

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 48849 of 2023

Applicant :- Pankaj Kumar Gupta

Opposite Party :- State of U.P.

Counsel for Applicant :- Devendra Deo Gupta

Counsel for Opposite Party :- G.A., Sanjai Kumar Singh

Hon'ble Rajeev Misra, J.

Heard Mr. D.D. Gupta, the learned counsel for applicant, the learned A.G.A. for State and Mr. Sanjai Kumar Singh, the learned counsel representing first informant opposite party 4.

Perused the record.

This bail application has been filed by the applicant Pankaj Kumar Gupta, seeking his enlargement on bail in Case Crime No. 73 of 2023, under Sections 376, 506 IPC, Sections 3/4 POCSO Act and Section 3(2) V SC/ST Act, P.S. Barwapatti, District Kushinagar, during the pendency of trial.

Record shows that in respect of an incident, which is alleged to have occurred on 29.8.2023, a delayed F.I.R. dated 1.9.2023 was lodged by first informant Munni Devi (mother of the prosecutrix) and was registered as Case Crime No. 73 of 2023, under Sections 323, 427, 452, 504, 506 IPC, P.S. Barwapatti, District Kushinagar,. In the aforesaid F.I.R., the applicant Pankaj Kumar Gupta has been nominated as solitary named accused.

The gravamen of the allegations made in the F.I.R. is to the effect that named accused Jitendra and Bal Kunwar dislodged the modesty of the prosecutrix. It is apposite to mention here that in the FIR there is no allegation regarding dislodging the modesty of the prosecutrix by committing aggravated sexual assault or penetrative sexual assault.

After above mentioned F.I.R. 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. Same is on record at page 26/27 of the supplementary affidavit filed on behalf

of applicant. From the perusal of said statement, it is apparent that the F.I.R. was lodged on the information given by the prosecutrix to her mother from the mobile phone of her neighbour. Thereafter, the prosecutrix was requested for internal medical examination. The prosecutrix in her statement before the Doctor, who medically examined her, has clearly implicated the applicant for dislodging her modesty. The Doctor, who medically examined the prosecutrix did not find any injury on her body so as to denote commission of deliberate or forceful sexual assault. However, with regard to the private part of prosecutrix, the Doctor has opined as follows:-

"Hymen old healed, torn"

Certain samples were collected from the body of the prosecutrix for pathological examination. However, the copy of supplementary medico legal report of the prosecutrix has not been brought on record.

Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr. P. C. Same is on record at pages 23/24 of the supplementary affidavit. The prosecutrix in her aforesaid statement has implicated the applicant Pankaj for dislodging her modesty deliberately and forcibly. During course of investigation, Investigating Officer recovered the date of birth of the prosecutrix i.e. 1.9.2009. Same was derived from the mark sheet of the prosecutrix pertaining to Class VIII. The occurrence giving rise to present criminal proceedings is alleged to have occurred on 29.8.2023. As such, the prosecutrix was aged about 13 years 11 months and 28 days on the date of occurrence. Investigating Officer further examined first informant and other witnesses under Section 161 Cr. P. C. Witnesses so examined have 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 the charge sheet dated 14.10.2023, whereby applicant has been charge sheeted under Sections under Sections 376, 506 IPC, Sections 3/4 POCSO Act and Section 3(2) V SC/ST Act.

Learned counsel for applicant contends that though applicant is a named and charge sheeted accused, yet he is liable to be enlarged on bail. According to the learned counsel for applicant, an F.I.R. is not the encyclopedia of the prosecution case, but it must disclose the basic prosecution case. To buttress his submission, he has referred to the following judgements of the Supreme Court:-

(1) Manoj and others Vs. State of Maharashtra (1999) 4 SCC 268

(2) Subhash Kumar Vs. State of Uttarakhand (2009) 6 SCC 641

(3) Achhar Singh Vs. S.O. M.P. (2021) 5 SCC 543

With reference to above, he submits that the F.I.R. giving rise to the present criminal proceedings, was lodged by the mother of the prosecutrix upon disclosure made by the prosecutrix herself. It is then contended that it is impossible to believe that the factum regarding dislodging the modesty of the prosecutrix was not even disclosed by the prosecutrix herself to her mother. He, therefore, contends that departure has occurred in the statements of the prosecutrix under Section 161 Cr.P.C. and 164 Cr.P.C. which reflects exaggeration and embellishment, therefore, the same are worthy of reliance. Attention of the Court was then invited to the statement of the prosecutrix under Section 161 Cr. P. C., wherein the prosecutrix has stated that information regarding the occurrence was given to her mother from the mobile phone of her neighbour. However, with reference to C.D. Parcha No. 8 dated 24.9.2023, the learned counsel for applicant contends that C.D.R. reports of mobile number of the neighbour were collected by the Investigating Officer, but no call was made from the said mobile phone or the mobile phone of the mother of the prosecutrix. He, therefore, contends that the very basis of the prosecution story is unfounded.

Attention of the Court was then invited by the learned counsel for applicant to the medico legal report of the prosecutrix. On basis thereof he submits that medical opinion does not support the ocular version of the occurrence as detailed in the statements of the prosecutrix under Sections 161 Cr. P. C. and 164 Cr. P. C.

Even otherwise, applicant is a man of clean antecedents, having no criminal history to his credit except the present one. Applicant is in jail since 2.9.2023. As such, he has undergone more than 3 months of incarceration. The police report in terms of Section 173 (2) Cr. P. C. i.e. charge sheet has already been submitted. As such, the entire evidence sought to be relied by the prosecution against applicant stands crystallized. However, upto this stage, no such circumstance has emerged on record necessitating the custodial arrest of applicant during the pendency of trial. He, therefore, contends 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. and the learned counsel representing first informant have vehemently opposed the prayer for bail. They submit since applicant is a named and charge sheeted accused, therefore, he does not deserve any indulgence by this Court. Prosecutrix is a young girl aged about 13 years, 11 months and 28 days, whose modesty has been deliberately and forcibly dislodged, 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 with reference to the record at this stage.

Having heard the learned counsel for applicant, the learned A.G.A. for state, the learned counsel for first informant, upon perusal of material brought on record, nature and gravity of offence, evidence, complicity of accused, accusation made and coupled with the fact that in the FIR giving rise to present criminal proceedings, no allegation regarding commission of deliberate sexual assault upon the prosecutrix has been made, admittedly, the FIR was lodged on the disclosure made by the prosecutrix to her mother, the prosecutrix in her subsequent statements under Sections 161/164 Cr.P.C. has departed from the basic prosecution case, the departure so made from the basic prosecution case as unfolded in the FIR remains unexplained, no explanation has come forward with regard to the new and alien story which has emerged in the subsequent statements of the prosecutrix referred to above, resultantly, the statement of the prosecutrix referred to above suffer from the vice of the embellishment, contradiction and exaggeration, which remain unexplained up to this stage, the prosecutrix has stated in her statement under Section 161 Cr.P.C. that information regarding the occurrence was given to her mother from the mobile phone of her neighbour, but as per the C.D.R. reports of the mobile number of the neighbour were collected by the Investigating Officer, no call was made from the said mobile phone or the mobile phone of the mother of the prosecutrix, though FIR is not the encyclopedia of the prosecution case but it must be disclosed the basic prosecution case as held in the aforementioned judgments referred to above, there is no allegation in the F.I.R. regarding dislodging the modesty of prosecutrix, as such, the same is an after thought 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, as such, the entire evidence sought to be relied by the prosecution against applicant stands crystallized, yet in spite of above, the learned A.G.A. and the learned counsel for first informant could not point out any such

circumstances 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 counsel for first informant in opposition to present application for bail, but without making any comments on the merits of the case, the applicant has made out a case for bail.

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

Let the applicant **Pankaj Kumar Gupta** involved in aforesaid case crime number, be released on bail on his furnishing a personal bond with two heavy 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 :- 12.12.2023

HSM