

Court No. - 15

Case :- CRIMINAL APPEAL No. - 2386 of 2023

Appellant :- Balley @ Shailendra Tiwari

Respondent :- State Of U.P. Thru. Prin. Secy Home Lko And 2 Others

Counsel for Appellant :- Vyas Narayan Shukla

Counsel for Respondent :- G.A.

Hon'ble Shamim Ahmed,J.

Heard Sri Vyas Narayan Shukla, learned counsel for the appellant, learned A.G.A. for the State and perused the entire record.

This Criminal Appeal under Section 14-A (2) of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act has been preferred against the impugned order dated 22.03.2023 passed by learned Special Judge (S.C./S.T. Act), Raebareli in Bail Application No.1007/2023, Case Crime No.0581 of 2022, under Sections 376-D, 366, 328, 506, 342 I.P.C. and Section 3(2)(5) of S.C./S.T. Act, Police Station Bhadokhar, District Raebareli, whereby the bail application of the appellant has been rejected.

Vide order dated 22.08.2023, notice was issued to be served upon opposite party nos.2 & 3 and vide office report dated 04.10.2023, the notice has been served upon them personally.

Today when the case is taken up, no one is present on behalf of the opposite party nos.2 and 3 nor any counter affidavit is filed on their behalf. As such, it appears that opposite party nos.2 and 3 are not interested to file counter affidavit. Since the matter pertains to bail and learned counsel for the appellant presses urgency in the matter, therefore, this Court has no other option but to proceed with the matter.

Learned counsel for the appellant submits that the appellant has been falsely implicated in the present case due to enmity and village rivalry. No such incident, as alleged by the prosecution, took place. The first information report was lodged on 31.10.2022 of the alleged incident dated 28.10.2022 without any plausible explanation of delay. As per the prosecution case, the prosecutrix, who is aged about 20 years, was taken by named accused, Arun and thereafter she was recovered and her statement under Section 161 Cr.P.C. was recorded, wherein she

has stated that she is a student of class 7 and she left house as there was some dispute with her mother. She further stated that she went to Raebareli and thereafter Delhi. After getting the information that her father has lodged F.I.R., she returned back. Learned counsel for the appellant further submits that in her statement recorded under Section 164 Cr.P.C., the prosecutrix has changed her version and named two accused i.e. the present appellant and one Annu and stated that they have kidnapped her and committed rape. She further stated that after committing rape, the accused persons left her and she came to her home. Thus, learned counsel for the appellant submits that there is a material contradiction in the statements of the prosecutrix recorded under Sections 161 and 164 Cr.P.C.

Learned counsel for the appellant further submits that the instant case is lodged with intention to get the financial benefit from the State Exchequer and also there was a pressure created by the police as well as father of the prosecutrix. Learned counsel further submits that the prosecutrix refused to undergo medical examination, as such, in absence of medical report, it cannot be said that the rape has been committed upon her. This fact has also been stated in the report of the doctor, which finds place at annexure no.5 to the affidavit filed in support of the bail application.

Learned counsel for the appellant further submits that the co-accused Annu @ Anoop Kumar Maurya has already been enlarged on bail by this Court vide order dated 03.08.2023 passed in Criminal Appeal No.807 of 2023 and the case of the present appellant is not on the worse footing than that of the co-accused, therefore, the present appellant may also be released on bail by this Court sympathetically.

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 24.01.2023 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

Learned A.G.A. opposed the prayer for bail, however, he is unable to dispute the contentions raised by learned counsel for

the appellant.

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, the unlikelihood of early conclusion of trial and also in the absence of any convincing material to indicate the possibility of tampering with the evidence and considering the fact that there are material contradictions in the statements of the victim recorded under Sections 161 and 164 Cr.P.C. and also considering the fact that the prosecutrix refused to undergo medical examination, as such, in absence of any medical examination, it cannot be said that the rape has been committed and considering the fact that the co-accused has already been enlarged on bail by this Court and the case of the present appellant is not on the worse footing than that of the co-accused 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 order passed by the court below is liable to be set aside.

Accordingly, the appeal is **allowed**. Consequently, the impugned judgment and order dated 22.03.2023 passed by learned Special Judge (S.C./S.T. Act), Raebareli in Bail Application No.1007/2023, Case Crime No.0581 of 2022, under Sections 376-D, 366, 328, 506, 342 I.P.C. and Section 3(2)(5) of S.C./S.T. Act, Police Station Bhadokhar, District Raebareli is hereby **set aside** and **reversed**.

Let the appellant, **Balley @ Shailendra Tiwari** be released on bail in the Case Crime No.0581 of 2022, under Sections 376-D, 366, 328, 506, 342 I.P.C. and Section 3(2)(5) of S.C./S.T. Act, Police Station Bhadokhar, District Raebareli 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.

(viii) The trial court is also directed to expedite the trial of the aforesaid case 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 :- 18.11.2023

Saurabh