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AFR

Court No. - 75

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 57301 of 2022

Applicant :- Asharam

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Shyam Lal, Abhilasha Singh, Ashutosh Yadav

Counsel for Opposite Party :- G.A.,Kanak Kumar Tripathi

Hon'ble Sanjay Kumar Singh,J.

1. Heard Shri Ashutosh Yadav. learned counsel for the applicant and Shri Rabindra Kumar Singh, learned Additional Government Advocate representing the State.

2. By means of this application under Section 439 of Cr.P.C., applicant Asharam, who is involved in Case Crime No.303 of 2022, under Sections 363, 366, 376, 506 IPC and ¾ of POCSO Act, police station Rajpura, district Sambhal, seeks enlargement on bail during the pendency of trial.

3. In short compass the facts of the case are that on 29.8.2022, the mother of the victim has given an application to the Superintendent of Police, (Public Grievance Cell), Sambhal to the effect that in respect of abduction, misdeed and threat to her daughter's life, she has given an application at the police station Rajpura, but neither her report has been lodged by the police nor victim was sent for medical examination. The report further alleges that on 24.8.2022, the minor daughter of informant aged about 17 years was enticed away by the applicant in respect whereof she made an application at the police station. Thereafter, applicant left

her daughter outside her village. Her daughter told her that the applicant forcibly made physical relation with her and also threatened her of dire consequences in case she reports the matter to the police.

4. It is contended by learned counsel for the applicant that in respect of the incident dated 24.8.2022, the first information report has been lodged on 31.8.2022 and the victim was medically examined on 31.8.2022 for which no plausible explanation has been tendered by the prosecution.

5. Learned counsel for the applicant further submits that the informant in her statement under Section 161 Cr.P.C. has stated inter alia that on 24.8.2022 when her minor daughter had gone to field, she was enticed away by the applicant and on the next day i.e., on 25.08.2022, he left her daughter outside the village. Her daughter told her that the applicant forcibly made physical relation with her. When second statement of the informant was recorded, she reiterated her earlier statement and has also stated that her daughter told her that the applicant disrobed her and committed misdeed/rape upon her. On being enquired, she stated that her daughter took bath and washed her clothes. On the basis of the aforesaid statement, it is argued that since victim took bath and washed her clothes, therefore, it could not be ascertained as to whether any sexual intercourse was done or not.

6. Referring the statement under Section 164 Cr.P.C. of the victim, much emphasis has been given by contending

that the victim has stated that the applicant has committed misdeed with her. On putting query about the misdeed, she explained that the applicant took off her Paijami as well as his pant and lie down upon her. Much emphasis has been given by contending that disclosure made by the victim in her statement under Section 164 Cr.P.C. does not come with the purview of Section 375(c) IPC because the said provision will attract if the said manipulation was to cause penetration whereas in the present case as per statement under Section 164 Cr.P.C. of the victim, no penetration was done, therefore, said provision is not attracted.

7. Referring to the medical examination report of the victim, it is argued that there was no injury on the private part of the victim and in supplementary report, no spermatozoa was found and the doctor was of the opinion that no positive opinion can be given about sexual abuse. In support of his submission, learned counsel for the applicant has relied upon the following decisions:

1. **Criminal Revision No. 1687 of 2013, (Digamber Harinkhede and another Vs. State of Madhya Pradesh)**, decided on 16.12.2018. (M.P. High Court).
2. **Santosh Vs. State of Kerala**, 2021 (3) KLJ 927 (Kerala High Court)
3. **Criminal Appeal No. 5 of 2020 (Chhefulson Snaitang Vs. State of Meghalaya)**, decided on 14.3.2022)

8. Learned counsel for the applicant next submitted that

medical examination of the applicant was also not conducted so as to rule out as to whether sexual offence was done or not which are mandatory as per Section 53A Cr.P.C. The medical examination of the victim was also done after seven days on 31.08.2022. Since the victim is an illiterate girl, therefore, her ossification test was conducted, according to which, she is aged about 17 years, therefore, there may be marginal error of two years on either side.

9. Lastly, it is submitted by the learned counsel for the applicant that there is no chance of the applicant of fleeing away from the judicial process or tampering with the prosecution evidence. The applicant is languishing in jail since 08.9.2022.

10. Opposing the prayer for bail of the applicant Shri Rabindra Kumar Singh, learned Additional Government Advocate submits that considering the allegations made by the victim in her statement under Section 164 Cr.P.C., offence under Section 376 is made out against the applicant and considering the gravity of the offence, the bail application of the applicant is liable to be rejected.

11. So far as the first contention of the learned counsel for the applicant that the FIR has been lodged with inordinate delay for which no plausible explanation has been given, is concerned, I find that the first information report itself speaks that the same has been lodged on the basis of an application made to the Superintendent of Police, Public Grievance Cell on 29.8.2022 wherein it has been stated that

in respect of coaxing her minor daughter, she has given an application at the police station Rajpura, but her FIR has not been lodged. From the perusal of the FIR itself it is clear that the first information report has been lodged after the intervention of the Superintendent of Police. Therefore, I am of the opinion that delay in lodging the first information report has properly been explained by the prosecution. Further in a case under section 376 IPC, the delay, if explained properly, is not fatal to the prosecution case.

12. Hon'ble Supreme Court in the case of **Ram Naresh and others Vs. State of Chhatisgarh, AIR 2012, SC 1357**, has held that the delay, if any, in lodging the FIR, if explained properly, is in no way fatal to the case of the prosecution.

13. In **Tara Singh and others Vs. State of Punjab, AIR 1991 SC 63**, Hon'ble Supreme Court held that mere delay in lodging the FIR by itself cannot give scope for an adverse inference leading to rejection of the prosecution case outright.

14. Hon'ble Supreme Court in **State of Punjab Vs. Gurmit Singh and others**, 1996 SCC (2) 384 Hon'ble Supreme Court held as under:

In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The courts cannot over-look the fact that in sexual

offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.

15. Second contention of learned counsel for the applicant is that since there was no penetration of male organ into the vagina, no offence under Section 376 IPC is made out against the applicant. This contention of the learned counsel for the applicant is totally misconceived inasmuch as the victim in her statement under Section 161 Cr.P.C has stated that when she had gone to Forest to fetch grass, accused-applicant forcibly took her and committed mis-deed with her and also threatened her of dire consequences. Further in her statement under Section 164 Cr.P.C. the victim has stated that on 24.8.2022 at about 3.00 PM when she had gone to cut grass, the accused came there and forcibly took her to a deserted place in a room through Kachha road where he committed misdeed with her. On a specific query by the Court about misdeed, the victim has stated that the accused took off her Paijami and thereafter he also has taken down his Pant and lie down upon her. On the next day, i.e. 25.8.2022, at about 12.00 in the night, he left her outside the village.

16. For better appreciation, the statements of the victim under Section 161 and 164 Cr.P.C. are reproduced herein below:

"बयान किया कि मेरा नाम "X" पुत्री "Y" जनपद सम्भल की रहने वाली हूं। मेरी उम्र लगभग 17 वर्ष है। मैं पढ़ी लिखी नहीं हूं। दिनांक 24.08.2022 को लगभग समय 3 बजे के करीब मैं जंगल में अकेली घास लेने के लिये गयी थी तभी अचानक पीछे से मेरे ही गांव का रहने वाला आशाराम s/o महेन्द्र ने मेरी पीछे से कौलिया भर ली और मुझे डराधमकाकर अपने साथ मेरी बिना मर्जी के जबरदस्ती मुझे अपने साथ ले गया। जहा पर उसने मेरे साथ गलत काम मेरी बेइज्जती भी की और मुझसे कहा कि अगर तूने किसी को इस बात के बारे में बताया तो तुझे और तेरे घरवालो को जान से मार दूंगा। दिनांक 25.08.2022 को वह मुझे गांव के बाहर छोडकर भाग गया। फिर जैसेतैसे मैंने अपने घर आकर यह सारी बात अपनी मां से बतायी। यही मेरा बयान है।

बयान पीडिता "X" अन्तर्गत धारा 164
सीआरपीसी.....पीडिता "X" उम्र लगभग 17 वर्ष पुत्री
"Y" निवासी जिला सम्भल ने सशपथ बयान किया
कि दिनांक 24.08.2022 को दिन 03 बजे मैं घास काटने गयी

थी आशाराम वहां आ गया वह मेरे गांव का ही है मैं बचपन से उसे जानती हूँ उस वक्त घटना के दौरान वहां और कोई नहीं था आशाराम ने मुझे पीछे से पकड़ लिया और बाईक पर बैठा लिया और कच्चे रास्ते बहुत दूर ले गया था हमे पहुंचते हुये वहाँ अन्धेरा हो गया था मैं अपनी मर्जी से नहीं गयी थी वहां एक कमरे मे आशाराम लेकर गया था कमरे में कोई और नहीं था वहां आशाराम ने मेरे साथ गन्दा काम किया गन्दा काम के मतलब पूछने पर पीडिता ने बताया कि मेरी पजामी उतारी और उसने अपनी पेन्ट उतारी और मेरे ऊपर लेट गया था इसके आगे क्या किया मुझे नहीं पता फिरदिनांक 25.08.2022 की शाम को लगभग 12 बजे मुझे गांव के बाहर छोड गया था पुलिस ने बयान लिया था मेडिकल भी हुआ है मुझे और कुछ नहीं कहना है "

17. From the perusal of the statement of the victim under Section 164 Cr.P.C it is clear that the applicant forcibly took her to a deserted place, kept her in a room throughout the night and committed rape on her and thereafter next day, in the night he left the victim outside the village.

18. As per report of the Medical Board comprises Chief Medical Officer, Orthopedic Surgeon and Radiologist, Sambhal, the age of the victim is 17 years. Although, as per

medical report of the victim , no injury was found either on the body or private part of the victim, but hymen of the victim was found torn and healed.

19. **Criminal Revision No. 1687 of 2013, (Digamber Harinkhede and another Vs. State of Madhya Pradesh), Santosh Vs. State of Kerala, and (Chhefulson Snaitang Vs. State of Meghalaya)(Supra)** relied upon by the learned counsel for the applicant are not at all applicable to the facts of the present case and therefore, are no help to the applicant.

20. **Digamber Harinkhede and another Vs. State of Madhya Pradesh)** (supra) was a case in which as per admitted case of the prosecution, the accused therein pressed the breast of the prosecutrix, but the learned trial court framed the charge under Section 376 (1) IPC, which was set aside by the High Court of Madhya Pradesh.

21. In **Santosh Vs. State of Kerala**, (Supra) the Kerala High Court while setting aside the conviction of the appellant therein under Section 11(i)read with section 12, 9(I)(m) read with Section 10, 3(C) read with section 5(m) and 6 of Protection of Children from Sexual Offences Act, 2012; Section 376(2)(i) and Section 377 IPC, he was sentenced under Section 376(1) read with Section 375(c), 354 and 354A(1)(i) IPC.

22. In **Chhefulson Snaitang Vs. State of Meghalaya** (Supra) the victim in her cross-examination stated that "it is a fact that the accused person did not penetrate his male

organ inside my vagina but he just rubbed from the top of my under wear". The Division Bench of High Court of Meghalaya at Shillong while upholding the conviction of the appellant therein, held as under:

" Even if the victim's evidence in her cross-examination is taken at face value, it would not imply that there was no penetrative sex. If it be accepted that at the relevant time the victim was wearing her underpants and the appellant rubbed his organ from over her underpants, there was no difficulty in penetration. Penetration for the purpose of Section 375 of the Penal Code does not have to be complete. Any element of penetration would suffice for the purpose of the relevant provision. Further, Section 375(b) of the Penal Code recognises that insertion, to any extent , of any object into the vagina or urethra would amount to rape. Even if it be accepted that the appellant herein forced his organ into the vagina or urethra of the victim despite the victim wearing her underpants, it would still amount to penetration for the purpose of Section 375(b) of the Penal Code.

In any event, by virtue of Section 375(c) of the Penal Code, when a person manipulates any part of the body of a woman so as to cause penetration into, inter alia, the vagina or urethra,

the act would amount to rape. There is sufficient evidence of such penetration in the present case.

23. The aforesaid decision in **Chhefulson Snaitang Vs. State of Meghalaya** is of no help to the applicant rather it is in favour of the prosecution.

24. As per FIR version, the incident in question took place on 24.8.2022 and medical examination of the victim was done on 31.8.2022, i.e. after one week of the incident. In the medical report, hymen of the victim was found torn and healed, which goes to suggest that victim was subjected to rape.

25. Admittedly, victim in the case in hand is minor aged about 17 years. A plain reading of offence of rape under Section 375 IPC shows that intercourse with a woman below eighteen years, with or without her consent, amounted to rape and mere penetration is sufficient to prove such offence. The expression 'penetration' denotes ingress of male organ into the female parts, however, slight it may be. Since, the victim was in confinement of the applicant for about one and a half day and there was specific allegations that he committed misdeed with her and on query by the investigating officer, she has explained that the applicant first took off her Pajjami and thereafter disrobed himself and lie down upon her. It is not the case of the applicant-accused that after he was trying to commit rape, someone has intervened or came to the place to save the victim as a result thereof he could not complete the act.

26. Hon'ble Supreme Court in the case of **State of Madhya Pradesh Vs. Mahendra alias Golu**, (2022)12 SCC 442 laid down the distinction between 'Preparation' and 'Attempt' to commit rape and explained the three stages of commission of a crime, which are as under:

"It is settled preposition of Criminal Jurisprudence that in every crim, there is first, Mens Rea (intention to commit), secondly, preparation to commit it, and thirdly, attempt to commit. If the third stage, that is 'attempt' is successfu, then the crime is complete. If the attempt fails, the crime is not complete, but law still punishes the person for attempting the said act. 'Attempt' is punishable because even an unsuccessful commission of offence is preceded by mens rea, moral guilt, and its depraving impact on the societal values is no less than the actual commission."

27. In the instant case since the acts of the applicant exceeded the stage beyond attempt to commit it, he is guilty of the offence punishable under Section 376 IPC.

28. Even if, for the sake of argument, it is assumed that there was no penetration, even then the applicant is liable to be punished under Section 376/511 IPC.

29. Moeover, Hon'ble Supreme Court in a plethora of judgements held that even slightest penetration of male organ into the female parts amounts to rape.

30. High Court of Kerala while examining the ingredients of the offence of rape, in **State of Kerala Vs. Kundumkara**

Govindan, 1969 Cr.L.J, held as under:

31. "The crux of the offence under Section 376 IPC is rape and it postulates a sexual intercourse. The word "intercourse" means sexual connection. It may be defined as mutual frequent action by members of independent organization. By a metaphor the word "intercourse" like the word "commerce" is applied to the relation of sexes. In intercourse there is temporary visitation of one organization by a member of the other organization for certain clearly defined and limited objects. The primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. There is no intercourse unless the visiting member is enveloped at least partially by the visited organization, for intercourse connotes reciprocity. In intercourse between thighs the visiting male organ is enveloped at least partially by the organism visited, the thighs; the thighs are kept together and tight."

31. In **Ranjit Hazarika Vs. State of Assam** (1988)8 SCC 635, it has been held by the Hon'ble Supreme Court that non-rupture of hymen or absence of injury on victim's private parts does not belie the testimony of the prosecutrix. The evidence of a victim of sexual assault stands at par with the evidence of an injured witness. Just as a witness who has

sustained an injury is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offender is entitled to great weight, absence of corroboration notwithstanding.”

32. In **Madan Gopal Kakkad Vs. Naval Dubey** (1992) 3 SCC 204, it has been held as under:

“Thus to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pedenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the 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.”

33. In **Radha Krishna Nagesh Vs. State of Andhra Pradesh** (2013) 11 SCC 688, Hon'ble Supreme Court held as under:

“The mere fact that the hymen was intact and there was no actual wound of her private parts is not conclusive of the fact that she was not subjected to rape. According to PW-9, there was a definite indication of attempt to rape the girl. Also, later semen of human origin was traceable in the private parts of the girl, as

indicated by the FSL report. This would sufficiently indicate that she had been subjected to rape. Penetration itself proves the offence of rape, but contrary is not true, i.e. even if there is no penetration, it does not necessarily mean that there is no rape.

34. 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 penetration 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.

35. 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."

36. **State Of Himachal Pradesh vs Asha Ram, 2006 Cri.L.J. 139** was a case in which High Court of Himachal Pradesh has acquitted the accused Asha Ram on the ground that no spermatozoa were found on the Salwar and underwear of the prosecutrix though according to the prosecution, complete act of sexual intercourse was committed. Further no evidence has come on record to show that hymen was ruptured. The medical evidence coming on record, as discussed above, is highly unreliable and even otherwise it does not establish that the victim was subjected to sexual intercourse. Hon'ble Supreme while setting aside the judgement of the High Court, has held as under:

"We record our displeasure and dismay, the way the High Court dealt casually with the offence so grave, as in the case at hand,

overlooking the alarming and shocking increase of sexual assault on the minor girls. The High Court was swayed by sheer insensitivity totally oblivious of growing menace of sex violence against the minors much less by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance. It is now 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 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 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.”

37. In the case of **Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753**, Hon'ble Supreme Court held thus:

In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opiated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to

establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplate it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society and its profile."

38. Hon'ble Supreme Court in **State of A.P. Vs. Bodem Sundara Rao, 1995 (6) SCC 230** has cautioned the Courts while dealing with the cases of sexual crime against women in the following words:

"Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The Courts are, therefore, expected to deal with the cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely."

39. So far as the last contention of the learned counsel for the applicant that medical examination of the applicant was not conducted as per Section 53A Cr.P.C, is concerned, it is to be noted that since the accused was arrested on 08.9.2022, i.e. after fifteen days of the incident, therefore, the investigating officer did not think it necessary to get him

examined under Section 53A Cr.P.C.

40. The Court must keep in mind while appreciating the evidence of the prosecutrix the values prevailing in the country, particularly in rural India. It would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. In our country, a woman, victim of sexual aggression, would rather suffer silently than to falsely implicate somebody. Any statement of a rape victim is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit.

41. Considering the overall facts and circumstances of the case as well as keeping in view the submissions advanced on behalf of parties, gravity of offence, role assigned to applicant and severity of punishment, I do not find any good ground to release the applicant on bail.

42. Accordingly, the bail application is rejected at this stage.

43. It is clarified observations made herein above are limited to the extent of determination of this bail application and will in no way be construed as an expression on the merits of the case. The trial court shall be absolutely free to arrive at its independent conclusions on the basis of evidence to be adduced by the parties.

Order Date :- 30.5.2023

Ishrat