

**Court No. - 65**

**Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 51050 of 2023

**Applicant :-** Mohd. Khushahal @ Lakki

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

**Counsel for Applicant :-** Shamshuddin Khan (S U Khan)

**Counsel for Opposite Party :-** G.A.,Jitendra Prasad Mishra

**Hon'ble Rajeev Misra,J.**

Heard Mr. S. U. Khan, the learned counsel for applicant and the learned A.G.A. for State.

This bail application has been filed by the applicant Mohd. Khushahal @ Lakki, seeking his enlargement on bail in Case Crime No. 781 of 2023 under Sections 120B, 376 (3) IPC and Sections 3/4/17 POCSO Act, P.S. Nandgram, District Ghaziabad 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 Smt. Meena Devi, opposite party 2 on 23.11.2023. However, in spite of service of notice, no one appears 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 5.10.2023, a delayed F.I.R. dated 07.10.2023 was lodged by first informant Smt. Meena Devi (mother of the prosecutrix) and was registered as Case Crime No. 781 of 2023 under Sections 376 120B IPC and Sections 3/4 POCSO Act, P.S. Nandgram, District City (Commissionerate Ghaziabad). In the aforesaid F.I.R., two persons namely Mohd. Khushahal @ Lakki Ansari (applicant herein) and Sangeeta have been nominated as named accused.

The gravamen of the allegations made in the F.I.R. is to the effect that on 5.10.2023, the daughter of the first informant i.e. prosecutrix had left her home for her school. However, named accused Lakki Ansari enticed away the prosecutrix i.e. daughter of the first informant on way and thereafter dislodged her modesty at the house of Sangeeta the named co-accused.

Subsequent to above F.I.R., 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 18 of the paper book. The prosecutrix in her aforesaid statement has fully supported the F.I.R. As per the aforesaid statement, the prosecutrix was taken away by the applicant to the house of Sangeeta, where her modesty was dislodged. The date of occurrence as per the said statement is alleged to be 5.10.2023. Subsequent to above, the prosecutrix was requested for her internal medical examination. However, the Doctor, who 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 the prosecutrix, the Doctor has opined as follows:-

**"Hymen Torn"**

Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr. P. C. which is on record at page 21 of the paper book. The prosecutrix in her aforesaid statement has departed from her previous statement under Section 161 Cr. P. C. and has further not supported the F.I.R. As per the said statement an inference can be drawn that no incident as alleged in the F.I.R. had occurred. On the pointing of applicant, the place of occurrence, where the modesty of the prosecutrix was dislodged was identified as the house of Sangeeta. During course of investigation, Investigating Officer recovered the certificate issued by the Principal N.K.S. Memorial Convent Junior High School, wherein the date of birth of the prosecutrix is mentioned as 25.11.2010. The occurrence giving rise to the present criminal proceedings, is alleged to have occurred on 5.10.2023. As such, the prosecutrix was aged about 13 years and few months on the date of occurrence. Investigating Officer further examined the 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 Investigating Officer during 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 26.10.2023, whereby applicant Mohd. Khushahal @ Lakki has been charge sheeted under Sections under Sections 376 (3) IPC and Sections 3/4 POCSO Act and Sangeeta has been charge sheeted under Sections 376 (3), 120 B IPC and 17 POCSO 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. With reference to the medical opinion on record, he submits that the medical evidence does not support the charge sheet.

Attention of the Court was then invited to the statements of the prosecutrix recorded under Sections 161 and 164 Cr. P. C. According to the learned counsel for applicant, the prosecutrix has not remained clear, categorical and consistent with regard to the prosecution story referred to above. If taken as a whole, it cannot be said that they are impeccable character. As such, no credence can be attached to the statements of the prosecutrix aforementioned nor the prosecution of the applicant can be maintained on the basis of same. As per the scheme of the Court, the statement under Section 164 Cr. P. C. has high probative value in comparison to statement under Section 161 Cr. P. C. Once the prosecutrix has not implicated the applicant in the crime in question her subsequent statements under Section 164 Cr. P. C. nor the prosecutrix has even contradicted her own previous statement under Section 161 Cr. P. C., therefore, the same is unworthy of credit and therefore unworthy of reliance.

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 8.10.2023. As such, he has undergone more than one and a half months of incarceration. Charge sheet in terms of 173 (2) Cr. P. C. has already been submitted. As such, the entire evidence sought to be relied upon by the prosecution against the applicant stands crystallized. Upto this stage, no such incriminating circumstance has emerged against applicant necessitating the custodial arrest of the applicant during the course of trial.

Per contra, the learned A.G.A. has opposed the prayer for bail. He submits 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 of tender age and aged about 16 years whose modesty has been dislodged. The medical evidence quo the private part of the prosecutrix clearly establishes the same. The place of occurrence has been identified by the prosecutrix herself which is the house of Sangeeta. Though the names of Sangeeta and Muskar have appeared in the documents accompanying the bail application, yet their statements have not been brought on record. On the over all conspectus, the learned A.G.A. contends that no sympathy be shown by this Court in favour of applicant.

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 and coupled with the fact that the objections raised by the learned A.G.A. could not be dislodged, but without commenting on the merits of the case, this Court does not any sufficient or good ground to enlarge the applicant on bail.

As a result present application fails and is liable to be **rejected**.

It is, accordingly, **rejected**.

**Order Date :- 29.11.2023**

HSM