

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 42725 of 2023

Applicant :- Karan

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

Counsel for Applicant :- Jitendra Kumar Yadav

Counsel for Opposite Party :- G.A., Babita Upadhyay

Hon'ble Rajeev Misra, J.

1. Heard Mr. Jitendra Kumar Yadav, the learned counsel for applicant, the learned A.G.A. for State and Mrs. Babita Upadhyay, the learned counsel representing opposite party 3 i.e. High Court Legal Services Committee, High Court, Allahabad.

2. Perused the record.

3. This application for bail has been filed by applicant-Karan, seeking his enlargement on bail in Case Crime No. 209 of 2023, under Sections 363, 376 IPC and Sections 3/4 POCSO Act, Police Station-Nigohi, District-Shahjahanpur 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 02.10.2023. 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 19.04.2023, a delayed FIR dated 05.05.2023 was lodged by first informant-Smt. Shahnaz (mother of the prosecutrix) and was registered as Case Crime No. 209 of 2023, under Section 363 IPC, Police Station-Nigohi, District-Shahjahanpur. In the aforesaid FIR, applicant-Karan has been nominated as solitary named accused.

6. As per the prosecution story as unfolded in the FIR, it is alleged that named accused-Karan i.e. applicant herein enticed away the minor daughter of the first informant i.e. the prosecutrix namely - X aged about 15 years.

7. 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 prosecutrix was recovered on 15.05.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 Cr.P.C., which is on record at page 21 of the paper book. The prosecutrix in her aforesaid statement has fully supported the FIR. She has, however, submitted that she was forcibly kidnapped by the named accused i.e. applicant herein. Thereafter, the prosecutrix was taken to NOIDA where her modesty was deliberately dislodged not only by the named accused but also by his associates. Subsequent to above, the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor, who medically examined her, has reiterated her previous statement under Section 161 Cr.P.C. However, the Doctor, who medically examined the prosecutrix, did not find any such injury on her body so as to denote commission of deliberate or forceful sexual assault. However, with regard to the private part of the prosecutrix, the Doctor has opined as follows:-

"Hymen - Old, Torn & Healed"

8. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. wherein the prosecutrix has rejoined her previous statement under Section 161 Cr.P.C. but with contradiction.

9. During course of investigation, Investigating Officer recovered the Transfer Certificate of the prosecutrix pertaining to Class-8 wherein the date of birth of the prosecutrix is recorded as 10.03.2008. The occurrence giving rise to present criminal proceedings is alleged to have occurred on 19.04.2023. As such, the prosecutrix was aged about 15 years, 1 month and 9 days. Investigating Officer further examined the first informant and other witnesses under Section 161 Cr.P.C. who have supported the FIR. On the basis of above and other material collected by Investigating Officer during course of investigation, he came to the conclusion that complicity of applicant is fully established in the crime in question. He, accordingly, submitted the charge sheet dated 22.08.2023 whereby applicant has been charge sheeted under Sections 363, 376 IPC and Sections 3/4 POCSO Act.

10. Learned counsel for applicant contends that though applicant is a named as well as charge sheeted accused yet he is liable to be enlarged on bail. With reference to the Medico Legal Examination Report of the prosecutrix, which is on record as Annexure-3 to the affidavit filed in support of the present application for bail., the

learned counsel for applicant submits that the medical evidence does not support the ocular version of the occurrence as unfolded in the statements of the prosecutrix recorded under Sections 161/164 Cr.P.C. Attention of the Court was then invited to the statements of the prosecutrix recorded under Sections 161/164 Cr.P.C. The learned counsel for applicant contends that when a parallel is drawn in between the aforementioned statements of the prosecutrix, it is apparent that the prosecutrix has not remained clear, categorical and consistent qua the manner of occurrence. The statement under Section 164 Cr.P.C. makes a departure from the previous statement under Section 161 Cr.P.C. Even otherwise, as per the said statement, the prosecutrix and the applicant were in consensual relationship for the last 2 years. Referring to the scheme of the Code (Cr.P.C.), the learned counsel for applicant contends that credence has to be given to the statement under Section 164 Cr.P.C. in comparison to the to the statement under Section 161 Cr.P.C. Attention of the Court was then invited to the judgment of the Supreme Court in ***Phool Singh Vs. State of M.P., (2022) 2 SCC 74***. With referent to above, the learned counsel for applicant contends that the prosecution of an accused for an offence of rape or 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, consistent and unambiguous. When the statements of the prosecutrix as noted above are taken as a whole and examined in the light of above, it is apparent that the statements of the prosecutrix are inconsistent and contradictory. As such, they suffer from the vice of the exaggeration, embellishment and contradiction for which, no explanation has come forward from the prosecutrix herself. On the above premise, the learned counsel for applicant submits that since the statement of the prosecutrix are not of impeccable character, therefore, no prosecution of applicant can be maintained on the basis of same.

11. 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 07.06.2023. As such, he has undergone more than 5 and 1/2 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 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.

12. Per contra, the learned A.G.A. for State and the learned counsel representing opposite party 3 have 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 is a young girl aged about 15 years, 1 month and 9 days. Learned A.G.A. has then referred to the judgment of Supreme Court in **X (Minor) Vs. The State of Jharkhand and Another 2022 LiveLaw (SC) 194** and on basis thereof, he submits that since the prosecutrix is below 16 years of age, therefore, even on account of consensual relationship, applicant is not entitled to be enlarged on bail.

13. When confronted with above, the learned counsel for applicant could not overcome the same.

14. Having heard, the learned counsel for applicant, the learned A.G.A. for State, the learned counsel representing opposite party 3, upon perusal of record, evidence, nature and gravity of offence, complicity of accused, accusations made coupled with the fact that the objections raised by the learned A.G.A. and the learned counsel representing opposite party 3 in opposition to the present application for bail could not be dislodged by the learned counsel for applicant with reference to the record, therefore, irrespective of the varied submissions urged by the learned counsel for applicant in support of the present application for bail, but without making any comments on the merits of the case, this Court does not find any good or sufficient ground to enlarge the applicant on bail.

15. As a result, present application for bail fails and is liable to be rejected.

16. It, accordingly, **rejected**.

Order Date :- 2.12.2023

Vinay