

Neutral Citation No. - 2024:AHC-LKO:41454

Reserved

AFR

Court No. - 11

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 9723 of 2022

Applicant :- Pradum Singh

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

Counsel for Applicant :- Alok Srivastava

Counsel for Opposite Party :- G.A.,Aslam Javed Siddiqui,Munna Singh

Hon'ble Rajesh Singh Chauhan,J.

1. Heard Shri Alok Srivastava, learned counsel for the applicant, Shri Rajnish Kumar Verma, learned A.G.A., however, no one has appeared on behalf of the informant/ complainant.

2. As per learned counsel for the applicant, the present applicant is in jail since 31.03.2022 in Case Crime No.56 of 2022, under Sections 376AB, 506 IPC and Section 5/6 of Protection of Children from Sexual Offences (POCSO) Act, 2012, Police Station- Asiwan, District- Unnao.

3. Learned counsel for the applicant has further submitted that the present applicant has been falsely implicated in the case as he has not committed any offence as alleged. As per prosecution story so narrated in the FIR, the present applicant has made oral sex with the daughter of the complainant/informant, who is aged about ten years. As per FIR, the present applicant, who is the neighbour of the informant/complainant, in the evening at 9:30 P.M. when informant/complainant was with her husband, the applicant came and asked that his mother is calling the prosecutrix/victim and after a lapse of time, the complainant along with her husband went for search of their daughter. While searching, they heard some sound coming from kothari of kanda and bhusa. They found that the cloths of the child were not on her body and the applicant was also not wearing cloths. After wearing cloths the child told that the present applicant has made oral sex with her and penetrated the penis in her way of urine.

4. Learned counsel for the applicant has submitted that the entire prosecution story is false and concocted inasmuch as the prosecution

story creates doubt as there was no independent eye witness account and last seen evidence.

5. Learned counsel for the applicant has also drawn attention of this Court towards the order dated 18.11.2021 passed by this Court in Criminal Appeal No.5415 of 2018, **Sonu Kushwaha Vs. State of U.P.**, relying upon paras 17 & 21 thereof, which reads as under:-

"17. From the perusal of the provisions of P.O.C.S.O. Act, it is clear that offence committed by appellant neither falls under Section 5/6 of P.O.C.S.O Act nor under Section 9(M) of P.O.C.S.O. Act because there is penetrative sexual assault in the present case as appellant has put his penis into mouth of victim. Putting penis into mouth does not fall in the category of aggravated sexual assault or sexual assault. It comes into category of penetrative sexual assault which is punishable under Section 4 of P.O.C.S.O. Act.

21. The court below has awarded the appellant to undergo 10 years rigorous imprisonment and fine of Rs. 5000/- under Section 6 of P.O.C.S.O. Act and under Section 6 of P.O.C.S.O. Act, minimum sentence is 10 years which may extend to imprisonment for life whereas under Section 4 of P.O.C.S.O. Act minimum sentence is 7 years but which may extend to imprisonment for life also. Learned court below has awarded minimum sentence provided under Section 6 of P.O.C.S.O. Act and accordingly, it would be appropriate to award the sentence to appellant under Section 4 of P.O.C.S.O. Act, seven years of rigorous imprisonment which is minimum provided in that Section and fine of Rs. Rs. 5,000/-, in default, three months additional simple imprisonment."

6. On the basis of aforesaid paras, the learned counsel for the applicant has tried to submit that in the present case, maximum sentence for the alleged offence committed may be seven years and the present applicant has already served about two years and two

months in jail, therefore, considering the period of incarceration, the present applicant may be released on bail.

7. Learned counsel for the applicant has further drawn attention of this Court towards Annexure No.5 of the bail application, which is the statement of the prosecutrix recorded under Section 164 of Cr.P.C., wherein her statement has been recorded under pressure of her family members.

8. Learned counsel for the applicant has reiterated that the present applicant has no previous criminal history, therefore, the present applicant undertakes that he shall not misuse the liberty of bail, if so granted by this court and shall abide by all terms and conditions of the bail order and shall cooperate in the trial proceedings.

9. Learned A.G.A. has opposed the aforesaid prayer of learned counsel for the applicant and has submitted that the offence in question is so heinous in nature, therefore, the present applicant may not be released on bail. He has drawn attention of this Court towards Annexure No.5 of the bail application, which is the statement of the prosecutrix recorded under section 164 of Cr.P.C., wherein she told that the present applicant has made oral sex with her and penetrated the penis in her way of urine. Learned AGA has submitted that since this is a case of oral sex so there might not be any other injury on the body of the victim.

10. Learned AGA has further drawn attention of this court towards Annexure No.4, which is the copy of medical report. Hymen was torned, which supports the prosecution story, and also the statement of the prosecutrix/victim recorded under Section 164 Cr.P.C. has reiterated the version of statement recorded under section 161 Cr.P.C., therefore, the present applicant may not be released on bail.

11. Heard learned counsel for the parties and perused the material available on record.

12. It is well settled that to constitute an offence of rape complete penetration of penis with emission of semen and the rupture of hymen is not necessary. Modi in his book- **Modi Textbook of Medical Jurisprudence and Toxicology, 23rd Edition**, at page 897, opined thus:

"To constitute the offence of rape, it is not necessary that there should be complete of the penis with the emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without the emission of semen, or even an attempt at penetration is quite sufficient for the purpose of law. It is, therefore, quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the Medical Officer should mention the negative facts in his report, but should not given his opinion that no rape had been committed. "

At page 928: In small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum."

13. In Parikh's Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

"Sexual intercourse: In Law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

14. Having heard learned counsel for the parties, having gone through the above definition of 'rape' opined by the eminent experts 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 10 years but as per her educational documents her age was 12 years on the date of incident, recorded her statements under Section 161 & 164 Cr.P.C. levelling specific allegation against the present applicant of committing rape with her. Notably, after reading the entire statement recorded under Section 164 Cr.P.C., the fact

would emerge that in such statement, she has levelled specific allegation of oral sex with her and the present applicant has penetrated the penis in her way of urine.

15. The victim/prosecutrix in her statement recorded under Section 164 Cr.P.C. has categorically informed that the present applicant committed oral sex with her. The victim/prosecutrix was about 12 years at the time of incident, therefore, at the stage of bail, it cannot be presumed that she has given such statement under the influence of her parents. Besides, the medical examination report supports her allegation wherein it has been verified that the penis was penetrated in the mouth of the victim/prosecutrix.

16. 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."

17. 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 and where the victim is a child below the age of 16 years, the Special Court shall presume that such person has committed the offence, unless the contrary is proved.

18. 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."

19. 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 to 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.

20. 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.

21. 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.

22. Considering the totality of the facts and circumstances of the issue in question, medical examination report, statement of the prosecutrix recorded under Section 164 Cr.P.C. and the provisions of law i.e. Section 375 IPC, Section 5/6 of POCSO Act, I do not find any substance in the arguments of learned counsel for the applicant, looking to the peculiar facts and circumstance of the present case, that I am conscious about the fact that the guilt of any person can be established before the learned trial court and no observation should be given affecting the trial, but on the basis of aforesaid material available on record, prima facie, I am not inclined to grant bail to the present applicant.

23. Accordingly, the bail application is **rejected** on merits.

24. Since the present applicant is in jail since 31.03.2022 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 nine months from the date of receipt of 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.

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

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

27. Before parting with, I appreciate the efforts and research made by Shri Piyush Tripathi, Research Associate attached with me, in finding out the relevant case laws applicable in the present case.

[Rajesh Singh Chauhan,J.]

Order Date :- 31.5.2024
Mohd. Sharif