

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 46861 of 2023

Applicant :- Aamir

Opposite Party :- State of U.P.

Counsel for Applicant :- Vinod Kumar Tirpathi, Manoj Kumar Tripathi

Counsel for Opposite Party :- G.A., M J Akhtar

Hon'ble Rajeev Misra, J.

1. Heard Mr. Vinod Kumar Tripathi, the learned counsel for applicant, the learned A.G.A. for State and Mr. V.M. Zaidi, the learned Senior Counsel assisted by Mr. M.J. Akhtar, the learned counsel representing first informant.

2. Perused the record.

3. This application for bail has been filed by applicant-Aamir, seeking his enlargement on bail in Case Crime No. 591 of 2023, under Sections 363, 376 IPC and Sections 3/4 POCSO Act, Police Station-Najibabad, District-Bijnor during the pendency of trial.

4. Record shows that in respect of an incident, which is alleged to have occurred on 31.08.2023, a delayed FIR dated 04.09.2023 was lodged by first informant-Laddan (Father of the prosecutrix) and was registered as Case Crime No. 591 of 2023, under Section 363 IPC, Police Station-Najibabad, District-Bijnor. In the aforesaid FIR, applicant-Aamir has been nominated as solitary named accused.

5. The gravamen of the allegations made in the FIR is to the effect that on 31.08.2023 at around 11:00 PM, named accused-Aamir i.e. applicant herein is alleged to have enticed away the daughter of first informant i.e. the 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 11.09.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 Cr.P.C., which is on record at page 31 of the paper book. The prosecutrix in her aforesaid statement has not supported the FIR. To the contrary, she has stated that she herself called the applicant on phone. Thereafter, the prosecutrix joined the applicant and accompanied him to Roshanabad. She has further stated that no physical

relations were established in between herself and the applicant-Aamir. Thereafter, the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor, who medically examined her, has departed from her previous statement under Section 161 Cr.P.C. Though, the statement under Section 161 Cr.P.C. has been partially reiterated but with the modification that the modesty of the prosecutrix was deliberately dislodged by the applicant. The act of sexual assault was lastly committed in the night of 07.09.2023 (See page 52 of the paper book). However, the Doctor, who medically examined the prosecutrix did not find any mark of fresh injury over her body including the private part (See page 53 of the paper book). However, with regard to the private part of the prosecutrix, the Doctor has opined as follows:-

"Hymen - Torn"

7. Certain samples were taken from the body of the prosecutrix for pathological examination. However, the supplementary medico legal report of the prosecutrix has not been brought on record. As per the medical opinion, the prosecutrix is said to be aged about 18 years.

8. During course of investigation, Investigating Officer recovered the date of birth of the prosecutrix which has been derived from the transfer certificate of the prosecutrix wherein the date of birth of the prosecutrix is recorded as 17.06.2007. The occurrence giving rise to present criminal proceedings is alleged to have occurred on 31.08.2023. As such, the prosecutrix was aged about 16 years, 2 months and 14 days on the date of FIR. Investigating Officer further examined the first informant and other witnesses under Section 161 Cr.P.C. Witnesses so examined have supported the FIR. On the basis of above and other material collected by Investigating Officer during course of investigation, he came to the conclusion that complicity of applicant is fully established in the crime in question. He, accordingly, submitted the charge sheet dated 01.10.2023 whereby applicant has been charge sheeted under Sections 363, 376 IPC and Sections 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. Attention of the Court was then invited to the Medico Legal Examination Report of the prosecutrix and on basis thereof, he submits that the medical evidence does not support the ocular version of the occurrence as unfolded in the statements of the prosecutrix before the Doctor, who medically examined the prosecutrix, and under Section 164 Cr.P.C. Apart from above, it is also contended that as per the medical opinion, the prosecutrix is

aged about 18 years. As such, she is major. Consequently, no proceedings under the provisions of POCSO Act can be maintained against applicant. With reference to the statement of the prosecutrix under Section 161 Cr.P.C., the learned counsel for applicant contends that the prosecutrix has herself joined the applicant and thereafter accompanied him to a different place. As such, the prosecutrix was neither abducted, kidnapped nor enticed away by the applicant. Consequently, no offence under Section 363 IPC can be said to have been committed by the applicant. It is then submitted by the learned counsel for applicant that the prosecutrix in her statements under Section 161 Cr.P.C., before the Doctor and under Section 164 Cr.P.C. has not remained clear, categorical and consistent. The prosecutrix has been taking different stands at different stages. Reference is made to the judgment of the Supreme Court in **Phool Singh Vs. State of M.P. (2022) 2 SCC 74**. On the basis of above, the learned counsel for applicant contends that the prosecution of an accused for an offence of rape and sexual assault can be maintained even in the absence of medical evidence and on the solitary statement of the prosecutrix. However, in such a circumstance, the statement of the prosecutrix should not suffer from the vice of embellishment, exaggeration and contradiction. In short, the same should be of impeccable character. However, when the statements of the prosecutrix referred to above are taken as a whole and considered in the light of above, it is apparent that the prosecutrix has been inconsistent in her aforesaid statements. As such, the prosecution of applicant on the basis of above cannot be sustained. Therefore, the applicant is liable to be enlarged on bail.

10. 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 17.09.2023. As such, he has undergone more than 3 months of incarceration. The police report in terms of Section 173(2) Cr.P.C. has already been submitted. As such, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized. However, up to this stage, no such circumstance has emerged on record necessitating the custodial arrest of applicant during the pendency of trial. On the above premise, he 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.

11. Per contra, the learned A.G.A. and Mr. V.M. Zaidi, the learned Senior Counsel for first informant have vehemently opposed the prayer for bail. They submit that since applicant is a named as well

as charge sheeted accused, therefore, he does not deserve any indulgence by this Court. The prosecutrix is a young girl aged about 16 years and few months whose modesty has been deliberately dislodged by the applicant. It is further contended that under the scheme of the Code i.e. Cr.P.C., the statement of the prosecutrix recorded under Section 164 Cr.P.C. has to be given credence over the statement under Section 161 Cr.P.C. Since the prosecutrix in her statement under Section 164 Cr.P.C. has clearly stated that her modesty was deliberately dislodged by the applicant, therefore, no sympathy be shown by this Court in favour of applicant. However, they could not dislodge the factual and legal submissions urged by the learned counsel for applicant in support of the present application for bail with reference to the record at this stage.

12. When confronted with above, the learned counsel for applicant contends it is an admitted case of the prosecutrix that the prosecutrix herself joined the applicant. The prosecutrix was dropped at her home by the parents of applicant. The prosecutrix remained in the house of applicant for 10 days. In her statement under Section 161 Cr.P.C., the prosecutrix has not alleged that her modesty was dislodged. No attempt has been made by the prosecutrix to even controvert her previous statement. As such, the statement of the prosecutrix under Section 161 Cr.P.C. suffers from the vice of exaggeration and embellishment which remains unexplained up to this stage.

13. Having heard, the learned counsel for applicant, the learned A.G.A. for State, the learned Senior Counsel for first informant, upon perusal of record, evidence, nature and gravity of offence, accusations made, complicity of accused and coupled with the fact that the Investigating Officer had determined the age of the prosecutrix with reference to her date of birth mentioned in the transfer certificate, same is manifestly illegal inasmuch as, the age of the prosecutrix can be determined only with reference to her date of birth recorded in any document recognized under Sections 94(2)(i) and 94(2)(ii) of the Juvenile Justice (Care and Protection of Children) Act, 2015, the judgment of the Supreme Court in **P. Yuvaprakash Vs. State, 2023 SCC OnLine SC 846**, wherein the Apex Court has observed that no determination of age can be made on the basis of the date of birth recorded in the scholar register, prima-facie, as per the medical opinion, the prosecutrix is major, as she is 18 years of age, therefore, the proceedings under the POCSO Act cannot be maintained against applicant as per the statement of the prosecutrix recorded under Section 161 Cr.P.C., she herself is a willing and consenting party inasmuch as, she

herself joined the applicant, therefore, applicant cannot be said to be guilty of abducting or kidnapping the prosecutrix or having enticed away the prosecutrix, the prosecutrix in her statements under Sections 161/164 Cr.P.C. has not remained clear, categorical and consistent, as such, the statements of the prosecutrix are unworthy of credit, the prosecutrix in her statement under Section 164 Cr.P.C. has not even controverted her previous statement under Section 161 Cr.P.C., the clean antecedents of applicant, the period of incarceration undergone, 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, yet in spite of above, the learned A.G.A. and the learned Senior Counsel representing first informant 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. and the learned Senior Counsel representing first informant in opposition to the present application for bail, but without making any comments on the merits of the case, applicant has made out a case for bail.

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

14. Let the **applicant-Aamir**, be released on bail in the 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.

15. 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 :- 18.12.2023

Vinay