

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 44111 of 2023

Applicant :- Prahlad @ Amarjeet

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

Counsel for Applicant :- Shravan Kumar Mishra

Counsel for Opposite Party :- G.A.,Mohd Faizyab
Rahamani,Pradeep Kumar

Hon'ble Rajeev Misra,J.

1. Heard Mr. Shravan Kumar Mishra, the learned counsel for applicant, the learned A.G.A. for State and Mr. Pradeep Kumar, the learned counsel representing first informant-opposite party-2.

2. Perused the record.

3. This application for bail has been filed by applicant- **Prahlad @ Amarjeet** seeking his enlargement on bail in Case Crime No.187 of 2023, under Sections 363, 366, 376 120B I.P.C. and 3/4 POCSO Act, Police Station- Didarganj, District- Azamgarh during the pendency of trial.

4. Record shows that in respect of an incident which is alleged to have occurred on 23.07.2023, a delyed F.I.R. dated 24.07.2023 was lodged by first informant Kamlesh Rajbhar(father of the prosecutrix) and was registered as Case Crime No.187 of 2023, under Sections 363, 366, 376 120B I.P.C. and 3/4 POCSO Act, Police Station- Didarganj, District- Azamgarh. In the aforesaid F.I.R. three persons namely Prahlad @ Amarjeet, the step-mother of the Prahlad @ Amarjeet and Indrash have been nominated as named accused.

5. The gravamen of the allegations made in the F.I.R. is to the effect that named accused Dhanu Kumar (applicant herein) with the connivance with the other accused enticed away the daughter of the first informant i.e. prosecutrix namely-X aged about 17 years.

6. 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 27.07.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 Cr.P.C.. which is on record at page 23 of the paper book. The prosecutrix in her aforesaid statement has not supported the FIR. As per the said statement, the prosecutrix herself joined the applicant. The prosecutrix in her above statement under Section 161 Cr.P.C. has clearly admitted that physical relations between the parties were established upon the consent. Thereafter, the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor, who medically examined her has not supported the F.I.R. However, the doctor, who medically examined the prosecutrix did not find any injury on her body so as to denote commission of deliberate sexual assault. With regard to the private part of the prosecutrix, the Doctor opined as follows:-

" Hymen- Torn"

7. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C., wherein, the prosecutrix has departed from her previous statement recorded under Section 161 Cr.P.C. by stating that her modesty was deliberately dislodged. During course of investigation, Investigating Officer recovered the High School Certificate of the prosecutrix wherein her date of birth is recorded as 05.04.2006. The occurrence giving rise to present criminal proceedings occurred on 23.07.2023. As such, on the date of occurrence, the prosecutrix was aged about 17 years, 3 months and 18 days. As such, the prosecutrix was below 18 years of age.

8. During course of investigation, the Investigating Officer examined the first informant and other witnesses under Section 161 Cr.P.C. who have 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 named accused is fully established in the crime in question. Accordingly he submitted the charge sheet dated 15.09.2023, whereby, applicant has been charge sheeted under Sections 363, 366, 376 I.P.C. and Section 3/4 POCSO Act.

9. 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. Referring to the statements of the prosecutrix under Section 161 Cr.P.C. referred to above, he submits that the prosecutrix is a willing party. The prosecutrix herself came and joined to applicant, as such, the prosecutrix was neither kidnapped nor abducted by the applicant. As such, no offence under Section 363/366 can be said to have been committed by the applicant.

Referring to the said statement, the learned counsel for applicant submits that the prosecutrix in her statement under Section 161 Cr.P.C. has further stated that physical relations between the parties were established consensually. Subsequently, the prosecutrix has departed from the said statement in her subsequent statement under Section 164 Cr.P.C. The departure so made remains unexplained upto this stage. With reference to the judgment of the Supreme Court in **Phool Singh Vs. State of M.P. (2022) 2 SCC 74**, learned counsel for applicant contends that though 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 but in such a circumstance, the statement of the prosecutrix must be clear, categorical and consistent. He therefore contends that when the aforementioned statements of the prosecutrix are examined as a whole in the light of law laid down by apex Court as noted above, it is evident that the prosecutrix in her aforesaid statements have not remained consistent. As such when the statements of the prosecutrix are taken as a whole, they do not fall in the category of impeccable evidence. As such, no prosecution of the applicant can be maintained on the basis of said statements.

10. Even otherwise, applicant is a man of clean antecedents having no criminal history to his credit except the present one. Applicant is in jail since 18.08.2023. As such he has undergone more than two months of incarceration. Learned A.G.A. submits that applicant has criminal history of three cases which remain unexplained. According to the learned A.G.A. the applicant has been implicated in following cases.

(i) Case Crime No. 257 of 2022 under Sections 323, 504, 506 I.P.C. P.S. Dedarganj, District Azamgarh.

(ii) Case Crime No. 297 of 2017 under Sections 379, 411 I.P.C. P. S. Barhad, District Azamgarh.

(iii) Case Crime No.319 of 2017 under Sections 379 and 411 I.P.C. P.S. Barhad, District Azamgarh.

11. When confronted with above the learned counsel for applicant contends that the applicant has not been implicated for an offence which is grievous or heinous in nature. Moreover, the three judges Bench judgment of the Supreme Court in the case of **Brijmani Devi Vs. Pappu Kumar and Another (2022) 4 SCC 497**, has held that simply on the ground that there is criminal history of an accused cannot be denied bail. According to the learned counsel in

view of the the period of incarceration undergone by applicant and inspite of the fact that 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. However, upto this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. He therefore 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 first informant-opposite party-2 have vehemently opposed the prayer for bail. They submits that since applicant is a named/charge sheeted accused therefore, he does not deserve any indulgence by this Court. 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.

13. Having heard, the learned counsel for applicant, the learned A.G.A. for State and the learned counsel representing first informant opposite party-2, upon perusal of record, evidence, complicity of applicant, gravity and nature of offence and accusation made coupled with the fact that referring to the statements of the prosecutrix under Section 161 Cr.P.C. referred to above, he submits that the prosecutrix is a willing party, the prosecutrix herself came and joined to applicant, as such, the prosecutrix was neither kidnapped nor abducted by the applicant, as such, no offence under Section 363/366 can be said to have been committed by the applicant, referring to the said statement, the learned counsel for applicant submits that the prosecutrix in her statement under Section 161 Cr.P.C. has further stated that physical relations between the parties were established consensually. Subsequently, the prosecutrix has departed from the said statement in her subsequent statement under Section 164 Cr.P.C. The departure so made remains unexplained upto this stage, with reference to the judgment of the Supreme Court in **Phool Singh Vs. State of M.P. (2022) 2 SCC 74**, learned counsel for applicant contends that though 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 but in such a circumstance, the statement of the prosecutrix must be clear, categorical and consistent. He therefore contends that when the aforementioned statements of the prosecutrix are examined as a whole in the light of law laid down

by apex Court as noted above, it is evident that the prosecutrix in her aforesaid statements have not remained consistent, as such, when the statements of the prosecutrix are taken as a whole they do not fall in the category of impeccable evidence, inspite of the fact that the charge sheet has already been submitted, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized, yet inspite of above, the learned A.G.A. and the learned counsel representing first informant opposite party-2 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 the learned A.G.A., and the learned counsel representing first informant opposite party-2 in opposition to the present application for bail, but without making any comment on the merits of the case, applicant has made out a case for bail.

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

15. Let the applicant- **Prahlad @ Amarjeet** be released on bail in 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.

16. 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 :- 23.11.2023

Imtiyaz