

A.F.R.**Court No. - 72****WWW.LIVELAW.IN****Case :- CRIMINAL MISC. BAIL APPLICATION No. - 22430 of 2021****Applicant :- Bulle****Opposite Party :- State of U.P.****Counsel for Applicant :- Anil Kumar Tripathi, Arun Kumar Pandey****Counsel for Opposite Party :- G.A.****Hon'ble Sanjay Kumar Singh,J.****In Re: Criminal Misc. Exemption Application No. 5 of 2021**

1-Heard Mr. Anil Kumar Tripathi, learned counsel for the applicant and Mr. M. C. Chaturvedi, learned Additional Advocate General assisted by Mr. Rajesh Mishra, learned A.G.A. appearing on behalf the State of U.P. and perused the record.

2-On 30.07.2021, the following order was passed:

It is pointed out by learned counsel for the applicant that the statement under Section 164 Cr.P.C. of the victim was recorded on 04.12.2020, wherein she has made allegation of rape against the Bulle (applicant) and co-accused Badal, but thereafter investigating officer has recorded the second statement of victim on 07.12.2020, in which she has assigned the role of committing rape only against the applicant and so far as co-accused Badal is concerned, she has stated that she earlier had made allegation of rape against co-accused Badal on the advice of her counsel. On the said statement, co-accused Badal has been charge sheeted only under Section 366 I.P.C.

It has been vehemently urged by learned counsel for the applicant that after recording statement under Section 164 Cr.P.C., there was no occasion for the investigating officer to record the second statement of the victim under Section 161 Cr.P.C. The investigating officer has not conducted fair investigation and he in collusion with co-accused Badal, in order to minimize the gravity of offence against him, recorded the second statement of the

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victim on 07.12.2020. It is also argued that under the facts and circumstances of the case, as mentioned above, statement of victim cannot be said to be reliable as the same does not inspire confidence in the eyes of law. Therefore, the applicant is also entitled to be released on bail.

In response, learned A.G.A. opposed the bail, but could not point out any statutory provision that after recording the statement under Section 164 Cr.P.C., investigating officer can record the second statement of the victim under Section 161 Cr.P.C.

Put up this case on 04.08.2021.

On the next date, investigating officer of this case shall appear in person before this Court and file an affidavit, explaining that why the second statement of the victim was not recorded by audio-video electronic means.

The instant order shall be communicated by the learned A.G.A. to the concerned investigating officer within 72 hours.

3-Pursuant to above order dated 30.07.2021 of this Court, Mr. Raj Kishore/Investigating Officer of this case (Presently posted as Station House Officer, Police Station- Phoolpur, District Prayagraj), who is personally present before this Court, has filed an affidavit of compliance dated 03.08.2021 and an application dated 09.08.2021 seeking exemption of his personal appearance in this case, through Mr. Rajesh Mishra, learned A.G.A.

4-Mr. M.C. Chaturvedi, learned Additional Advocate General appearing for the State of U.P. submits that after recording the statement under Section 164 Cr.P.C. of the victim/prosecutrix on 04.12.2021, her second statement under Section 161 (1) Cr.P.C. was recorded on 07.12.2021 by the Investigating Officer in good faith in discharge of his duty as provided in paragraph no. 107 of the Police Regulations. He also submits that there is no bar for recording second statement of the victim/prosecutrix. On putting specific query regarding compliance of 1st and 2nd proviso to Section 161(3) Cr.P.C.,

Mr. Chaturvedi has fairly conceded that in this case, second statement under Section 161 of the Cr.P.C. of the victim/prosecutrix has not been recorded by any woman police officer, but the same has been recorded by Mr. Raj Kishore/Investigating Officer. He further admits that second statement of the victim was also not recorded by any audio-video electronic means. He next submitted that now Investigating Officer realizing his mistake tendered his unconditional written apology and he will be careful in future. Lastly, he insisted for not taking any action against the Investigating Officer assuring the Court that matter in hand will be examined and considered by the higher authorities and an appropriate action will be taken in the matter.

5-Per contra, learned counsel for the accused-applicant submits that Investigating Officer did not conduct a fair investigation. He in order to extend undue favour to co-accused Badal, himself recorded the second statement under Section 161 Cr.P.C. of the victim in the case diary on 07.12.2020, showing that victim in her second statement under section 161 Cr.P.C. has alleged that she in her statement under Section 164 Cr.P.C. had made allegation of rape against co-accused Badal on the advice of her Advocate, but Investigating Officer neither asked the victim to disclose the name of that Advocate nor recorded the statement of victim's Advocate.

6-Before delving into the matter, here it would be useful to quote the Section 161 of the Code of Criminal Procedure, which reads thus:-

“161. Examination of witnesses by police.

(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or

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to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

Provided that statement made under this sub-section may also be recorded by audio-video electronic means.

Provided further that the statement of a woman against whom an offence under section 354, section 354-A, section 354-B, section 354C, section 354D, section 376 (section 376A, section 376AB, section 376-B, section 376-C, section 376-D, section 376-DA, section 376 DB), section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.”

7-Having heard the argument of the learned counsel for the parties and on perusing the affidavit dated 03.08.2021 of the Investigating Officer, I find that :-

- (i)-Second statement dated 07.12.2020 of the victim/prosecutrix was not recorded by a woman police officer, but the same was recorded by Mr. Raj Kishore (I.O.).
- (ii)-Second statement of the victim was also not recorded by audio-video means.
- (iii)-In the affidavit dated 03.08.2020, no explanation has been given for not following the provisions provided in 1st and 2nd proviso to Section 161(3) Cr.P.C.
- (iv)-In paragraph nos. 9 and 11 of the affidavit dated 03.08.2021, it is mentioned that Investigating Officer has complied the provisions of Section 161(3) Cr.P.C., but the same is not correct averment, which are false on the face of record itself as well as in the light of statement of Mr. Chaturvedi given at the bar, as mentioned above.

8-In a criminal offence one of the established canons of just, fair and transparent investigation is the right of accused as well as victim, therefore high responsibility lies upon the Investigating

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Officer not to conduct an investigation in tainted and unfair manner, which may legitimately lead to a grievance of accused that unfair investigation was carried out with an ulterior motive. It must be impartial, conscious and uninfluenced by any external influences. Avoiding any kind of mischief, effort should be made to bring the guilty to law as nobody stands above the law. It is not only the responsibility of the Investigating Officer but as well as that of Courts to ensure fair investigation. The purpose and object of case diary is to maintain fairness in the investigation, transparency and record for ensuring proper investigation. The proper investigation is one of the essentials of the criminal justice system and an integral facet of rule of law. The investigation is a delicate painstaking and dexterous process, therefore ethical conduct is also essential and investigation should be free from objectionable features or legal infirmities.

9-It would be relevant to mention that 1st and 2nd proviso to Section 161(3) Cr.P.C had been inserted by Act 5 of 2009 (w.e.f. 31.12.2009) and Act 13 of 2013 (w.e.f. 2.03.2013) respectively, but this Court has been noticing that in majority of cases, the said provisions are not being followed by the Investigating Officers in true sense and practice of recording second statement under section 161 Cr.P.C. of the victim/prosecutrix after recording her statement under Section 164 Cr.P.C. is on higher side and in some cases, conclusions are drawn by the Investigating Officer on the basis of second statement under section 161 Cr.P.C., ignoring the statements under Section under Section 164 Cr.P.C. This Court also found that it is common argument on behalf of the prosecution in all such cases that there is no bar for recording the second statement under section 161 Cr.P.C. of the victim/prosecutrix. In the opinion of this Court, the statement under Section 164 Cr.P.C. will prevail over the statement under Section 161 Cr.P.C.

10-High Courts are sentinels of justice with extraordinary powers to ensure that rights of citizen are duly protected. Since Mr. Chaturvedi has fairly conceded that 1st and 2nd proviso to Section

161(3) Cr.P.C. has not been followed in this case and assured this Court that higher authority will certainly look into the matter, therefore this Court is not taking any action leaving it upon the authorities concerned to take appropriate action in the matter. In view of above, personal appearance of Mr. Raj Kishore (Investigating Officer of this case) is dispensed with.

Exemption application No. 5 of 2021 dated 09.08.2021 is disposed of.

11-Let a copy of this order be sent to the Director General of Police, U.P., Lucknow and Principal Secretary, Home U.P. Lucknow within two weeks, who shall issue necessary directions/guidelines to all the Senior Superintendent of Police regarding compliance of statutory provisions provided in 1st and 2nd proviso to Section 161 (3) Cr.P.C. within two months.

12- Copy of this order be also sent to the Senior Superintendent of Police, Prayagraj for examining the conduct of the Investigating Officer of this case and taking appropriate action in the matter.

13-The order passed by the Senior Superintendent of Police, Prayagraj and directions/guidelines issued by the Director General of Police, U.P. Lucknow, as directed above, shall be communicated to this Court through the Registrar General, High Court Allahabad within eleven weeks.

Order on bail application

List this case on 02.09.2021 for hearing the bail application of the applicant.

Order Date: 11.08.2021

Sumaira

Justice Sanjay
Kumar Singh

Digitally signed by Justice
Sanjay Kumar Singh
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