

Court No. - 70

Case :- APPLICATION U/S 528 BNSS No. - 8434 of 2025

Applicant :- Atul Kumar Singh

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Ajay Singh

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Amrendra Nath Singh, the learned Senior counsel assisted by Mr. Ajay Singh, the learned counsel for applicant and the learned A.G.A. for State-opposite party-1.

2. Perused the record.

3. Applicant-Atul Kumar Singh, who is a charge sheeted accused and facing trial before Court below, has approached this Court by means of present application under Section 528 BNSS with the following prayer:

" It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to quash the judgment/order dated 13.01.2025, passed by learned Additional Sessions Judge/Fast Track Court (crime against women) No.2, Varanasi, passed in discharge application 7Kh moved by applicant, in Sessions Case No.44/2022, arising out of Case Crime No.1533/2019 (State Vs. Atul Kumar Singh), under sections 376, 506, 323, 328 I.P.C. and section 67A I.T. Act, Police Station-Cantt., District-Varanasi (U.P.).

It is further prayed to stay the proceeding of aforesaid case during the pendency of application before this Hon'ble court.

And/or may pass such other and further order or direction which this Hon'ble Court may deems fit and proper under the facts and circumstances

of the case, otherwise the applicant will suffer irreparable loss and injury."

4. Record shows that in respect of an incident, which is alleged to have occurred on 14.10.2019, a delayed FIR dated 28.11.2019 was lodged by the prosecutrix-first informant-opposite party-2 Sujata Singh and was registered as Case Crime No. 1533 of 2019 (State Vs. Atul Kumar Singh) under Sections 376, 506, 323, 328 I.P.C. and Sections 67A of I.T. Act, Police Station-Cantt, District-Varanasi. In the aforesaid FIR, applicant-Atul Singh has been nominated as solitary named accused.

5. Subsequent to aforesaid FIR, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter-XII Cr.P.C. He recorded the statement of first informant and other witnesses under Section 161 Cr.P.C. The statement of prosecutrix recorded under Section 161 Cr.P.C. is on record at page 53 of the paper book. The prosecutrix in her aforesaid statement has fully supported the FIR.

6. Thereafter, the prosecutrix was medically examined. However, the Doctor, who medically examined the prosecutrix did not find any injury on her body so as to denote commission of deliberate and forceful sexual assault. No injuries were found on the private parts of the prosecutrix either. Certain samples were taken from the body of prosecutrix for pathological examination. However, the result of the same is also in the negative. As such, the medical evidence on record does not support the ocular version of the occurrence.

7. The statement of the prosecutrix was then recorded under Section 164 Cr.P.C. Same is on record at page 68 of the paper book. In her aforesaid statement, the prosecutrix has rejoined and reaffirmed her previous statement.

8. On the basis of above and other material collected by the Investigating Officer, during course of investigation, he came to the conclusion that offence complained of against applicant is prima-facie established. He, therefore, opined to submit the charge sheet/police report. Accordingly, Investigating Officer submitted the charge sheet/police report dated 26.06.2020 in terms of Section 173(2) Cr.P.C., wherein the accused-applicant has been charge sheeted under Sections 376, 506, 323, 328 IPC and Sections 67A of the IT Act.

9. After submission of aforementioned charge sheet/police report, cognizance was taken upon same by the jurisdictional Magistrate in exercise of jurisdiction under Section 190(1)(b) Cr.P.C. and simultaneously applicant was summoned to face trial. Since offence complained of is triable exclusively by the Court of Sessions, therefore, concerned Magistrate in line with Section 209 Cr.P.C. committed the case to the Court of Sessions. Resultantly, Sessions Trial No. 44 of 2022 (State Vs. Atul Kumar Singh), under Sections 376, 506, 323, 328 IPC, Police Station-Cantt., District-Varanasi came to be registered and is now pending in the Court of Additional District Judge, FTC-II (CAW), Varanasi.

10. During the pendency of trial, applicant filed a discharge application (Paper No. 7Kha) in terms of Section 227 Cr.P.C. praying therein that he be discharged in aforementioned Sessions Trial. The discharge application filed by applicant was opposed by the prosecution. Ultimately, the Additional District Judge, F.T.C.-II, (CAW), Varanasi rejected the discharge application filed by applicant, vide order dated 13.01.2025.

11. Perusal of order impugned dated 13.01.2025 passed by Court below will go to show that Court below rejected the discharge

application filed by applicant on the finding that since the prosecutrix in her statements under Sections 161 and 164 Cr.P.C. has fully supported the prosecution story, therefore, prima-facie case is made out against applicant. The Court further observed that the issue as to whether the statements of the prosecutrix are neither credible nor reliable can be considered only at the stage of trial. The Court below thus concluded that since prima-facie case is made out against accused-applicant, therefore, the accused is not liable to be discharged.

12. Thus feeling aggrieved by the above order dated 13.01.2025, applicant has now approached this Court by means of present application under Section 482 Cr.P.C.

13. Mr. Amrendra Nath Singh, the learned Senior counsel assisted by Mr. Ajay Singh, the learned counsel for applicant contends that the order impugned dated 13.01.2025 passed by Court below is manifestly illegal and therefore, the same is liable to be quashed by this Court. According to the learned Senior counsel, as per the FIR lodged by first informant/opposite party-2, the occurrence giving rise to the impugned criminal prosecution of applicant is alleged to have occurred on 14.10.2019, whereas, the FIR was lodged on 28.11.2019. As such, there is a delay of 44 days in lodging the FIR. However, the delay in lodging the FIR has neither been explained in the FIR itself, which was lodged by the prosecutrix herself i.e. first informant/opposite party-2 nor in the subsequent statement of the first informant/opposite party-2 herself. He, therefore, contends that since the FIR is highly belated but the delay in lodging the FIR having not been sufficiently explained at all, therefore, the criminal prosecution of applicant on the basis of such a delayed FIR cannot be sustained.

14. It is next contended by the learned Senior counsel that the prosecutrix is major. She herself accompanied the applicant willingly and consciously. The prosecutrix in her statements under Sections 161/164 Cr.P.C. has herself admitted that she accompanied the applicant willingly and consciously. It is for this reason that applicant has not been charge sheeted either under Section 363 or 366 IPC. On the above premise, he thus contends that since the prosecutrix is major and a willing and consenting party, no offence under Section 376 IPC can be said to be made out against applicant. Court below, while passing the impugned order has clearly ignored aforesaid aspect of the matter, which has vitiated the order impugned.

15. Learned Senior counsel for applicant has then taken the Court to the Medico Legal Examination Report as well as the Supplementary Medico Legal Examination Report of the prosecutrix. With reference to the same, it is urged by the learned Senior counsel that the medical evidence does not support the prosecution story as unfolded in the FIR inasmuch as, the Doctor, who conducted the medico legal examination of the prosecutrix, did not find any sign on her body so as to denote commission of any deliberate/forceful sexual assault nor any injury was found on her private parts. The result of the samples taken from the body of the prosecutrix is also in the negative. It is thus contended by the learned Senior counsel that since the medical evidence does not support the ocular version of the occurrence, the applicant was liable to be discharged. The order impugned has been passed by Court below in clear ignorance of above, as such, the same is perverse. Consequently, the same is liable to be quashed by this Court.

16. Attention of the Court was then invited by the learned Senior counsel to the statements of the prosecutrix recorded under Sections 161 and 164 Cr.P.C. In the aforesaid backdrop, the learned Senior counsel would contend that in none of her statements i.e. under Section 161 Cr.P.C. or under Section 164 Cr.P.C., the prosecutrix has mentioned about the date on which, her modesty is alleged to have been dislodged by the applicant. In the absence of the specific date/dates on which, the modesty of the prosecutrix is alleged to have been dislodged, no criminal prosecution of applicant can be sustained. The prosecution of an accused for a criminal wrong can be maintained only on concluded facts and not on hypothesis. Since in the absence of aforesaid material facts, the prosecution case is simply hypothetical, no prosecution of the applicant can be sustained. Court below, while passing the order impugned, has completely overlooked aforesaid facts, which renders the order impugned unsustainable in law and fact.

17. It is lastly contended by the learned Senior counsel for applicant that the criminal prosecution of applicant is not only malicious but also an abuse of the process of Court. Referring to the judgment of of Supreme Court in ***Rajiv Thapar and Ors. Vs. Madan Lal Kapoor reported in 2013 (3) SCC 330***, the learned Senior counsel submits that when the test laid down by Apex Court in aforementioned judgment is applied to the facts of the present case, the veracity of the prosecution case is clearly unfolded.

18. On the edifice of aforementioned submissions, the learned Senior counsel contended that since the very prosecution of applicant cannot be sustained, the order impugned passed by Court below negating the discharge prayed by applicant is liable to be

quashed.

19. Per contra, the learned A.G.A. for State-opposite party-1 has vehemently opposed the present application. He submits that the order impugned in present application is perfectly just and legal. As such, the same is not liable to be interfered with by this Court. Present case is neither a case of no evidence nor it can be definitely concluded as per the material on record i.e. the papers accompanying the police report that no offence is made out against applicant. In the absence of the discharge application, as copy of the same has not been filed by applicant along with this application, the grounds urged by applicant in support of the discharge application filed by him before Court below are not discernible from the record. However, this much is apparent that as no evidence was collected by the Investigating Officer regarding the alleged abortion of the fetus in the womb of the prosecutrix, the applicant has not been charge sheeted under Section 313 IPC. Applicant has been charge sheeted under Sections 328, 323, 376 and 506 IPC as well as Section 67 IT Act as per the statements of the prosecutrix recorded under Sections 161 and 164 Cr.P.C. and the evidence on record. The veracity of the aforesaid statements of the prosecutrix cannot be examined at this stage. The same have to be taken ipso-facto. There is no pleading in the entire affidavit filed in support of this application that no obscene video of the prosecutrix was recovered by the Investigating Officer. As such, no fault can be attached to the charge sheet in absence of that ground. Since prima-facie case is made out against applicant, therefore, the discharge prayed by applicant has been rightly negated by Court below. Clear and cogent findings have been recorded by Court below in support of the conclusion drawn by it that no good ground is made out to discharge the applicant as prima-facie case

is made out against applicant for trial. Once the findings returned by Court below on the issues raised before Court below have not been specifically challenged or dislodged by the learned Senior counsel for applicant then the conclusion drawn by Court below cannot be altered. As such, the present application is liable to be dismissed.

20. Having heard Mr. Amrendra Nath Singh, the learned Senior counsel assisted by Mr. Ajay Singh, the learned counsel for applicant, the learned A.G.A. for State-opposite party-1 and upon perusal of record, this Court finds that Court below has rejected the discharge application filed by applicant on the ground that a prima-facie case is made out against applicant. The said conclusion has been drawn by Court below on the basis of the statements of the prosecutrix recorded under Sections 161 and 164 Cr.P.C., wherein the prosecutrix has clearly and categorically supported the prosecution story as unfolded in the FIR. The veracity of the statements of the prosecutrix recorded under Sections 161 and 164 Cr.P.C. cannot be examined at this stage. An attempt has been made by applicant to dislodge the credibility and reliability of the prosecutrix in support of the ground that the criminal prosecution of applicant is not only malicious but also an abuse of the process of Court. The relevant pleadings in this regard have been made in paragraphs 14, 15, 16, 17 and 18 of the affidavit filed in support of present application. However, on a conjoint reading of the said paragraphs, no malafide can be inferred against the prosecutrix as the aforesaid paragraphs are contradictory to each other. Apart from above, the parameters regarding exercise of jurisdiction under Section 227/239 Cr.P.C., now stand crystallized by the Three Judges Bench judgment of Supreme Court in **Tarun Jit Tejpal Vs. State of Goa, (2020) 14 SCC 556**, wherein the Bench has observed that

the prosecution of an accused can be sustained when a prima-facie case is made out against accused, which is different from the issue that prima-facie the accused can be convicted. The Bench has further observed that even in the case of grave suspicion, which is different from mere suspicion, the prosecution of an accused can be sustained. The prosecutrix in her statements under Sections 161 and 164 Cr.P.C. has remained clear, categorical and consistent. Apart from above, this Court, while deciding the veracity of the order passed by court below regarding the discharge claimed by an accused cannot examine the veracity of the said statements as it would amount to mini trial. The statements of the victim recorded under Sections 161 and 164 Cr.P.C. have to be taken ipso-facto. Reference in this regard be made to the judgments of Supreme Court and this Court in (i). **Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat (1983) 3 SCC 217 (paragraph 11)**, (ii). **Criminal Appeal No. 1129 of 2023 (Okansh Kumar Singh Vs. State of U.P. and Another) decided on 03.08.2023 (paragraph 29)** and (iii) **Vijaya Singh and Another Vs. State of Uttarakhand, 2024 SCC OnLine SC 3510 (paragraph 31)**. As such, as per the said evidence, the criminality alleged to have been committed by applicant is prima-facie made out. In view of above, the order impugned is in confirmity with the judgment of Supreme Court noted above.

21. In view of the discussion made above, the present applications fails and is liable to be dismissed.

22. It is, accordingly, dismissed.

Order Date :- 17.3.2025

YK