

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 48153 of 2023

Applicant :- Rahul

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

Counsel for Applicant :- Nagendra Bahadur Singh, Kumar
Ashutosh Srivastava

Counsel for Opposite Party :- G.A., Santosh Kumar
Mishra, Vinay Kumar Mishra

Hon'ble Rajeev Misra, J.

1. Heard Mr. Nagendra Bahadur Singh, the learned counsel for applicant, the learned A.G.A. for State and Mr. Santosh Kumar Mishra, the learned counsel representing first informant opposite party-4.

2. Perused the record.

3. This application for bail has been filed by applicant-Rahul, seeking his enlargement on bail in Case Crime No. 364 of 2023, under Sections 323, 504, 506, 376 IPC, and 3/4 POCSO Act, Police Station-Rudrapur, District-Deoria during the pendency of trial.

4. Record shows that in respect of an incident, which is alleged to have occurred on 27.08.2023, a prompt FIR dated 27.08.2023 was lodged by first informant-Smt. Sunaina Devi (mother of the prosecutrix) and was registered as Case Crime No. 364 of 2023, under Sections 323, 504, 506, 376 IPC, and 7/8 POCSO Act, Police Station-Rudrapur, District-Deoria. In the aforesaid FIR, four persons namely Rahul, Bajrangi, Nikhil and Ram Darash have been nominated as named accused.

5. The gravamen of the allegations made in the FIR to the effect that named accused Rahul came to the filed of the first informant where the daughter of the first informant had gone to erect temporary wooden platform at height for convenience of growth of the crops (Jhamda). It is at this juncture, named accused Rahul is alleged to have entered the field of the first informant and thereafter caught hold of the hand of the prosecutrix and dragged her.

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 statement of the prosecutrix was recorded under Section 161 Cr.P.C., which is on record at page 7 of the supplementary affidavit. The prosecutrix in her aforesaid statement has not alleged that the applicant committed aggravated sexual assault or penetrative sexual assault upon her. 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. and has now stated that her modesty was dislodged by named accused by forcibly committing sexual assault upon her. The doctor who medically examined the prosecutrix did not find any injury on her person 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 follows:

Hyumen Perineum- Not intact No bleeding present.

7. Certain samples were taken from the body of the prosecutrix for pathological examination. However, the copy of the supplementary Medico Legal Report has not been brought on record. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. which is on record at page 40 of the paper book. The prosecutrix in her aforesaid statement has not only departed from the prosecution story as unfolded in the F.I.R. but also from her own previous statement under Section 161 Cr.P.C. as well as the statement given before the doctor. The prosecutrix has not come up with specific particulars and details with regard to the manner of occurrence (sexual assault) giving rise to the present criminal proceedings.

8. During course of investigation, Investigating Officer recovered the transfer certificate of the prosecutrix, wherein her date of birth is recorded as 14.12.2008. Learned counsel representing first informant submits that prosecutrix has passed her High School Examination. As per the said certificate, the date of birth of the prosecutrix is same. The occurrence giving rise to the present criminal proceedings occurred on 27.08.2023. As such, the prosecutrix was aged about 14 years and 8 months. During course of investigation, Investigating Officer examined the 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 the Investigating Officer, he came to the conclusion that complicity of applicant is fully

established in the crime in question. He accordingly, submitted that charge sheet dated 14.09.202, whereby, applicant has been charge sheeted under Sections 323, 504, 506, 376 IPC, and 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. The present criminal proceedings have been engineered against the criminal proceedings as a counter-blast to the criminal proceedings already initiated from the side of the present applicant by way of Case Crime No. 364 of 2023, under Sections 323, 504, 506, 376 IPC, and 3/4 POCSO Act. Copy of the said F.I.R. is on record at page 20 of the paper book.

10. It is then contended that the F.I.R. giving rise to present criminal proceedings was lodged by the mother of the prosecutrix upon disclosure made by the prosecutrix herself. According to the learned counsel for applicant though F.I.R. is not the encyclopedia of the prosecution case but it must be disclose the basic prosecution case. To buttress his submission, he has relied upon the following judgments of Supreme Court **(i). Manoj and Others Vs. State of Maharashtra, (1999) 4 SCC 268, (ii). Subhash Kumar Vs. State of Uttarakhand, (2009) 6 SCC 641 and (iii). Achhar Singh Vs. State of M.P. (2021) 5 SCC 543.** On the above premise, he submits that facts stated by the prosecutrix in her statement under Section 164 Cr.P.C. have not been mentioned in the F.I.R. when admittedly the F.I.R. was lodged by the mother of the prosecutrix, upon the disclosure made by the prosecutrix to her mother. Moreover, the prosecutrix has not even controverted her previous statement under Section 161 Cr.P.C. On the above premise, he, therefore, contends that the departure made by the prosecutrix in her statement before the doctor and under Section 164 Cr.P.C. is an afterthought. This fact also remains unexplained upto this stage. Consequently, the statements of the prosecutrix referred to above, suffer from the vice of embellishment, contradiction and exaggeration which remains unexplained upto this stage.

11. Referring to the judgment of the Supreme Court in **Phool Singh Vs. State of M.P. (2022) 2 SCC 74**, he contends that the prosecution of an accused for an offence of rape or 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 must be clear, categorical and consistent. When the above-mentioned statements of the prosecutrix recorded under Section 161, the statement

before the doctor and her statement under Section 164 Cr.P.C are taken as a whole and examined, in the light of aforesaid parameters, it is evident that the prosecutrix has not remained clear, categorical and consistent throughout. The embellishment, exaggeration and contradiction occurring in the statements of the prosecutrix, qua the prosecution story as unfolded in the F.I.R. firstly in her statement before the doctor, who medically examined her and lastly in her subsequent statement under Section 164 Cr.P.C. remains uncontroverted/unexplained upto this stage. As such, the said statements of the prosecutrix i.e. statement before the doctor and her statement under Section 164 Cr.P.C. are not of impeccable character. As per the statement of the prosecutrix under Section 161 Cr.P.C. no offence under Section 7/8 POCSO Act is made out against applicant. On the above premise, he therefore, contends that applicant is liable to be enlarged on bail.

12. 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 05.09.2023. As such, he has undergone more than two 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, upto this stage, no such incriminating 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.

13. Per contra, the learned A.G.A. and the learned counsel representing first informant have vehemently opposed the prayer for bail. They submit that since applicant is a named and charge sheeted accused, therefore, he does not deserve any indulgence by this Court. The prosecutrix is a young girl aged about 14 years, 8 months and 13 days. Furthermore, under the scheme of the Code i.e. Cr.P.C., statement of the prosecutrix recorded under Section 164 Cr.P.C. has to be given credence over statement under Section 161 Cr.P.C. The prosecutrix in her statement under Section 164 Cr.P.C. has clearly implicated the applicant in the crime in question. As such, 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 with reference to the record.

14. Having heard the learned counsel for applicant, the learned

A.G.A. for State, the learned counsel representing first informant upon perusal of record, evidence, complicity of applicant, nature and gravity of offence, accusations made, complicity of accused and coupled with the fact that present criminal proceedings appear to have been launched as a counter blast to the criminal proceedings initiated against the family members of the prosecutrix, the F.I.R. giving rise to the present criminal proceedings was lodged by the mother of the prosecutrix upon the disclosure made by the prosecutrix herself, there is no allegations in the F.I.R. regarding dislodging the modesty of the prosecutrix by committing aggravated sexual assault or penetrative sexual assault upon the prosecutrix, the prosecutrix in her statement under Section 161 Cr.P.C. has supported the F.I.R., but has not alleged that sexual assault was committed upon her by applicant, however, the prosecutrix in her statement before the doctor who medically examined her has departed from her previous statement under Section 161 Cr.P.C., the departure so made in the said statement remains uncontroverted in later part of her statement before the doctor who medically examined her, the doctor who medically examined the prosecutrix did not find any signs on her body so as to denote commission of deliberate or penetrative sexual assault. opinion given by the doctor with regard to the private part of the prosecutrix cannot be *ipso facto* taken to be true as the two are contradictory to each other, the prosecutrix in her statement under Section 164 Cr.P.C. has come out with a new story which is different from the one stated in the F.I.R., the statement under Section 161 Cr.P.C., as such, embellishment has occurred in the aforesaid statement of the prosecutrix but the same remains unexplained upto this stage, the prosecutrix in her subsequent statement has not even controverted her statement under Section 161 Cr.P.C., when the statements of the prosecutrix referred to above are taken as a whole and considered in the light of parameters laid down by the Apex Court in **Phool Singh (Supra)**, it cannot be said that statements of the prosecutrix when taken as a whole are of impeccable character as this suffer from the vice of embellishment, exaggeration and contradiction, which remains unexplained upto this stage, the clean antecedents of applicant, the period of incarceration undergone, the police report under Section 173 (2) CrPC i.e. charge-sheet 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. 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 law laid down by the Supreme Court in **X (Minor) Vs. State of**

Jharkhand 2022 Live Law (SC) 194, and the objections raised by the learned A.G.A. and the learned counsel representing first informant in opposition to this application for bail, but without making any comment on the merits of the case, applicant has made out a case for bail.

15. Accordingly, the bail application is **Allowed**.

16. Let the applicant-**Rahul**, be released on bail in 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.

17. However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his/her 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 :- 7.12.2023

Imtiyaz