

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 48476 of 2023

Applicant :- Nitin

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

Counsel for Applicant :- Jitendra Rana

Counsel for Opposite Party :- G.A., Mohak Agarwal

Hon'ble Rajeev Misra, J.

Heard Mr. Jitendra Rana, the learned counsel for applicant, the learned A.G.A. for State and Mr. Mohak Agarwal, the learned counsel representing opposite party-3 (High Court Legal Service Committee, High Court, Allahabad).

This application for bail has been filed by applicant Nitin seeking his enlargement on bail in Case Crime No.147 of 2023, under Sections 363, 376, 328 IPC, Section 3/4 PocsO Act and Section 3(2)5 SC/ST Act, police station Jarcha, district Gautam Budh Nagar, during the pendency of trial.

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 31.10.2023. 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.

Perused the record.

Record shows that in respect of an incident which is alleged to have occurred on 23.07.2023, a delayed first information report dated 25.07.2023 was lodged by first informant-Mahesh (father of the prosecutrix) and was registered as Case Crime No.0147 of 2023, under Sections 363, 366 IPC, police station Jarcha, district Greater Noida (Commissionerate Gautam Budh Nagar). In the aforesaid F.I.R., the applicant Nitin has been nominated as solitary named accused.

The gravamen of the allegations made in the first information report is to the effect that the named accused Nitin enticed away the minor daughter of first informant i.e. prosecutrix namely 'X' aged about 17 years.

After aforesaid 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 27.07.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161

CrPC, which is on record at page 27 of the paper book. The prosecutrix in her aforesaid statement has not supported the F.I.R. To the contrary, the prosecutrix has stated that she was in love with the applicant. On 23.07.2023, she herself went to the applicant alone and joined the applicant. The prosecutrix has further stated that she thereafter accompanied the applicant to Ghaziabad where the parties lived together and on account of above the parties came into co-habitation as husband and wife. Accordingly, physical relations between the parties were also established. Subsequent to above, the prosecutrix was requested for her internal medical examination, which was refused by her. Ultimately, the statement of the prosecutrix was recorded under Section 164 CrPC, which is on record at page 36 of the paper book. The prosecutrix in her aforesaid statement has departed from her previous statement recorded under Section 161 CrPC and has now come up with a new story that her modesty was dislodged by the applicant after administering some stupefying substance mixed in the cold-drink, offered to her.

During course of investigation, Investigating Officer recovered the Scholar Register/Transfer Certificate of Class-X of the prosecutrix wherein her date of birth is recorded as 29.06.2006. Further, as per the Certificate issued by the Principal, Rana Sangram Singh Inter College, Bisahda, Gautam Budh Nagar, the date of birth of the prosecutrix is also 29.06.2006. The occurrence giving rise to the present criminal proceedings is alleged to have occurred on 23.07.2023. As such, the prosecutrix was aged about 17 years and 24 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 the Investigating Officer during course of investigation, he came to the conclusion that complicity of applicant is fully established in the crime in question. Accordingly, he submitted the charge-sheet dated 23.08.2023, whereby applicant Nitin has been charge-sheeted under Sections 363, 376, 328 IPC, Section 3/4 Pocs0 Act and Section 3(2)5 SC/ST Act.

Learned counsel for the applicant contends that though applicant is a named/charge-sheeted accused, inasmuch as, the charge-sheet has been submitted against applicant on 23.08.2023 yet he is liable to be enlarged on bail. Referring to the statement of the prosecutrix recorded under Section 161 CrPC, the learned counsel for applicant contends that the prosecutrix is a willing and consenting party. As per the said statement, the prosecutrix herself came and joined the applicant and thereafter accompanied the applicant to Ghaziabad where the parties lived together as husband and wife. On the above premise, it is thus urged that applicant

cannot be said to be guilty of either kidnapping, abducting or enticing the prosecutrix for committing sexual assault upon her or to solemnize marriage with the prosecutrix. As such, no offence under Section 363 IPC can be said to have been committed by the applicant. Since the prosecutrix was in consensual relationship with the applicant, therefore no deliberate act was committed by applicant upon the prosecutrix to dislodge the modesty of the prosecutrix. Therefore, no offence under Section 376 IPC can be said to have been committed by the applicant. Apart from above, there is no medical report to support the charge-sheet as the prosecutrix has herself refused for her internal medical examination. It is then contended by the learned counsel for applicant that the prosecutrix in her subsequent statement under Section 164 CrPC has departed from her previous statement under Section 161 CrPC. Under the Scheme of the Code (CrPC) the statement of the prosecutrix under Section 164 CrPC is to be given credence over the previous statement under Section 161 CrPC. He further submits that irrespective of above, there must be an explanation with regard to the departure so made in the subsequent statement under Section 164 CrPC. He further submits that there is contradiction in both the statements of the prosecutrix and the prosecutrix herself is not clear and categorical with regard to the prosecution story which she wants to prove against the applicant. The departure so made in the subsequent statement under Section 164 CrPC remains unexplained up to this stage. However, she has not even contradicted her previous statement under Section 161 CrPC. Attention of the Court was then invited to the judgement of Supreme Court in **Phool Singh Vs. State of M.P. (2022) 2 SCC 74** and on basis thereof, the learned counsel for applicant submits that 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 be clear, categorical and consistent. When the aforesaid test is applied to the present case and the statements of the prosecutrix are taken as a whole, it is evident that the statements of the prosecutrix suffer from the vice of embellishment, contradiction and exaggeration. Therefore they do not fall in the category of impeccable evidence. As such no prosecution of applicant can be maintained on the basis of above.

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 28.07.2023. As such, he has undergone more than four months of incarceration. The police report under Section 173 (2) CrPC i.e. the charge-sheet has already been submitted against applicant, therefore 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 on the basis of which it can be said that custodial arrest of applicant is absolutely necessary during the pendency of trial. It is thus contended 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 trial.

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

Having heard the learned counsel for applicant, the learned A.G.A. for State, upon perusal of material brought on record, evidence, complicity of the accused, accusation made, nature and gravity of offence and coupled with the fact that there is no medical evidence to support the charge-sheet, inasmuch as the prosecutrix has herself refused for her internal medical examination, the statements of the prosecutrix as recorded under Section 161/164 CrPC are inconsistent and contradictory, the embellishment emerging in the subsequent statement of the prosecutrix under Section 164 CrPC has not been explained, the judgement of the Supreme Court in **Phool Singh (supra)** referred to above wherein it has been categorically held that prosecution of an accused for an offence of rape/sexual assault can be maintained even in the absence of medical evidence and on the basis of the solitary statement of the prosecutrix however, in such a situation the statement of the prosecutrix should be clear, categorical and consistent, the statements referred to above when taken as a whole do not fall in the category of incapable character, as per the statement of the prosecutrix recorded under Section 161 CrPC prima facie she is a willing and consenting party, she herself came and join the applicant as such applicant cannot be held to be guilty of either kidnapping, abducting or enticing the prosecutrix for committing rape upon the prosecutrix or solemnize marriage with the prsoscuctrix, the prosecutrix was in consensual relationship with the applicant and no deliberate act was committed by the applicant to dislodge the modesty of the prosecutrix therefore no offence complained of can be said to have been committed by the applicant, in spite of the fact that the charge-sheet has been submitted against applicant and therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized, yet the learned A.G.A. could not point out any such incriminating circumstance from the record necessitating the custodial arrest of the applicant during the

pendency of trial, the judgement of Supreme Court in **Sumit Subhashchandra Gangwal and Another Vs. State of Maharashtra and Another 2023 LiveLaw (SC) 373 (paragraph 5)**, the clean antecedents of the applicant, the period of incarceration undergone therefore, irrespective of the objections raised by the learned A.G.A. in opposition to the present application for bail but, without making any comments on the merit of the case, the applicant has made out a case for bail.

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

Let the applicant **Nitin**, involved in aforesaid case crime number, be released on bail on his furnishing a personal bond with 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 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 counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under section 229-A I.P.C.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his 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, in accordance with law, under section 174-A I.P.C.

(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 him 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.

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 :- 30.11.2023.

Rks.