

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 44861 of 2023

Applicant :- Ankit Kumar Jaiswal

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

Counsel for Applicant :- Krishna Mani

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. K. M. Gupta, the learned counsel for applicant and the learned A.G.A. for State

2. Perused the record.

3. Instant bail application has been filed by applicant-Ankit Kumar Jaiswal seeking his enlargement on bail in Case Crime No. 94 of 2023 under Sections 363, 376D, 506 I.P.C. and 5g/6 POCSO Act, Police Station-Windhamganj, District-Sonbhadra, during the pendency of trial.

4. At the very outset, the learned A.G.A. submits that notice of present bail application has been served upon first informant/opposite party-2 on 15.10.2023. 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.

5. Record shows that in respect of an incident, which is alleged to have occurred on 01.09.2023, a delayed F.I.R. dated 03.09.2023 was lodged by first informant Lalman Vishwakarma (father of the prosecutrix) and was registered as Case Crime No. 94 of 2023 under Sections 363, 376DA, 506 I.P.C. and 5g/6 POCSO Act, Police Station-Windhamganj, District-Sonbhadra. In the aforesaid

F. I.R., three persons namely Khurshid Ansari, Ajeet Kumar Jaiswal and Ankit Kumar Jaiswal (applicant herein) have been nominated as named accused.

6. The gravamen of the allegations made in the F.I.R is to the effect that while the prosecutrix was traveling in a Tempo driven by named/charged sheeted accused Ankit Kumar Jaiswal (applicant herein) and two other named accused i.e. Khurshid Ansari and Ajeet Kumar Jaiswal came on a motorcycle and thereafter kidnapped the prosecutrix. The F.I.R. further records that one of the named accused Khurshid Ansari dislodged the modesty of the prosecutrix forcibly by committing rape upon her whereas another accused Ajeet Kumar Jaiswal made a video of the obscene seen as noted above.

7. After aforementioned F.I.R. was lodged, the Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter XII Cr.P.C. Thereafter statement of the prosecutrix was recorded under Section 161 Cr.P.C., which is on record at page 29 of the paper book. The prosecutrix in her aforesaid statement has fully supported the F.I.R.. Thereafter, the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor, who medically examined her, has rejoined her previous statement under Section 161 Cr.P.C. . The Doctor, who medically examined the prosecutrix, however, 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 under:

"Hymen - Hymen ruptured old healed and old torn."

8. Ultimately, statement of the prosecutrix was recorded under

Section 164 Cr.P.C., which is on record at page 43 of the paper book. In her aforesaid statement the prosecutrix has reiterated her earlier statement recorded under Section 161 Cr.P.C.

9. During course of investigation, Investigating Officer recovered the date of birth of the prosecutrix recorded in the institution where she was studying in Class 10th. As per the certificate so issued, the date of birth of the prosecutrix as recorded in the School records is 18.03.2006. The occurrence giving rise to present criminal proceedings occurred on 01.09.2023. As such, on the date of incident, the prosecutrix was aged about 17 years, 5 months and 14 days .

10. During course of investigation, Investigating Officer examined first informant and other witnesses under Section 161 Cr.P.C. Witnesses so examined have substantially supported the F.I.R. On the basis of above and other material collected by Investigating Officer during the course of investigation, he came to the conclusion that complicity of all the three named accused is fully established in the crime in question. He accordingly, submitted the charge sheet dated 13.09.2023 whereby all the named accused have been charge-sheeted under Sections, 363, 376D A, 506 I.P.C. and 5g/6 POCSO Act.

11. Learned counsel for applicant submits that though applicant is a named as well as charge-sheeted accused yet he is liable to be enlarged on bail. Named and charge-sheeted co-accused Ajeet Kumar Jaiswal has been enlarged on bail by this Court vide order dated 01.11.2023 passed in Criminal Misc. Bail Application No.44915 of 2023 (Ajeet Kumar Jaiswal Vs. State of U.P. and 3 others). For ready reference, the same is reproduced herein under:

"1. Heard learned counsel for the applicant, learned A.G.A for the State and perused the record.

2. There is an allegation against the applicant is that he along with co-accused persons have committed rape with the victim. Learned counsel for the applicant submits that the victim in her statement recorded under Section 161 Cr.P.C. has specifically stated that on 01.03.2023 at about 08:00 P.M. she was going to school, in the meantime, the co-accused Ankit Kumar Jaiswal came with her tempo and asked her to drop her to school, since she was getting late, she sat on his tempo, who took her towards the railway crossing instead of school on the way, the applicant and co-accused Khursheed Ansari forcibly took her on a motor cycle tying her mouth towards the jungle, where the co-accused Khursheed Ansari had committed rape with her whereas, the applicant was standing a distant place on the other side, the victim in her statement recorded under Section 164 Cr.P.C. has specifically stated that two accused persons took her on a motor cycle in which, one of the accused had committed rape and the other one, was standing far away. Learned counsel thus argued that the victim has specifically named the accused Khursheed Ansari as a person, who has committed rape in her statement recorded under Section 161 Cr.P.C. on the other hand, in her statement under Section 164 she has stated that one person has committed rape without naming him, which itself belies the prosecution story. Learned counsel further argued that the victim is major and in fact, she had a love affair with the co-accused Khursheed Ansari and out of her own free will she had gone with the co-accused Khursheed Ansari and with her own volition she had made physical relation with him. Learned counsel further argued that the only role assigned to the applicant is that he took away the victim forcibly along with co-accused Khursheed Ansari, and that co-accused had committed rape. It is thus contended that the applicant being friend of co-accused Khursheed Ansari has been falsely implicated in the present case. Learned counsel has also drawn attention of this Court to Annexure-7 to the affidavit accompanying the bail application, to demonstrate that the victim and the co-accused Khursheed Ansari are well known to each other and they were conversation on audio and video calls. He next argued that perusal of the medical report shows that the hymen ruptured old torn and healed, thus the medical evidence also does not corroborate with the prosecution version. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been mentioned. It has also been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. He next submits that applicant is languishing in jail since 04.09.2023 having no criminal history.

3. Per contra, learned A.G.A. has opposed the prayer for bail of the applicant by contending that the innocence of the applicant cannot be adjudged at pre trial stage, therefore, he does not deserve any indulgence. In case the applicant is released on bail he will again indulge in similar activities and will misuse the liberty of bail.

4. Considering the entire facts and circumstances of the case, submissions of learned counsel for the parties, nature of evidence, and all attending facts and circumstances of the case, without expressing any opinion on merits of the case, this Court is of the view that the applicant has made out a case for bail. Hence the bail application is allowed.

5. Let applicant Ajeet Kumar Jaiswal involved in Case Crime No. 94 of 2023 under Sections 363, 376D, 506 I.P.C., and Section 5G/6 of POCSO Act, Police Station Windhamganj, District Sonbhadra, be released on bail on furnishing a personal bond and two heavy local sureties each of the like amount to the satisfaction of the court concerned subject to the following conditions:-

I. The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence and 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 of the Indian Penal Code.

III. In case, the applicant misuses the liberty of bail and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the 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 of the Indian Penal Code.

IV. The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against him in accordance with law.

In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

6. Identity, status and residence proof of the applicant and sureties be verified by the court concerned before the bonds are accepted.

Order Date :- 1.11.2023 "

12. According to the learned counsel for applicant, the applicant is simply a Tempo Driver of the vehicle in which the prosecutrix was traveling. As per recital contained in the F.I.R. as well as the statements of the prosecutrix referred to above, applicant cannot be

said to be the guilty of dislodging the modesty of the prosecutrix. He therefore submits that case of present applicant is clearly distinguishable from named and charge sheeted co-accused Ajeet Kumar Jaiswal and Khurshid Ansari, He therefore contends that applicant is liable to be enlarged on bail.

13. 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 custody since 04.09.2023. As such, he has undergone more than two and a half months of incarceration. Police report (charge-sheet) in terms of Section 173 (2) Cr.P.C. has already been submitted against applicants, therefore the entire evidence sought to be relied upon by the prosecution against applicants stands crystallised. However, upto this stage, no such incriminating circumstance has emerged on the record necessitating the custodial arrest of applicant during the pendency of trial. On the above premise, the learned counsel for applicant thus 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..

14. Per contra, the learned A.G.A. has opposed the prayer for bail. He contends that since the applicant is a named as well as charge-sheeted accused therefore he does not deserve any indulgence by this Court. However, the learned A.G.A. could not dislodge the factual and legal submissions urged by the learned counsel for applicant with reference to the record at this stage.

15. Having heard the learned counsel for applicant, the learned A.G.A. for State, upon consideration of material on record, evidence, gravity and nature of offence, accusations made as well as complicity of applicant, coupled with the fact that though the

applicant is a named and charge sheeted accused yet the Court finds that neither in the F.I.R. any allegation for dislodging the modesty of the prosecutrix has been made against applicant nor the prosecutrix in her statements under Section 161/164 Cr.P.C. has implicated the applicant for dislodging her modesty, the case of present applicant is clearly distinguishable from other named and charge sheeted co-accused namely Ajeet Kumar Jaiswal and Khurshid Ansari, the period of incarceration undergone, the clean antecedents of applicant, police report (charge-sheet) 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 applicants stands crystallised, yet in spite of above the learned A.G.A. could not point out any such circumstance from the record necessitating the custodial arrest of applicant during the pendency of trial, therefore irrespective of the objections raised by the learned A.G.A. in opposition to the present application for bail but without expressing any opinion on the merits of the case, applicant has made out a case for bail.

16. Accordingly, present application for bail is **allowed**.

17. Let the applicant-**Ankit Kumar Jaiswal** involved in aforesaid case crime number be released on bail 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) Applicant will not tamper with prosecution evidence.

(ii) Applicant will abide the orders of court, will attend the court on every date and will not delay the disposal of trial in any manner whatsoever.

(iii) Applicant will not indulge in any unlawful activities.

(iv) Applicant will not misuse the liberty of bail in any manner whatsoever.

18. The identity, status and residential proof of sureties will be verified by court concerned and in case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail of applicant and send him to prison

19. It is however made clear that named/charge sheeted co-accused Khurshid Ansari shall not claim parity from the order dated 01.11.2023 as well as this order.

Order Date :- 22.11.2023

YK