

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 51024 of 2023

Applicant :- Rahul Paswan

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

Counsel for Applicant :- Sanjay Kumar Mishra, Sudhir Kumar Shukla

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

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

2. Perused the record.

3. This application for bail has been filed by applicant-**Rahul Paswan** seeking his enlargement on bail in Case Crime No. 102 of 2023, under Sections 363, 366A, 376 IPC and 5L/6 POCSO Act, Police Station-Bairia, District-Ballia during the pendency of trial.

4. 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 28.11.2023. 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.

5. Record shows that in respect of an incident which is alleged to have occurred on 22.02.2023 a delayed F.I.R. dated 24.02.2023 was lodged by first informant Krishna Kumar Gaud (father of the prosecutrix) and was registered as Case Crime No. 102 of 2023, under Sections 363, 366 IPC Police Station-Bairia, District-Ballia. In the aforesaid F.I.R., applicant Rahul has been nominated as solitary named accused.

6. The gravamen of the allegations made in the F.I.R. is to the effect that named accused Rahul (applicant herein) enticed away the daughter of the first informant i.e. the prosecutrix on 22.02.2023 at around 1:00 P.M.

7. 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 prosecutrix was recovered on 14.07.2023. Thereafter the statement of the prosecutrix was recorded under Section 161 Cr.P.C. The prosecutrix in her aforesaid statement has not supported the F.I.R. As per the said statement, the prosecutrix appears to be a willing and consenting party, inasmuch as, she herself joined the applicant and thereafter accompanied him to Bombay. Subsequent to above, 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., but with an improvement that she has solemnized marriage with the applicant and both the parties were living together as husband and wife consensually. 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:-

Hymen - Ruptured (old torn)

8. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. The same is on record at page 25 of the paper book. The prosecutrix in her aforesaid statement has departed from her previous statements recorded under Section 161 Cr.P.C and before the doctor who medically examined her. Prosecutrix has now implicated the applicant for having deliberately and forcibly dislodge her modesty. During course of investigation, Investigating Officer recovered the Admit Card of the prosecutrix for High School Examination wherein her date of birth is recorded as 15.03.2006. The occurrence giving rise to present criminal proceedings is alleged to have occurred on 22.02.2023. As such, on the date of occurrence, the prosecutrix was aged about 16 years, 11 months and 11 days. Investigating Officer further 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 Investigating Officer during the 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 08.08.2023 whereby applicant has been charge sheeted under Sections 363, 366A, 376 I.P.C. and 5L/6 POCSO Act.

9. Learned counsel for applicant submits that though applicant is a named and charge sheeted accused, yet he is liable to be enlarged on bail. Attention of the Court was then invited to the judgment of the Supreme Court in **Phool Singh Vs. State of M.P. (2022) 2**

SCC 74, With reference to the aforesaid judgment, the learned counsel for applicant 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 i.e. unambiguous. When the aforesaid test is applied to the statements of the prosecutrix referred to above, by taking them as a whole. It is apparent that the prosecutrix has not been consistent in her aforesaid statements. The departure which has emerged in the subsequent statement of the prosecutrix i.e. the statement under Section 164 Cr.P.C. remains unexplained upto this stage. Moreover, the prosecutrix has not been controverted her own previous statement under Section 161 Cr.P.C. He, therefore, contends that when the aforesaid statement of the prosecutrix are taken together they do not fall in the category of impeccable evidence. As such, no prosecution of applicant can be maintained on the basis of above.

10. 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 16.07.2023. As such, he has undergone more than four 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.

11. 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. 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 the statement under Section 161 Cr.P.C. Admittedly, the prosecutrix in her subsequent statement under Section 164 Cr.P.C. has implicated the applicant in the crime in question. The prosecutrix is a child within the definition of the POCSO Act. As admittedly she is below 18 years of age. Applicant is guilty of dislodging the modesty of a young girl repeatedly and continuously. On the above conspectus. it is thus urged that no

sympathy be shown by this Court in favour of applicant. However, he could not dislodge the factual and legal submissions urged by the learned counsel for applicant in support of the bail application with reference to the record.

12. Having heard the learned counsel for applicant, the learned A.G.A. for State, upon perusal of record, evidence, complicity of accused, nature and gravity of offence, accusations made, and coupled with the fact that since the prosecutrix in her statement under Section 161 Cr.P.C., before the doctor who medically examined her, and under Section 164 Cr.P.C. has been inconsistent, the departure occurring in the statement of the prosecutrix under Section 164 Cr.P.C. from her previous statements as noted above remains unexplained upto this stage, the prosecutrix has not been controverted her previous statements, prima facie the prosecutrix is a willing and consenting party, the medical evidence does not support the statement of the prosecutrix under Section 164 Cr.P.C. that the modesty of the prosecutrix was dislodged deliberately or forcibly, the clean antecedents of applicant, the period of incarceration undergone, the police report under Section 173 (2) Cr.P.C 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 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, the applicant has made out a case for bail.

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

14. Let the **applicant- Rahul Paswan** 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.

15. 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 :- 13.12.2023

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