

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 47973 of 2023

Applicant :- Mahesh Chandra

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

Counsel for Applicant :- Brajesh Kumar Solanki,Pranjal Kesarwani

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

Heard Mr. Brajesh Kumar Solanki, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant Mahesh Chandra seeking his enlargement on bail in Case Crime No.43 of 2017, under Sections 363, 366, 376 IPC and Section 3/4 Pocso Act, police station Barla, district Aligarh, during the pendency of trial.

Perused the record.

At the very outset, the learned A.G.A. submits that notice of present application for bail has been served upon first informant-opposite party-2 on 20.10.2023. 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 for bail.

Record shows that in respect of an incident which is alleged to have occurred on 03.02.2017 a delayed first information report dated 01.03.2017 was lodged by first informant, namely, Smt. Rambeti (mother of the prosecutrix) and was registered as Case Crime No.0043 of 2017, under Sections 363, 366 IPC, police station Barla, district Aligarh. In the aforesaid F.I.R., four persons, namely, Mahesh (applicant herein); Lokha; Radha and Sukhveer have been nominated as named accused.

After aforementioned first information report was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter XII CrPC. The prosecutrix was recovered on 28.03.2017. Thereafter, the statement of the prosecutrix was recorded under Section 161 CrPC, which is on record at page 24 of the paper book. The prosecutrix in her aforesaid statement has not supported the FIR. To the contrary, the prosecutrix has stated that she herself out of her own sweet will joined the applicant and accompanied him to Allahabad. 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 CrPC. The prosecutrix has now alleged that she was abducted by the applicant and thereafter sexually assaulted by the applicant. The Doctor who examined the prosecutrix did not find any injury on her person so as to denote commission of recent sexual assault. However, with regard to the private part of the prosecutrix, the Doctor has opined as follows :-

"Hymen - Old, healed, tear present."

As per the medical opinion, the prosecutrix is said to be aged about 18 years. Ultimately, the statement of the prosecutrix was recorded under Section 164 CrPC, which is on record at page 42 of the paper book. The prosecutrix in her aforesaid statement has rejoined her previous statement given before the Doctor. The genesis of the said statement is that the modesty of the prosecutrix was deliberately dislodged by the applicant.

During the course of investigation, Investigating Officer recovered the High School Certificate-cum-marks sheet of the prosecutrix wherein her date of birth is recorded as 01.05.1999. The occurrence giving rise to the present criminal proceeding is alleged to have occurred on 03.02.2017. As such, the prosecutrix was aged 17 years 09 months and 02 days on the date of occurrence. Investigating Officer further examined the first informant and other witnesses under Section 161 CrPC. The witnesses so examined have substantially supported the FIR. 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 applicant is fully established in the crime in question. He, accordingly, submitted the charge-sheet dated 17.07.2017, whereby applicant has been charge-sheeted under Sections 363, 366, 376 IPC and Section 3/4 PocsO Act.

It is apposite to mention here that after the aforementioned FIR was lodged, applicant Mahesh Chandra along with four others approached this Court by means of Criminal Misc. Writ Petition No.3967 of 2017 (Rajni Kumari And 4 others Vs. State of U.P. And 3 others). The aforesaid writ petition was disposed of finally by this Court vide order dated 21.03.2017, which reads as under :-

"Heard Sri Mohit Singh, learned counsel for the petitioners, Sri D.K. Yadav, learned counsel for the respondent no. 4, Sri A.P. Paul, learned A.G.A. for the State and perused the impugned F.I.R. as well as material brought on record.

This writ petition has been filed by the petitioners for quashing the impugned FIR dated 1.3.2017 registered as case crime no. 43 of 2017, under Sections 363, 366 IPC, P.S. Barla, District Aligarh.

It has been submitted by the learned counsel for the petitioners that petitioner no. 1, who is the victim has voluntarily eloped with petitioner no. 2, who is already married but has left his earlier wife and will marry with petitioner no. 1 after getting divorce from his earlier wife. He submits that at present petitioner no. 1 is living with petitioner no. 2, hence interim protection may be granted to the petitioners.

Per contra learned counsel for the respondent no. 4 and learned AGA for the State submitted that the impugned FIR is not liable to be quashed on the basis of the submissions advanced by the learned counsel for the petitioners.

After having heard learned counsel for the parties present and perused the impugned FIR as well as the other material brought on record, we dispose of this writ petition with the following directions:

(i) Investigation of the aforesaid case shall go on but the petitioner nos. 1, 3, 4 and 5 shall not be arrested in the aforesaid case till the submission of police report under Section 173(2) Cr.P.C., subject to their cooperation during investigation.

(ii) As far as the petitioner no. 2 is concerned, the petition stand dismissed.

With this direction, this petition is finally disposed of."

Learned counsel for the applicant contends that though the applicant is a named as well as charge-sheeted accused yet he is liable to be enlarged on bail. Referring to the statements of the prosecutrix recorded under Section 161 CrPC he submits that the prosecutrix is a willing and consenting party. As per the statements of the prosecutrix referred to above it cannot be definitely concluded that applicant is guilty of having abducted, kidnapped or enticed away the prosecutrix. The prosecutrix was aged about 17 years 09 months and 02 days on the date of occurrence. On the above premise, the learned counsel for applicant submits that applicant is liable to be enlarged on bail.

Even otherwise, applicant is a man of clean antecedents having no criminal history to his credit except the present one. The applicant is in jail since 27.09.2023. As such, he has undergone more than two months of incarceration. The police report in terms of Section 173 (2) CrPC has already been submitted. As such, the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized. However, up to this stage, no such circumstance has emerged necessitating the custodial arrest of the applicant during the pendency of trial. It is thus urged by the learned counsel for applicant 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 investigation/trial.

Per contra, the learned A.G.A. has vehemently opposed the prayer for bail. He submits that since the applicant is a named as well as charge-sheeted accused therefore, he does not deserve any indulgence by this court. Referring to the order

dated 21.03.2017 passed by this Court, the learned A.G.A. submits that since applicant was already married therefore he has committed adultery in maintaining physical relations with the prosecutrix who admittedly is a minor girl. The prosecutrix was aged about 17 years 09 months and 02 days on the date of occurrence therefore, she is covered within the definition of 'child' under the Pocso Act. In view of above no sympathy be shown by this Court. The trial has already commenced. As per the order-sheet of the court below, applicant abandoned the proceedings of the trial from the year 2017 up to 2022. Consequently, non-bailable warrant was issued against applicant pursuant to which he surrendered on 27.09.2023. On the above conspectus, he submits that no sympathy be shown by this Court in favour of applicant. As such, the present application for bail is liable to be rejected.

When confronted with above, the learned counsel for applicant could not overcome the same.

Having heard the learned counsel for applicant, the learned A.G.A. for State, upon perusal of material brought on record, nature and gravity of offence, evidence, complicity of the accused, accusation made, coupled with the fact that the objections raised by the learned A.G.A. in opposition to the present application for bail could not be dislodged by the learned counsel for applicant therefore, irrespective of the varied submissions urged by the learned counsel for applicant in support of the present application for bail, this Court does not find any good or sufficient ground to enlarge the applicant on bail.

This application for bail thus fails and is liable to be rejected.

It is accordingly **rejected**.

Order Date :- 7.12.2023.

Rks.