

Court No. - 70

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 45679 of 2023

Applicant :- Shailendra Kumar And Another

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

Counsel for Applicant :- Kamlesh Singh

Counsel for Opposite Party :- G.A.,Aditya Kumar Rai

Hon'ble Sameer Jain,J.

1. Sri Kamlesh Singh, learned counsel for the applicants submits that due to mistake in the prayer clause of the instant bail application, section 5 Cha has been mentioned in place of section 5 Chha and therefore, they may be permitted to make necessary correction in the prayer clause, during the course of the day.

2. In view of the above, learned counsel for the applicants is permitted to make necessary correction in the prayer clause of the instant bail application during the course of the day, itself.

3. Sri Aditya Kumar Rai, Advocate submitted that he has filed his power on behalf of the informant in the office of this Court on 28.10.2023 but his name could not be shown in the cause list.

4. Heard Sri Kamlesh Singh, learned counsel for the applicants; Sri Ajai Kumar Rai, learned counsel for the informant and Sri Amar Nath Vishwakarma, learned Brief Holder for the State-respondent.

5. The instant application has been filed seeking release of the applicants on bail in Case Crime No. 159 of 2023, under Sections 354, 323, 506, 341, 342, 376D IPC & Section 5 Chha/6 POCSO Act, Police Station Safai, District Etawah, during pendency of the trial in the court below.

6. FIR of the present case was lodged against two persons (non applicants) and according to the FIR on 27.7.2023 at about 7 am when daughter of the informant was going to school then on the way nominated accused Raju intercepted her and forcibly took her in his house and outraged her modesty.

7. It is further mentioned in the FIR that in the house of co-accused Raju another co-accused Pushpendra Yadav was also present and he also outraged her modesty and when his

daughter resisted then they threatened to kill her brother Gagan.

8. Learned counsel for the applicants submitted that the applicants were neither named in the FIR nor in the statement of the victim recorded under section 161 Cr.P.C. and from perusal of the statement of the victim recorded under section 161 Cr.P.C. it appears that she stated that co-accused Pushpendra has taken her at his home and pressurized her to make conversation with co-accused Raju and thereafter he dropped her but when her statement under section 164 Cr.P.C. was recorded after six days then victim changed her earlier version and stated that applicants and co-accused Pushpendra and others committed rape with her and this fact clearly suggests that victim is not a reliable witness.

9. He further submitted that only being friends of co-accused Pushpendra and Raju, applicants have been roped in the present matter.

10. He further submitted that applicants are having no criminal history and they are in jail in the present matter since 11.8.2023.

11. Per contra, learned AGA as well as learned counsel for the informant opposed the prayer for bail and submitted that victim is minor girl aged about 16 and half year and she in her statement recorded under section 164 Cr.P.C. categorically stated that applicants and two others have committed rape upon her.

12. They further submitted that even according to the doctor, possibility of sexual assault cannot be ruled out and her injury report also suggests that it is a case of sexual assault but both could not dispute the fact that in the statement of victim under section 161 Cr.P.C. applicants were not even named and in her statement under section 161 Cr.P.C. she did not even make any allegation of rape and only stated that co-accused Pushpendra had taken her to his house where he pressurized her to make conversation with co-accused Raju and thereafter he dropped her at her house.

13. They further could not dispute the fact that applicants are having no previous criminal history.

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

15. Although, from the perusal of the record, it appears that victim is even below 18 years old girl and she in her statement recorded under section 164 Cr.P.C. made allegation of gang

rape against the applicants and two others and her medical examination report also indicates that it may be a case of sexual assault and rape but there are material contradictions in the statements of the victim recorded under sections 161 Cr.P.C. and 164 Cr.P.C. and in the statement recorded under section 161 Cr.P.C. she did not even disclose the name of the applicant and only disclose the name of nominated accused persons Raju and Pushpendra and against them also she did not make any allegation of rape and only stated that co-accused Pushpendra had taken her at his house and pressurized her to make conversation with co-accused Raju and thereafter Pushpendra himself dropped her at her house.

16. Further applicants are having no previous criminal history to their credit and they are in jail in the present matter since 11.8.2023.

17. Therefore, considering the facts and circumstances of the case, discussed above, in my view, applicants are 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 applicants, **Shailendra Kumar and Vivek Shakya**-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 applicants shall appear before the trial court on the dates fixed, unless their personal presence is exempted.

(ii) The applicants shall not directly or indirectly, make inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade their from disclosing such facts to the Court or any police officer or tamper with the evidence.

(iii) The applicants 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 applicants.

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 :- 30.10.2023

Ankita