Neutral Citation No. - 2023:AHC-LKO:71653

Court No. - 15

Case :- CRIMINAL APPEAL No. - 752 of 2023
Appellant :- Kaushal Kishore @ Nanhe
Respondent :- State Of U.P. Thru. Addl. Chief Secy. Home, Lko. And Another
Counsel for Appellant :- Uttam Kumar Awasthi,Julfikar Ahmad
Counsel for Respondent :- G.A.

Hon'ble Shamim Ahmed,J.

1. The case is taken up in the revised call.

2. Heard Sri Julfikar Ahmad, learned counsel for the appellant and Sri Veer Bhan Singh, the learned A.G.A. for the State-opposite party No. 1 and perused the entire record.

3. As per the office report dated 04.04.2023 notice has already been served upon the opposite party No. 2 but till date neither any counsel has appeared on behalf of opposite party No. 2 nor counter affidavit has been filed on her behalf.

4. Today when the case is taken up even in the revised call, neither any counsel has appeared on behalf of opposite party No. 2 nor counter affidavit has been filed on her behalf. It appears that the opposite party No.2 is not interested to file any counter affidavit.

5. In the above circumstances, as the matter pertains to bail this Court has no option but to proceed for final arguments to decide the present appeal.

6. The present criminal appeal under Section 14-A (2) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act has been preferred against the impugned order dated 09.01.2023 passed by the Court of Additional Session Judge/Special Judge, S.C./S.T. (P.A.) Act, Hardoi in Bail Application No. 3419/2022:State Vs. Kaushal Kishore and others, arising out of Case Crime No. 0594 of 2022, under Sections 376-D, 504, 506 I.P.C. and Section 3(2) (v) SC/ST Act, Police Station Kotwali Dehat, District Hardoi, whereby the bail application of the appellant has been rejected.

7. Learned counsel for the appellant submits that the appellant is innocent and has been falsely implicated in the present case. No such incident took place as alleged by the prosesutrix in the F.I.R. The said

F.I.R. was lodged on 29.10.2022 after much delay by moving an application under Section 156 (3) Cr.P.C. regarding the alleged incident dated 18.07.2022 that too after thought and taking advice by legal expert. The entire allegation of committing rape by the appellant and other named co-accused person is false and fabricated and the F.I.R. has been lodged with the enmity and to falsely implicate the appellant only to defame the image of the appellant and his entire family in the society.

8. Learned counsel for the appellant further submits that in the F.I.R. the prosecutrix, who is aged about 34 years has stated that the appellant along with other named co-accused has committed rape in the "jungle" and thereafter they left her alone then she came back to her house. In her statement recorded under Sections 161 and 164 Cr.P.C. she has repeated the version of the F.I.R. but with material contradiction. Sometime she said that she came alone in the house and sometime she said that she came by the rickshaw to the house.

9. Learned counsel for the appellant submits that the story as narrated by the prosecutrix in the statement recorded under Sections 161 and 164 Cr.P.C. as well as in the version of the F.I.R. is false. No such incident took place nor the appellant was present along with other named co-accused on the spot.

10. Learned counsel for the appellant further submits that the allegation of rape also got demolished after perusal fo the medical report, wherein the doctor has clearly opined that there is no any external injury present on any part of the body, thus it is impossible if it is a gang rape and no injury was present on any part of the body of the prosecutrix, that also falsify the prosecution story.

11. Learned counsel for the appellant placed reliance on the final opinion given by the doctor in which he has clearly opined that on the basis of internal and external examination, no definite opinion can be given about the sexual assault. Further, hymen also not present and no discharge was also seen at the time of examination, thus he submits that medical report totally speaks against the allegation, as levelled by the prosecutrix in the statement recorded under Sections 161 and 164 Cr.P.C. as well as version of the F.I.R.

12. Learned counsel for the appellant put emphasis on the report submitted by the Circle Officer dated 30.12.2022 in which he has went to the village of the prosecutrix and the villagers have clearly

stated this fact to the Circle Officer that the lady (prosecutrix) by playing conspiracy with one Anil Mishra used to lodge false and fabricated case against many persons. The report of the Circle Officer dated 30.12.2022 is annexed as Annexure-2 to the affidavit filed in support of the bail application.

13. Learned counsel for the appellant placed much emphasis on the another F.I.R. which was lodged by the prosecutrix on 31.03.2021 against two named persons, namely, Bhannu and Krishnakant and two unknown persons regarding an incident dated 02.09.2021 bearing F.I.R. No. 0448 of 2021 under Sections 392 and 376-D I.P.C. and the said F.I.R. was also lodged by moving an application under Section 156 (3) Cr.P.C. A copy of the said F.I.R. is annexed as Annexure-10 to the affidavit filed in support of the bail application.

14. Learned counsel for the appellant has drawn attention towards the affidavit dated 09.01.2023 given by the prosecutrix before the court below in the present case, in which in paragraph Nos. 4 and 5 she has clearly stated that she has lodged the F.I.R. but the appellant and other named co-accused have not committed the alleged offence, even though she did not recognize the persons and only on the information given by the villagers, the name of the appellant and other co-accused were taken in the F.I.R. and in paragraph No. 7 she has also admitted this fact that the appellant and other co-accused has not abused her with caste languages, thus the affidavit which is filed before the court below clearly established that the entire prosecution story is false and fabricated. No such incident took place and the prosecutrix even did not recognize the appellant and other named co-accused persons and it was also submitted that she is a married lady and her husband is living some other place for his livelihood and only on the instance of one Anil Mishra, name of the appellant and other co-accused were taken only with the intention to get financial aid given by the State Exchequer, as the appellant belongs to upper caste and the prosecutrix belongs to SC/ST category. The copy of the affidavit dated 09.01.2023 is annexed as Annexure No. 9 to the affidavit filed in support of the bail application.

15. Learned counsel for the appellant further submits that accused/appellant is languishing in jail since 12.12.2022 who has no previous criminal history, and in case the appellant is enlarged on bail, he shall not misuse the liberty of bail and he shall also fully cooperate with the trial. He has further submitted that there is no possibility of

the appellant to intimidate or pressurize the witnesses or any other persons acquainted with the facts of the present case.

16. Several other submissions in order to demonstrate the falsity of the allegations made against the appellant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the appellant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 12.12.2022 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

17. For the aforesaid reasons, learned counsel for the appellant submits that the instant criminal appeal deserves to be allowed and the order dated 09.01.2023 passed by the Court of Additional Session Judge/Special Judge, S.C./S.T. (P.A.) Act, Hardoi in Bail Application No. 3419/2022:State Vs. Kaushal Kishore and others, arising out of Case Crime No. 0594 of 2022, under Sections 376-D, 504, 506 I.P.C. and Section 3(2) (v) SC/ST Act, Police Station Kotwali Dehat, District Hardoi deserves to be set aside and consequently, the accused/appellant deserves to be enlarged on bail during pendency of the trial.

18. Per contra, Sri Veer Bhan Singh, learned A.G.A. submits that from perusal of the affidavit dated 09.01.2023 given by the prosecutrix before the court below, it appears that the prosecutrix did not recognize the appellant and other named co-accused, even though she has not supported the prosecution case. It was also argued that as per the report of the Circle Officer dated 30.12.2022 it transpires that the lady (prosecutrix) is habitual to lodge false and fabricated F.I.R. on the instance of one Anil Mishra, in which he had went to the village of the prosecutrix and the villagers have clearly stated this fact to the Circle Officer that the lady (prosecutrix) by playing conspiracy with one Anil Mishra used to lodge false and fabricated case against many persons, but he submits that there is active participation of accused/appellant in the crime. Therefore, the accused/ appellant is not entitled to be enlarged on bail and the instant criminal appeal deserves to be dismissed. However, he has been unable to dispute the

other factual submissions advanced by the learned counsel for the accused/appellant.

19. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, unlikelihood of early conclusion of trial and also in absence of any convincing material to indicate the possibility of tampering with the evidence and considering the fact that there appears force in the argument of learned counsel for the appellant that the prosecutrix in her affidavit dated 09.01.2023 given before the court below in paragraph Nos. 4 and 5 has clearly stated that she has lodged the F.I.R. but the appellant and other named co-accused have not committed the alleged offence, even though she did not recognize the persons and only on the information given by the villagers, the name of the appellant and other co-accused were taken in the F.I.R. and in paragraph No. 7 she has also admitted this fact that the appellant and other co-accused has not abused her with caste languages, thus the affidavit which is filed before the court below clearly established that the entire prosecution story is false and fabricated and there also appears force in the argument of learned counsel for the appellant that allegation of rape also got demolished after perusal fo the medical report, wherein the doctor has clearly opined that there is no any external injury present on any part of the body, thus it is impossible if it is a gang rape and no injury was present on any part of the body of the prosecutrix, that also falsify the prosecution story and further considering the fact that appellant is in jail since 12.12.2022 and has now by done a substantial period of detention and further considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh Vs. State of UP and another**, reported in **(2018) 3 SCC 22**, this Court is of the view that the learned court below has failed to appreciate the material available on record, the impugned order passed by the trial court is liable to be set aside.

20. Accordingly, the appeal is **allowed**. Consequently, the order dated 09.01.2023 passed by the Court of Additional Session Judge/Special Judge, S.C./S.T. (P.A.) Act, Hardoi in Bail Application No. 3419/2022:State Vs. Kaushal Kishore and others, arising out of Case Crime No. 0594 of 2022, under Sections 376-D, 504, 506 I.P.C.

and Section 3(2) (v) SC/ST Act, Police Station Kotwali Dehat, District Hardoi is hereby **reversed** and **set aside**.

21. Let the appellant, **Kaushal Kishore @ Nanhe,** be enlarged on bail in Case Crime No. 0594 of 2022, under Sections 376-D, 504, 506 I.P.C. and Section 3(2) (v) SC/ST Act, Police Station Kotwali Dehat, District Hardoi with the following conditions:-

(i) The appellant shall furnish a personal bond with two sureties each of like amount to the satisfaction of the court concerned.

(ii) The appellant shall appear and strictly comply following terms of bond executed under section 437 sub section 3 of Chapter- 33 of Cr.P.C.:-

> (a) The appellant shall attend in accordance with the conditions of the bond executed under this Chapter.
>
> (b) The appellant shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and
>
> (c) The appellant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

(iii) The appellant shall cooperate with investigation /trial.

(iv) The appellant shall file an undertaking to the effect that he shall not seek any adjournment on the dates 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.

(v) The appellant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(vi) In case, the appellant misuses the liberty of bail during trial, in order to secure his presence, proclamation under section 82 Cr.P.C. is issued and the appellant 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 of the Indian Penal Code.

(vii) The appellant shall remain present, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the appellant 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.

22. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the prayer for bail and must not be construed to have any reflection on the ultimate merit of the case.

23. The trial court is also directed to expedite the trial of the aforesaid case, within a period of one year from today, by following the provisions of Section 309 Cr.P.C., strictly without granting any unnecessary adjournments to the parties, in case there is no other legal impediment.

Order Date :- 01.11.2023

Arvind

Digitally signed by :-
ARVIND KUMAR SRIVASTAVA
High Court of Judicature at Allahabad,
Lucknow Bench