

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 49716 of 2023

Applicant :- Smt Mahrn Nisha

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

Counsel for Applicant :- Anil Kumar

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Anil Kumar, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. At the very outset, the learned counsel for applicant submits that he be permitted to correct the description in the cause title as due to typographical error, an inadvertent mistake has crept therein.

4. Prayer made by the learned counsel for applicant is bona-fide. Same is not opposed by the learned A.G.A.

5. Accordingly, it is **allowed**.

6. Let necessary correction in the cause title of present application for bail be carried out by the learned counsel for applicant during course of the day.

7. This application for bail has been filed by applicant-Smt Mahrn Nisha, seeking her enlargement on bail in Case Crime No. 534 of 2023, under Sections 363, 366, 376, 120-B IPC and Sections 3/4 POCSO Act, Police Station-Kasganj, District-Kasganj during the pendency of trial.

8. 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 4 on 18.11.2023. However, in spite of service of notice no one has put in appearance on behalf of first informant-opposite party 4 to oppose this application for bail.

9. Record shows that in respect of an incident, which is alleged to have occurred on 05.08.2023, a prompt FIR dated 05.08.2023 was lodged by first informant-Santosh Kumar (father of the prosecutrix) and was registered as Case Crime No. 534 of 2023,

under Sections 363, 366 IPC, Police Station-Kasganj, District-Kasganj. In the aforesaid FIR, one Danish (son of applicant) has been nominated as solitary named accused.

10. The prosecution story as unfolded in the FIR is to the effect that named accused enticed away the minor daughter of the first informant i.e. the prosecutrix who is a student of Class-9.

11. 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 06.08.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 Cr.P.C., wherein the prosecutrix has not supported the FIR. As per the aforesaid statement, the prosecutrix appears to be a willing and consenting party. Subsequently, the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor, who medically examined her has rejoined her previous statement under Section 161 Cr.P.C. The complicity of applicant in the crime in question has emerged in the statement of the prosecutrix referred to above. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. Same is on record at page 61 of the paper book. The prosecutrix in her aforesaid statement has reiterated her previous statement under Section 161 Cr.P.C.

12. During course of investigation, Investigating Officer recovered the date of birth of the prosecutrix i.e. 11.03.2008. The same was discovered from the Transfer Certificate of the prosecutrix pertaining to Class-5. Investigating Officer examined first informant and other witnesses under Section 161 Cr.P.C. Witnesses so examined have substantially 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 named accused Danish, his mother Smt. Mahrn Nisha and Sharik (brother of named accused) is established in the crime in question. He, accordingly, submitted the charge sheet dated 26.08.2023 whereby named accused Danish has been charge sheeted under Sections 363, 366, 376 IPC and Sections 3/4 POCSO Act whereas the other 2 not named accused Smt. Mahrn Nisha (i.e. applicant herein) and Sharik have been charge sheeted under Sections 363, 366, 376, 120-B IPC and Sections 3/4 POCSO Act.

13. Learned counsel for applicant contends that though applicant is a named and charge sheeted accused yet she is liable to be

enlarged on bail. Applicant is the mother of named and charge sheeted co-accused Dansih. Since applicant is a lady, therefore, she is entitled to the benefit of the provisions contained in proviso to Section 437 Cr.P.C. Furthermore, applicant cannot be held guilty of committing an offence under Section 376 IPC and Sections 3/4 POCSO Act. The only role assigned to the applicant as per the statements of the prosecutrix recorded under Section 161 and 164 Cr.P.C. is that of a conspirator. According to the learned counsel for applicant, conspiracy is a closed door affair and therefore, subject to trial evidence. On the above conspectus, he, therefore, contends that applicant is liable to be enlarged on bail.

14. Even otherwise, applicant is a woman of clean antecedents inasmuch as, she has no criminal history to her credit except the present one. Applicant is in jail since 09.08.2023. As such, she has undergone more than 4 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, therefore, submits that applicant is liable to be enlarged on bail. In case, the applicant is enlarged on bail, she shall not misuse the liberty of bail and shall co-operate with the trial.

15. Per contra, the learned A.G.A. has opposed the prayer for bail. He submits that since applicant is a charge sheeted accused, therefore, she does not deserve any indulgence by this Court. The prosecutrix is a young girl of tender age about 15 years, 4 months and 24 days. The applicant has actively connived with the named accused Danish in kidnapping the prosecutrix. As such, no sympathy be shown by this Court in favour of applicant. However, the learned A.G.A. could not dislodge the factual and legal submissions urged by the learned counsel for applicant in support of this application for bail with reference to the record at this stage.

16. Having heard, the learned counsel for applicant, the learned A.G.A. for State, upon perusal of record, evidence, nature and gravity of offence, accusations made and complicity of accused coupled with the fact that since applicant is a lady, therefore, she is entitled to the benefit of provisions contained in proviso to Section 437 Cr.P.C. the only role assigned to the applicant as per the statements of the prosecutrix referred to above is that a conspirator, conspiracy is a closed door affair, therefore, subject to trial evidence, 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 the learned A.G.A. could not point out from the record any such circumstance necessitating the custodial arrest of applicant during the pendency of trial, the judgment of the Supreme Court in **Sumit Subhashchandra Gangwal Vs. State of Maharashtra, 2023 LiveLaw (SC) 373** (Paragraph 5), 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 merits of the case, applicant has made out a case for bail.

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

18. It is made clear that the other charge sheeted accused shall not be entitled to claim parity with this order.

18. Let the **applicant-Smt Mahrun Nisha**, be released on bail in aforesaid case crime number on her 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.

19. However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on 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 :- 13.12.2023

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