of the law laid

down by the Apex Court in **Phool Singh (supra)**, it is evident that the statements of the prosecutrix are not of impeccable character, named and charge-sheeted co-accused Pushpendra, who has been declared to be a juvenile has already been enlarged on bail, the learned A.G.A. and the learned counsel for first informant could not point out any such distinguishing feature in the case of present applicant so as to distinguish the case of present applicant from named and charge-sheeted but bailed out co-accused and deny him bail, the police report under Section 173 (2) CrPC has already been submitted, therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized, yet in spite of above the learned A.G.A. nor the learned counsel representing first informant could point out any such circumstance from the record necessitating the custodial arrest of the applicant during the pendency of trial, judgement of the Apex Court in the case of **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. and the learned counsel for first informant in opposition to the 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 **Yogesh Kumar**, 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 :- 1.12.2023.

Rks.