

Neutral Citation No. - 2024:AHC-LKO:42231

A.F.R.

RESERVED

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 9640 of 2023

Applicant :- Irshad Ahmad

Opposite Party :- State Of U.P. Thru. Secy. Deptt. Home Civil Sectt. Lko And 3 Others

Counsel for Applicant :- Vaibhav Kalia, Vidhu Bhushan Kalia

Counsel for Opposite Party :- G.A.

Hon'ble Rajesh Singh Chauhan,J.

1. Heard Sri Vaibhav Kalia, learned counsel for the applicant and Sri G.D. Bhatt, learned Additional Government Advocate for the State.

2. Despite the service of notice upon opposite party No.2, no one has appeared on behalf of opposite party No.2. As a matter of fact, no one has appeared on behalf of opposite party No.2 on any date.

3. This is the second bail application as the first bail application bearing Criminal Misc. Bail Application No.5158 of 2022; Irshad Ahmad vs. State of U.P. & others; has been rejected vide order dated 30.11.2022 passed by Hon'ble Dinesh Kumar Singh, J. The order dated 30.11.2022 reads as under:-

"1. Heard learned counsel for the applicant, Sri Ran Vijay Singh, learned A.G.A. and perused the record.

2. The present application under Section 439 Cr.P.C. has been filed by the applicant Irshad Ahmad seeking bail in FIR/ Case Crime No.-247 of 2021 under section-376, 354, 504, 506 I.P.C. & Section- (1)(w), 3(1)(Dha), 3(2)(v) SC/ST Act and section 3/4 and section 7/8 POCSO Act and section 67, I.T. Act, Police Station-Pachpedwa District-Balrampur.

3. The allegation against the accused-applicant is of committing rape on the prosecutrix, who is 17 years old girl and a student of Class XI. It is further alleged that the accused-applicant had made some video-clips and clicked

indecent photographs of the victim without clothes and sent these indecent photographs on Whatsapp to other persons. The accused-applicant was not allowing the prosecutrix to get married and blackmailing her on the basis of alleged photographs and video-clips. The prosecutrix in her statements recorded under sections 161 and 164, Cr.P.C. has specifically alleged that the accused-applicant raped her and clicked the photo and video-slips and threatened her that if she would tell anybody about the incident, he shall make the video viral and would not allow her to marry anyone else. When the prosecutrix told the incident to her parents, the parents went to the house of the accused-applicant, however, the brothers of the prosecutrix ran them away.

4. Considering the nature of allegations against the accused-applicant and the stand of the prosecutrix in her statements recorded under section 161 and 164, Cr.P.C. this court does not deem it appropriate to enlarge the accused-applicant on bail at this stage and, therefore, the bail application is rejected.

5. The accused-applicant may revive the bail plea after the prosecutrix gets examined in the court.

6. The trial court should make endeavour to record the statements of the prosecutrix and other witnesses of fact expeditiously, preferably within a period of six months.

7. Let a copy of this order be transmitted to the learned trial court for necessary compliance."

4. Learned counsel for the applicant has stated that despite the specific direction being issued by this Court on 30.11.2022 (supra) to record the evidence of the prosecutrix and other witnesses of fact within a period of six months but those statements have not been recorded within time so stipulated.

5. As per learned counsel for the applicant, the present applicant (Irshad Ahmad) is languishing in jail since 28.12.2021 in Case Crime /F.I.R. No.247 of 2021, under Sections 376, 354, 504 & 506 I.P.C. and Section 3 (1) (w) (i), 3 (1) (Dha) & 3 (2) (v) of S.C./S.T.

Act and Section 3/4 and 7/8 of Protection of Children from Sexual Offences Act (in short POCSO Act) and Section 67 of Information Technology Act, Police Station-Pachpedwa, District-Balrampur.

6. Learned counsel for the applicant has stated that he shall not address those grounds which have already been considered by this Court while rejecting the first bail application but shall address only those grounds which have emerged after recording of the statement of the prosecutrix and other witnesses.

7. Precisely, the fact of the present case have been narrated in para-3 of order dated 30.11.2022 (supra).

8. Attention has been drawn towards the supplementary affidavit dated 02.05.2024 showing Annexure Nos.SA-1, SA-2, SA-3, SA-4 & SA-5, which are the statements of PW-1 (Arjun Kumar Valmiki), PW-2 (Prosecutrix), PW-3 (Seema Devi), PW-4 (Rajesh Kumar Singh, Principal) & PW-5 (Dr. Mahikriti Sishodia) .

9. Learned counsel for the applicant has stated that if the aforesaid statements are perused, the fact would emerge that there are relevant decisive contradictions in the story alleged by the prosecution.

10. As per learned counsel for the applicant, the victim is a major lady but in the F.I.R., her age has been indicated as 17 years.

11. Sri Kalia has submitted that in the F.I.R. and in her statement the prosecutrix has stated that she is studying in Lokmanya Tilak Inter College, Panchpedwa in Class-X whereas the Principal of the said institution Sri Rajesh Kumar Singh has been examined as PW-4 has stated that the date of birth of the prosecutrix is 20.05.2004 and she was a regular student of his institution till Class-X and got admission in Class-XI but on account of non-deposition of fee for Class-XI and for being regular absent her name was struck off from the roll of

regular student on 19.10.2021, thereafter, she did not get admission again in the institution. Therefore, as per Sri Kalia, on the alleged date of incident i.e. 20.12.2021 she was not a bonafide/ legal student of the institution in question.

12. Sri Kalia has also drawn attention of this Court towards the evidence of Dr. Mahikriti Sishodia, the Medical Officer, District Hospital, Balrampur (PW-5) recorded on 17.10.2023 wherein she has stated that she had internally examined the prosecutrix on 27.12.2021 and as per examination it was found that her hymen was torn and the hymen may likely to torn if any girl drives Cycle, plays some field games or does the hard-work. As per her examination, there was no evidence of rape.

13. Sri Kalia, learned Counsel for the applicant has referred the order dated 16.04.2024 passed by this Court in Criminal Misc. Bail Application No.2322 of 2024, wherein this Court has observed that the age of the prosecutrix / child should be determined by the Medical Board for the reason that the medical report may prove to be a reliable piece of evidence; the said medical report will assist the process of law and enable the courts to make a conclusive finding on the victim's age after considering all evidences in the record; the said medical reports determining the victim's age at the very outset will also help prevent misuse of the POCSO Act and the said medical reports are relatable to specific provisions of law. In the aforesaid judgment, the relevant provisions of Section 164-A Cr.P.C. and Section 27 of the POCSO Act, which provides the medical examination of a child, have been considered.

14. Learned counsel for the applicant has also submitted that if the prosecution story is taken on its face value, it appears that the impugned F.I.R. is anti-time inasmuch as she allegedly narrated her plight to her mother on 26.12.2021 but the impugned F.I.R. has been lodged on 25.12.2021. He has further submitted that there is no

allegation of rape in the F.I.R. and the story has been developed later on.

15. Learned counsel for the applicant has also submitted that the story that the present applicant had clicked some obscene video and photographs of the prosecutrix is false and concocted inasmuch there is no material available with the prosecution to that effect. He has also stated that another story that the present applicant has sent those video clips to the person with whom the marriage of the prosecutrix was settled, is incorrect. Further, almost all the fact witnesses have been examined, therefore, considering the period of incarceration of the applicant in jail i.e. about two years and six months, he may be enlarged on bail.

16. Per contra, learned Additional Government Advocate has opposed the aforesaid bail application by submitting that the statement of the prosecutrix recorded under Sections 161 & 164 Cr.P.C. as well as her evidence recorded before the learned trial court are intact wherein she has levelled specific allegations of rape against the present applicant. The age of the prosecutrix/ child is below 18 years. In terms of Section 29 of the POCSO Act, burden is upon the applicant to establish that he has not committed offence of rape upon the prosecutrix.

17. Attention has been drawn towards Annexure No.CA-9 of the counter affidavit, which is the statement of one Sonu with whom the marriage of the prosecutrix was fixed, who has categorically stated that he is a labourer and doing labour work at Bangalore where he received one phone call on his Mobile Number from one person namely Irshad, who has informed him that the girl with whom his marriage has been fixed, is his lover and he loves her and he has established physical relations with her for couple of times. When the aforesaid Cell Phone Number was verified by the Investigating Agency, it was found that such Cell Phone Number belongs to the

present applicant. The aforesaid C.D.R. report has also annexed with the counter affidavit which indicates that those Cell Phone Numbers belong to the present applicant. Therefore, learned Additional Government Advocate has stated that the present applicant has not only committed rape with a minor girl, who is below 18 years, but also has informed this incident to a person with whom marriage of the prosecutrix was fixed, resultant thereof, that marriage was broken before it could take place.

18. Learned Additional Government Advocate has also referred Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, wherein it has categorically mandates that if any School Certificate of the child/ prosecutrix is available, the same would be given first preference than others. Notably, in the present case, the date of birth of the prosecutrix as per the High School Certificate is 20.05.2004, which means she was aged about 17 years and 05 months, therefore, the medical examination report, if any, may not have overriding effect over the age so indicted in the High School Certificate.

19. Learned Additional Government Advocate has relief upon the judgment of Apex Court rendered in the case in re: ***P. Yuvaprakash vs. State Rep. By Inspector of Police reported in 2023 LiveLaw (SC) 538***, wherein the Apex Court in para-16 observed as under:-

"16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94 (2) of the JJ Act, this court held in Sanjeev Kumar Gupta vs. The State of Uttar Pradesh & Ors. that:

Clause (i) of Section 94 (2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the concerned examination board in the same category (namely) (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age

determination by means of medical analysis is provided. Section 94(2) (a) (i) indicates a significant change over the provisions which were contained in Rule 12 (3) (a) of the Rules of 2007 made under the Act of 2000. Under Rule 12 (3) (a) (i) of matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94 (2) (i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category."

20. Having heard learned counsel for the parties and having perused the material available on record, at the very outset, I would like to observe that the prosecutrix/ child, who was aged about 17 years on the date of incident, recorded her statements under Section 161 & 164 Cr.P.C. wherein the specific allegation against the present applicant of committing rape with her has been levelled. Though there is some variation in her statement recorded under Section 164 Cr.P.C. on some part but if the entire statement recorded under Section 164 Cr.P.C. is read, the fact would emerge that in such statement too, she has levelled specific allegation of rape against the present applicant.

21. To me, mere long detention in jail does not entitle an accused for bail. Further, it all depends on the facts and circumstances of each case as there is no straight jacket formula for granting bail. Therefore, period of long incarceration may be considered as one of the grounds for granting bail, but it depends upon facts and circumstances of the particular case. The Hon'ble Apex Court in re; **Rajesh Ranjan Yadav v. CBI through its Director, (2007) 1 SCC 70**, has observed as under:-

"..... None of the decisions cited can be said to have laid down any absolute and unconditional rule about when bail should be granted by the Court and when it should not. It all depends on the facts and circumstances of each case and it cannot be said there is any absolute rule that the mere

fact that the accused has undergone a long period of incarceration by itself would entitle him to be enlarged on bail."

22. Section 29 of the POCSO Act provides for presumption as to certain offences. It provides that if a person is prosecuted for violating any provision of Sections 3, 5, 7 & 9 of the Act, the Special Court shall presume that such person has committed the offence, unless the contrary is proved.

23. The Apex Court in re; ***State of H.P. Vs. Asha Ram, (2005) 13 SCC 766***, has observed in para-5, which reads as under:-

"5. We record our displeasure and dismay, the way the High Court dealt casually with an offence so grave, as in the case at hand, overlooking the alarming and shocking increase of sexual assault on minor girls. The High Court was swayed by the sheer insensitivity, totally oblivious of the growing menace of sexual violence against minors much less by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance. It is now a well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."

24. The Apex Court in re; *Ganesan Vs. State represented by its Inspector of Police*, (2020) 10 SCC 573 while considering the judgments of *Vijay v. State of M.P.*, (2010) 8 SCC 191, *State of Maharashtra v. Chandraprakash Kewalchand Jain*, (1990) 1 SCC 550, *State of U.P. Vs. Pappu*, (2005) 3 SCC 594, *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384, *State of Orissa v. Thakara Besra*, (2002) 9 SCC 86 and *Krishan Kumar Malik v. State of Haryana*, (2011) 7 SCC 130 has observed that hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient, provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

25. In the case of *Pappu* (supra), the Apex Court has held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion and that consent should be free consent.

26. The Apex Court in re; *Phool Singh v. State of Madhya Pradesh*, (2022) 2 SCC 74, has considered the judgment of *Sham Singh vs. State of Haryana*, (2018) 18 SCC 34, wherein the Apex Court has observed that the testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.

27. Therefore, considering the facts and circumstances of the present case as well as the dictums of the Apex Court, as considered above, I am not inclined to grant bail to the present applicant.

28. Accordingly, the bail application is *rejected*.

29. Since the present applicant is in jail since 28.12.2022¹ and the trial in POCSO cases should be conducted and concluded with expedition, preferably within a period of one year in terms of Section 35 (2) of the POCSO Act, therefore, I hereby direct the learned Trial Court to conclude the trial within a period of six months from the date of receipt of a copy of this order taking recourse of Section 309 Cr.P.C. by fixing short dates, if possible, fix dates on day-to-day basis to ensure that the examination of all prosecution witnesses and other witnesses from both the sides, if any, be completed expeditiously and if any of the witnesses does not cooperate in the trial proceedings properly, the learned Trial Court may take appropriate coercive steps against such witness, which is permissible under the law. Further, no unnecessary adjournment shall be given to any of the parties so that the trial in question could be concluded within the time so stipulated.

30. However, liberty is given to the applicant to file another bail application, if the trial is not concluded within the aforesaid stipulated time.

31. Let copy of this order be provided to the learned Trial Court through District & Sessions Judge, Balrampur by the Registry of this Court within three working days for its strict compliance.

[Rajesh Singh Chauhan,J.]

Order Date :- 31.5.2024

Suresh/