

Neutral Citation No. - 2023:AHC-LKO:65816

Court No. - 15

Case :- CRIMINAL APPEAL No. - 3048 of 2022

Appellant :- Ritesh Jaiswal

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

Counsel for Appellant :- Anita, Gauri Suwan Pandey, Kaustubh Singh

Counsel for Respondent :- G.A., Arshad Hafeez Khan, Dinesh Kr. Sharma

Hon'ble Shamim Ahmed, J.

1. Heard Sri K.K.Sharma, learned counsel for the appellant as well as Sri Dinesh Kumar Sharma, the learned A.G.A. for the opposite party No.2 and Sri Ashok Kumar Srivastava, learned A.G.A. for the State-opposite party No. 1 and perused the entire record.
2. Learned counsel for the opposite party No.2 submits that he has tried to contact several times to her client, but she is not turning up to file the counter affidavit. He further submits that he will argue the case in absence of the counter affidavit.
3. Learned A.G.A. has already filed counter affidavit.
4. 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 24.11.2022 passed by the Court of Special Judge SC/ST Act, Barabanki in Bail Application No. 3779 of 2022: Ritesh Jaiswal Vs. State of U.P.), arising out of Case Crime No.307/2022, under Sections 376D, 504, 506 I.P.C. and Section 3 (1) (d), 3 (1) dha), 3(2) (va), 3(2) (v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Police Station Kursi, District Barabanki, whereby the bail application of the appellant has been rejected.
5. Learned counsel for the appellant submits that the appellant is innocent and has been falsely implicated in the present case due to enmity and village party bandi. No such incident took place as alleged by the prosecution.
6. Learned counsel for the appellant further submits that on 03.09.2022 father of the prosecutrix lodged the F.I.R. under Section

354, 504, 506 I.P.C. and Section 3 (1) (d), 3 (1) dha), 3(2) (va) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act stating therein that the daughter of the complainant is aged about 23 years was having love affairs with the appellant and he obtained some photographs of her daughter and started blackmailing her daughter and it was also stated in the F.I.R. that the marriage proposal was also given by the prosecutrix as well as the father, but the appellant denied, as they are of low caste.

7. Learned counsel for the appellant further submits that parties were consenting parties and were in love affairs, this fact has already been mentioned by the father of the prosecutrix in the F.I.R.. The appellant is ready to marriage with the prosecutrix but the family members of the appellant were not ready. As the prosecutrix was aged about 23 years, she is major and she knew her consequences very well, as the marriage between two castes at any point of time denied by either of the parties and she was very much aware of this fact.

8. Learned counsel for the appellant further submits that there is no any allegation in the F.I.R. that the appellant has made physical relation forcefully with the prosecutrix. The prosecutrix in her statement recorded under Section 161 Cr.P.C. almost repeated the version of the F.I.R. and it was admitted by the prosecutrix that she was in relation with the appellant and she used to met with the appellant and stayed in hotel as husband and wife and he has also made false promise of marriage, when the prosecutrix pressurized for marriage, the appellant refused for the same and threatened her that if she talk about the marriage, he will viral the photographs, which was taken by him on his mobile phone. Thereafter, her statement under Section 164 Cr.P.C. was recorded in which she took somersault and allegation of gang rape was levelled against the appellant and his cousin brother, namely, Aman Jaiswal.

9. Learned counsel for the appellant further submits that the allegation of rape was levelled on the pressure crated by the police and family members, whereas no such incident took place at all. It is a case of love affairs with the appellant and the prosecutrix. Co-accused Aman Jaiswal was not involved in any manner in the present case, but only to create pressure his name has been taken by the prosecutrix.

10. Learned counsel for the appellant further submits that the allegation of rape got demolished after perusal of the medical report, wherein the doctor has clearly stated that no definite opinion about

sexual assault can be given and according to pathologist report two vaginal smear slides were found to be negative for spermatozoa. Hymen were old, torn and healed. Urine Pregnancy Test came negative. Thus, the medical report does not support the allegation of rape either on the appellant or on the co-accused Aman Jaiswal.

11. Learned counsel for the appellant further submits that the prosecutrix is major and she knew her consequences very well that the family member can be turned up at any time and may refuse for marriage, as the appellant and the prosecutrix are of different caste and the prosecutrix and her family members also aware of this fact, thus whatsoever relation was made that was made with the consent of the prosecutrix. Even though the promise if any was made in bad faith or with the intention to deceive the victim, this was not the case of the prosecution. Further, it is not the case of prosecutrix that the intention of the appellant was mala fide and that he had clandestine motives, the relation, if any made appears to be on the sweet will of the prosecutrix, then this will not come in the purview of rape as has been held by the Hon'ble Supreme Court in the case of **Pramod Suryabhan Pawar vs. State of Maharashtra, (2019) 9 SCC 608** and placed reliance upon paras 17 and 21, which are reproduced hereunder:-

"17. In Uday v State of Karnataka the complainant was a college going student when the accused promised to marry her. In the complainants statement, she admitted that she was aware that there would be significant opposition from both the complainants and accuseds families to the proposed marriage. She engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The court observed that in these circumstances the accuseds promise to marry the complainant was not of immediate relevance to the complainants decision to engage in sexual intercourse with the accused, which was motivated by other factors: [(2003) 4 SCC 46].

25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be

shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each

other several times that come what may, they will get married (Emphasis supplied).

21. The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The appellants failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellants promise of marriage. Therefore, even if the facts set out in the complainants statements are accepted in totality, no offence under Section 375 of the IPC has occurred."

Thus, learned counsel for the appellant submits that in view of the judgment rendered by the Hon'ble Supreme Court, the promise of marriage made by the appellant to the prosecutrix is in good faith as per the case set up by the complainant and it does not amount to rape as there is a consent of the prosecutrix. It is further submitted that even the medical report of the prosecutrix does not support the version of the prosecution as the doctor has clearly stated that no definite opinion about sexual assault can be given and according to pathologist report two vaginal smear slides were found to be negative for spermatozoa. Hymen is old, torn and healed. Urine Pregnancy Test came negative, the age of the prosecutrix was 23 years, as such, allegation of rape levelled against the appellant and other co-accused are false and, therefore, the appellant is entitled for bail.

12. Learned counsel for the appellant further submits that accused/appellant is languishing in jail since 22.09.2022, 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.

13. For the aforesaid reasons, learned counsel for the appellant submits that the instant criminal appeal deserves to be allowed and the order dated 24.11.2022 passed by the Court of Special Judge SC/ST Act, Barabanki in Bail Application No. 3779 of 2022: Ritesh Jaiswal Vs. State of U.P.), arising out of Case Crime No.307/2022, under Sections 376D, 504, 506 I.P.C. and Section 3 (1) (d), 3 (1) dha), 3(2) (va), 3(2) (v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Police Station Kursi, District Barabanki deserve to be set aside and consequently, the accused/appellant deserves to be enlarged on bail during pendency of the trial.

14. 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 22.09.2022 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

15. Per contra, Sri Dinesh Kumar Sharma, learned counsel for the opposite party No.2 has vehemently opposed the prayer for bail and submitted that the bail of the appellant be rejected, as the prima facie the appellant is involved in a heinous offence and cognizable offence is made out against the appellant. Sri Ashok Kumar Srivastava, learned A.G.A. for the State made an agreement with the argument as advanced by learned counsel for the appellant and they prayed for rejection of the present appeal and submits that the appellant is not entitled to get any relief by this Court.

16. 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 initially the F.I.R. was lodged under Section 354, 504, 506 I.P.C. and Section 3 (1) (d), 3 (1) dha), 3(2) (va) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, there is no any allegation of any forceful relation. It was admitted by the complainant, who is the father of the prosecutrix that her daughter and the appellant was in love affairs and there was some agreement between the prosecutrix and the appellant that they will marry, but later on the family members of the appellant denied for marriage; in the statement under Section 161 Cr.P.C. she has almost repeated the version of the F.I.R. and has not levelled any allegation of forceful physical relation by the appellant; in her statement recorded under Section 164 Cr.P.C. she admitted this fact that the appellant took her to hotel and she remained there and made relation as husband and wife, thus there appears force in the argument of learned counsel for the appellant that whatsoever relation was made, that was made with the consent of the prosecutrix, the appellant has not made physical relation or has promised for marriage under any misconception or by playing fraud. The prosecutrix is aged about 23 years, thus she is major and knew her consequences very well that at any point of time, being of another caste, the appellant or his family members can backup from the proposal of marriage, she must be aware and ready for the consequences; and the parties are consenting parties. The medical report of the prosecutrix does not support the version of the prosecution regarding allegation of rape, as the doctor has clearly stated that no definite opinion about sexual assault can be given and according to pathologist report two vaginal smear slides were found to be negative for spermatozoa. Hymen is old, torned and healed. Urine Pregnancy Test came negative and further considering the fact that appellant is in jail since 22.09.2022 and has now by done a substantial period of detention and further considering the judgment of Hon'ble Supreme Court in the case of **Pramod Suryabhan Pawar (supra)** as well as considering the larger mandate of the Article 21 of the Constitution of India and further the law laid down by the Hon'ble Apex Court in the cases of **Dataram Singh vs. State of U.P. 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.

17. Accordingly, the appeal is **allowed**. Consequently, the order dated 24.11.2022 passed by the Court of Special Judge SC/ST Act, Barabanki in Bail Application No. 3779 of 2022: Ritesh Jaiswal Vs. State of U.P.), arising out of Case Crime No.307/2022, under Sections 376D, 504, 506 I.P.C. and Section 3 (1) (d), 3 (1) dha), 3(2) (va), 3(2) (v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Police Station Kursi, District Barabanki is hereby **reversed and set aside**.

18. Let the appellant, **Ritesh Jaiswal**, be enlarged on bail in Case Crime No.307/2022, under Sections 376D, 504, 506 I.P.C. and Section 3 (1) (d), 3 (1) dha), 3(2) (va), 3(2) (v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Police Station Kursi, District Barabanki 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.

19. 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.

20. 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 :- 10.10.2023

Arvind