

Court No. - 70

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 44305 of 2023

Applicant :- Lucky Khan

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

Counsel for Applicant :- Om Prakash

Counsel for Opposite Party :- G.A.,Aarushi Khare

Hon'ble Sameer Jain,J.

1. Sri Pankaj Kumar, learned AGA, for the State, apprised the Court that notice has been served to the informant of the case on 18.10.2023.

2. Despite service of notice, none appeared on behalf of the informant.

3. However, Sri Pankaj Kumar, learned AGA for the State and Ms. Aarushi Khare, learned counsel for the High Court Legal Services Committee are present.

4. Heard Sri Om Prakash, learned counsel for the applicant and Sri Pankaj Kumar, learned AGA for the State-respondent and Ms. Aarushi Khare, learned counsel appearing for High Court Legal Services Committee.

5. The instant application has been filed seeking release of the applicant on bail in Case Crime No. 283 of 2023, under Sections 363, 342, 376-D, 506 IPC, 6 POCSO Act and 3/5(1) U.P. Prohibition of Unlawful Conversion of Religion Act, Police Station- Kalyanpur, District- Kanpur Nagar, during pendency of the trial in the court below.

6. FIR of the present case was lodged against applicant and co-accused Soheb Khan and according to FIR, age of the victim is 16 years and applicant and co-accused Soheb Khan has taken her to

the hotel and thereafter forcibly made physical relationship with her and also stated that she had to change her religion and also threatened her to viral her indecent photographs and videos.

7. Learned counsel for the applicant submitted that entire allegation made against the applicant in the FIR is totally false and baseless and although, victim repeated the version of the FIR in her statement recorded under Section 161 Cr.P.C. but when her statement was recorded under Section 164 Cr.P.C. then she although, stated that applicant and co-accused Soheb Khan had taken her to the hotel room but she categorically stated that no physical relationship was made by either applicant or by co-accused Soheb Khan.

8. He further submitted that although, applicant and co-accused Soheb Khan were arrested along with victim from the hotel and from the room of the hotel condom, mask and bed-sheet were also recovered but during chemical examination, no semen was found on bed sheet and only semen and blood was found in the penile swab of the applicant and co-accused Soheb Khan and in the vaginal swab of the victim. He further submitted that as victim was having love affair with co-accused Soheb Khan therefore, possibility cannot be ruled out that she made physical relationship with him and there is no DNA report on record, which can show that semen found in the vaginal swab of the victim was of the applicant.

9. He further submitted that applicant is a young boy therefore, if in the penile swab of the applicant semen was found then only on this basis, it cannot be said that he made physical relationship with the victim. He further submitted that applicant has been made accused in the present matter only being friend of co-accused Soheb Khan and applicant is not having any criminal history and is

in jail since 05.07.2023.

10. He further submits, co-accused Shoeb Khan has been released on bail by this Court on 9.10.2023 and case of applicant is at par with him.

11. Per contra, learned AGA as well as learned counsel appearing for High Court Legal Services opposed the prayer for bail and submitted that applicant belonged to different community and applicant and co-accused Soheb Khan both sexually exploited the victim after taking her in the hotel room and this fact is evident from the vaginal swab of the victim and even from the penile swab of the applicant and co-accused Soheb Khan but both the counsels could not dispute the fact that victim in her statement recorded under Section 164 Cr.P.C. categorically stated that as police arrived at spot, therefore, applicant and co-accused Soheb Khan could not make physical relationship with her. They further could not dispute, co-accused Soheb Khan has been released on bail and case of applicant is at par with him.

12. I have heard learned counsel for the parties and perused the record of the case.

13. Although, from the perusal of the FIR, it appears that it was lodged by the victim herself and victim in the FIR and in the statement recorded under Section 161 Cr.P.C. stated that applicant and co-accused Soheb Khan had taken her to the hotel room and made physical relationship with her but in the statement recorded under Section 164 Cr.P.C. she stated that as police arrived in the hotel room, therefore, applicant and co-accused could not make physical relationship with her.

14. Further, however, when police arrived at spot then applicant and co-accused Soheb Khan were arrested and their penile swab

were taken and as per the FSL report, in both the penile swab, semen was found and even in the vaginal swab of the victim presence of the semen was confirmed after its analysis but as victim in her statement recorded under Section 164 Cr.P.C. categorically stated that neither applicant nor co-accused Soheb Khan could make physical relationship with her, therefore, merely on the basis of presence of the semen in the vaginal swab of the victim, it cannot be presumed at this stage that it was the semen of the applicant.

15. Further, applicant is a young boy, therefore, if in his penile swab, semen was found then merely on this basis, it cannot be said that he made physical relationship with the victim.

16. Further, co-accused Soheb Khan has been granted bail and case of applicant is at par with him.

17. Therefore, considering the facts and circumstances of the case discussed above, in my view applicant is entitled to be released on bail.

18. Accordingly, without expressing any opinion on the merits of the case, the instant bail application is allowed.

19. Let the applicant- **Lucky Khan** be released on bail in the aforesaid case on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions:-

(i) The applicant shall appear before the trial court on the dates fixed, unless his personal presence is exempted.

(ii) The applicant shall not directly or indirectly, make inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court

or any police officer or tamper with the evidence.

(iii) The applicant shall not indulge in any criminal and anti-social activity.

20. In case of breach of any of the above condition, the prosecution will be at liberty to move an application before this Court for cancellation of the bail of the applicant.

21. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial.

Order Date :- 17.11.2023

SKM