

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 48500 of 2023

Applicant :- Rihan @ Sahjad

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

Counsel for Applicant :- Sunil Kumar, Amir Khan, Sadrul Islam Jafri

Counsel for Opposite Party :- G.A., Ambleshwar Pandey, Anuj Srivastava, Vikas Srivastava

Hon'ble Rajeev Misra, J.

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

Heard Mr. N.I. Jafri, the learned Senior counsel assisted by Mr. Amir Khan, the learned counsel for applicant, the learned A.G.A. for State and Mr. Ambleshwar Pandey, the learned counsel representing first informant opposite party 2.

This bail application has been filed by the applicant Rihan @ Sahjad, seeking his enlargement on bail in Case Crime No. 424 of 2023, under Sections 376, 384, 506 IPC and Sections 5/6 POCSO Act, P.S. Sikandarabad, District Bulandshahar, during the pendency of trial.

Record shows that an F.I.R. dated 17.7.2023 was lodged by first informant Smt. Tuba Khan (mother of the prosecutrix) and was registered as Case Crime No. 424 of 2023, under Sections 354, 354D, 384, 506 IPC and Sections 7/8 POCSO Act, P.S. Sikandarabad, District Bulandshahar. In the aforesaid F.I.R. two persons namely Rihan @ Sahjad, Vakas have been nominated as named accused, whereas friend of Rihan has also been arraigned as accused.

The gravamen of the allegations made in the F.I.R. is to the effect that named accused Rihan @ Sahjad developed intimacy with the daughter of the first informant i.e. the prosecutrix and thereafter, dislodged her modesty deliberately and forcibly. The F.I.R. further records that certain obscene photographs of the victim were snapped and on the basis of same, threat and coercion was extended to the prosecutrix to give money else obscene photographs would be made viral.

After above mentioned F.I.R. was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter XII Cr. P. C. The statement of the prosecutrix was recorded under Section 161 Cr. P. C., wherein she has supported the F.I.R. The same is on record at page 41 of the paper book. Subsequent to above, the prosecutrix was requested for her internal medical examination, but the same was refused by her.

Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr. P. C., wherein the prosecutrix has supported the F.I.R. but with a rider that initially the applicant Rihan @ Sahjad and the prosecutrix were friends, but subsequently, her modesty was dislodged by the applicant and certain obscene photographs of the prosecutrix were also snapped. During course of investigation, Investigating Officer examined the first informant under Section 161 Cr. P. C., wherein she has also supported the F.I.R. Investigating Officer recovered High School Certificate of the prosecutrix wherein date of birth is recorded as 12.9.2005. As such, on the date of F.I.R., the prosecutrix was aged about 17 years, 10 months and 5 days. 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 Rihan @ Sahjad alone is established in the crime in question. Accordingly, Investigating Officer submitted the charge sheet dated 28.7.2023, whereby applicant has been charge sheeted under Sections 376, 384, 506 IPC and Sections 5/6 POCSO Act.

Learned Senior counsel for applicant contends that though applicant is a named and charge sheeted accused, yet he is liable to be enlarged on bail. F.I.R. is highly belated. The date and time column of the F.I.R. is blank and the date of occurrence has not even been mentioned in the body of F.I.R. As per the narration contained in the F.I.R., the occurrence is alleged to have occurred 3 years back. He, therefore, contends that the F.I.R. is highly belated. However, neither in the F.I.R. nor in the statement of the first informant any explanation has been offered regarding the delay in lodging the F.I.R. Referring to the judgement of Supreme Court in **P. Rajagopal Vs. State of Tamil Nadu, AIR (2019) SC, 2866 (Paragraph 8)**, the learned Senior Counsel for applicant contends that since the delay in lodging the F.I.R. has not been explained, consequently, the prosecution of applicant itself cannot be maintained. Reference in this regard is also made to judgement of the Supreme Court in **Mandar Deepak Pawar Vs. The State of Maharashtra and Another 2022 LiveLaw (SC) 649**, wherein the

Apex Court has quashed the proceedings under Section 371 IPC on the ground of delay.

According to the learned Senior counsel, the F.I.R. was lodged on the information given by the prosecutrix herself to the first informant i.e. mother. However, various facts that have emerged in the statements of the prosecutrix recorded in her statements under Sections 161/164 Cr. P. C. are conspicuous by their absence in the body of the F.I.R. He, therefore, contends that though F.I.R. is not an encyclopedia of the prosecution case, but it must disclose the basic prosecution case. Referring to the material on the record, he submits that the prosecutrix and applicant were acquainted with each other for a long period and there were whats-app chats of the prosecutrix as well as the applicant. He, therefore, contends that departure made by the prosecutrix in her statements referred to above from the prosecution story as unfolded in the F.I.R., is an after thought. The embellishment that has occurred in the statements of the prosecutrix in her statement under Sections 161/164 Cr. P. C., remains unexplained upto this stage, therefore, they are unworthy of reliance.

Learned Senior counsel then submits that though in the statement of the prosecutrix referred to above, it has been alleged that the obscene photographs of the prosecutrix, which were made viral on the mobile phone of the mother of the prosecutrix were downloaded in the pen drive and given to the Investigating Officer, but the applicant has not been charge sheeted under Section 67A of the I.T. Act. There is nothing on the record to show that the requisite certificate regarding the pen drive in terms of Section 65B of the Evidence Act was given by the mother of the prosecutrix to the Investigating Officer.

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 20.07.2023. As such, he has undergone more than 4 months of incarceration. The charge sheet has been submitted against the applicant on 28.7.2023. As such, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized. Even upto this stage, no such incriminating circumstance has emerged against applicant necessitating the custodial arrest of applicant during the pendency of trial. He, therefore, contends 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 opposite party 2 have vehemently opposed the present application for bail. They submit that since applicant is a named and charge sheeted accused therefore, he does not deserve any indulgence by this Court. Prosecutrix is a young girl aged about less than 18 years. On the date of lodging of the F.I.R. the prosecutrix was aged about 17 years 10 months and 5 days. On account of the conduct of the applicant, the modesty of the prosecutrix has been dislodged and consequently, her prestige has also been down graded in the society. Considering the aforesaid aspect of the matter and coupled with the fact that the parties were acquainted with each other and taking advantage of this situation, the modesty of the prosecutrix was dislodged, therefore, no sympathy be shown by this Court in favour of applicant. However, they could not dislodge the factual/legal submissions urged by the learned Senior counsel for applicant with reference to the record at this stage.

Having heard the learned Senior counsel for applicant, the learned A.G.A. for state, the learned counsel for first informant, upon perusal of record, evidence, nature and gravity of offence, complicity of the accused, accusation made and coupled with the fact that the F.I.R. giving rise to present application for bail is highly belated, inasmuch as there is a clear recital in the F.I.R. that the occurrence giving rise to present criminal proceedings occurred three years prior to the date of F.I.R. itself, there is no explanation for the delay in lodging the F.I.R., in view of above, the prosecution of the applicant itself cannot be maintained, in view of the law laid down by Apex Court in **P. Rajagopal Vs. State of Tamil Nadu and Mandar Deepak Pawar (supra)**, there is no medical evidence to support the ocular version of the occurrence as the prosecutrix has herself refused for her internal medical examination, the prosecutrix and the applicant were in acquaintance with each other as is established from the whats app chat of the prosecutrix and the applicant, which fact has not been disputed by the learned counsel representing first informant, pen drive alleged to have been given by the mother of the prosecutrix regarding obscene photographs of the prosecutrix to the Investigating Officer, has not been part of the case diary, there is nothing on record to show that the requisite certificate in respect of pen drive in terms of Section 65B of the Evidence Act was given by the mother of the prosecutrix to the Investigating Officer, the applicant has not been charge sheeted under Section 67A of the I.T. Act, embellishment that has occurred in the statements of the prosecutrix under Sections 161/164 Cr. P. C. qua the story unfolded in the F.I.R. remains unexplained upto this stage, the

charge sheet has been submitted against the applicant on 28.7.2023, as such, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized, yet in spite of above, the learned A.G.A. could not point out any such circumstances from the record necessitating the custodial arrest of applicant during the pendency of trial, 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 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 **Rihan @ Sahjad** involved in aforesaid case crime number, be released on bail on his furnishing a personal bond with two heavy 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 :- 6.12.2023

HSM/Arshad