

A.F.R.**Court No. - 76****Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 53947 of 2021**Applicant :-** Atul Mishra**Opposite Party :-** State Of U.P. And 3 Others**Counsel for Applicant :-** Ishan Deo Giri, Sarvesh Pandey**Counsel for Opposite Party :-** G.A.**Hon'ble Rahul Chaturvedi, J.**

1. Heard Shri Ishan Deo Giri, learned counsel for the applicant, learned A.G.A. and perused the record of the case.

2. Applicant Atul Mishra is facing prosecution in Case Crime No.0456 of 2019, u/s 363, 366, 376 I.P.C.; Section 3/4 of POCSO Act, 2012 and Sections 3(2)v, 3(2)va of the Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, 1989, Police Station-Khaga, District-Fatehpur. He is behind the bars in connection with aforesaid offence since 4.10.2021 and seeking bail during trial, whereas the victim/prosecutrix is languishing at Government Child Welfare Home (Girls), Khuldabad, Prayagraj along with her infant baby in her lap.

3. Pursuant to the earlier orders of this Court, the notices were issued to the concerned respondents. The C.J.M. Fatehpur who vide its intimation dated 22.1.2022 informs the court that the notices were served upon Rajendra Prasad (Respondent No.2) personally, but of no response. Nor learned A.G.A. has filed any counter affidavit so far, on the other hand, the applicant is

behind the bars since October, 2021 waiting for justice. Hence with the help and aid of learned A.G.A. the Court is proposing to decide the bail application.

3. Prosecution against the applicant was rolled by the father of the victim Ms 'A' by filing F.I.R. on 17.11.2019 u/s 363 I.P.C. with the specific allegation that his daughter is a minor, pursuing her studies in Class-XI, (Date of Birth : 15.6.2005 as per her High School certificate) was enticed away by the applicant from 06.11.2019. This is the gist of the F.I.R.

4. Normally, this Court, on these factual aspect of the issue, is most uncharitable and unmerciful to such type of accused, who used a minor girl to quench their animal instinct and commit rape with her, but paragraphs herein below have compelled the Court to shift its stand for a greater cause and in the interest of larger good.

5. Applicability of statutory provisions in the facts and circumstances of the case is not a mathematical exposition or its theorem. When the law courts apply to these provisions, we should be careful about what would be its end result. If after applying any provisions in a given facts, leading to a disastrous and catastrophic result, it is the duty of the courts of law to mellow down its rigors in order to achieve much more meaningful and swallowable application of that provision in a given facts and circumstances of the case.

6. Now coming back to the facts of the case in hand,

after lodging of the F.I.R., the police have recorded statements u/s 161 Cr.P.C. of the informant and his wife. From these statements, it was surfaced that the victim was missing since 6.11.2019, when gone to her school and thereafter her whereabouts were not known. Interestingly, from the same day the applicant too was missing. Thus it was gathered that both of them fled away to some unknown destination. Ms 'A' who was student of Class-XI and as per her High School Certificate-2019 her date of birth is 15th June, 2005, and thus on the date of incident she was barely 14 years 4 months of age, provenly a minor girl.

7. Police after lodging the F.I.R. in October, 2019, came to the informant on 2.3.2021, for recording his statement second time (majeed bayan), Annexure-4, in which he candidly declined to co-operate with the police, revealing that he knows the whereabouts of the victim but he has decided not to interfere in her life. He also asked the police officials to drop the case. Accordingly, the police on the same day has filed CLOSURE REPORT No.14/2021 before the court for its acceptance.

8. Since the victim was not traceable for a considerable period, it seems it was a black blot on the functioning of the police; thus, they kept the matter pending. Eventually on 4.10.2021 after getting a tip from the informer, police arrested the victim and her small baby in her lap along with the applicant from east of by-pass.

After the alleged arrest of the victim, her baby and the applicant, the police, all of a sudden became active and pasted Sections 3(2)5 of the SC/ST Act, as the victim belongs to 'PASI' community.

9. After the alleged arrest, the victim was produced for her regular statements u/s 161 and 164 Cr.P.C. (Annexures 7 and 9) recorded on 7.1.2021 and 11.10.2021 respectively. Conjoint reading of both these statements following common feature are surfaced :-

(a) Victim is the student of Class-XI and having date of birth 16.6.2005.

(b) Both, the victim and the applicant, were nurturing inter-se relationship for the last three years.

(c) On 6.11.2019, without informing any one in the family or friends, both of them have decided to fled away. Thus from Khaga to Fatehpur, and thereafter via Lucknow, ultimately they reached to Delhi.

(d) After performing marriage in the Shiva Temple, they started living in a rented accommodation as husband and wife for two years. During this period, out of this relationship the prosecutrix/victim on 21.5.2021 has given birth to a baby, who is now about 4 months old.

(e) In no uncertain terms, the victim states that on her own volition and accord she joined the company of the applicant; both of them decided to stay at Delhi and maintain the relationship as husband and wife. Even now the victim wants to live with the applicant as his wife and does not wish to go back with her parent.

10. After the aforesaid, since on the date of incident the victim was minor, consequently, all the authorities at the subordinate level, unmindful of the fact that the

victim is carrying a baby in her lap, sent her to RAJKIYA BALGRIH (BALIKA) KHULDABAD, PRAYAGRAJ and the applicant is in jail. An order to this effect was passed by Juvenile Justice Board, Fatehpur on 8.10.2021 and since then she is residing at the said 'Balgrih' with her baby. On the other hand learned Additional Sessions Judge/ Special Judge (POCSO Act), Fatehpur has rejected the bail application moved on behalf of applicant, having Bail Application No.2346/2021, vide order dated 23.11.2021. Hence the present bail application before this Court.

11. As mentioned above, undisputedly on the date of incident i.e. 06.11.2019, the victim Ms. 'A' was a minor girl and her 'consent' as contemplated u/s 375/376 I.P.C. has got no value in the eyes of law. This seems to be conservative approach to deal and decide the instant issue and rightly so. But as I have stated in the opening part of the order, that applicability of any statutory penal provision is not a mathematical exposition or theorem. It contains inherent flexibility to cope up an extraordinary situation and to have more meaningful and larger good.

12. There can be no second thought as to the seriousness of the offence under the POCSO Act and the object to achieve. Enactment of POCSO Act was to effectively address the heinous crime of sexual abuse and sexual exploitation of children. The Act was introduced to provide protection of children from the offences of sexual assault and harassment etc. This Act

also provides for safeguarding the interest of the child at every stage of judicial process. But this laudable object must have some genuine and inherent exceptions too. It is imperative for the Court of law to draw thin line that demarcates the nature of acts that should not be made to fall within the scope of this enactment. There are certain gray areas, where the severity of the sentences provided under the Act, rightly so be diluted keeping in view the facts of each case. If these rigors of the enactment is pasted hastily or irresponsibly, it could lead to irreparable damage to the reputation and future of young whose actions would have been only innocuous and may lead to spoiling the future life of that innocent lovers or couple who out of sheer innocence have initially developed and thereafter established that relationship, which if seen through the bioscope of these penal provisions of Act of 2012, would fall within the realm of offence.

13. Growing incidences where teenagers and young adults fall victim of the offences under the POCSO Act, being slapped by the penal provisions of POCSO Act without understanding the far reaching implication of the severity of the enactment, is an issue that brings much concern to the conscience of this Court. A reading of the statement of objects and reasons of POCSO Act would show that, as mentioned, to protect the child from the offences of sexual abuse, sexual assault and harassment, pornography, pursuant to the Article-15 of the Constitution of India, 1950 and the Conservation on the Rights of the children. However, a

large array of the cases filed under the POCSO Act seems to be those arising on the basis of the complaints/F.I.Rs. lodged by the families of adolescents and teenagers who are involved in romantic relationship with each other. The scheme of the Act clearly shows that it did not intend to bring within its scope or limits, the cases of the nature where the adolescents or teenagers involved in the dense romantic affair.

14. This Court deems it fit and necessary to take a moment to delve into an important aspect, the awareness of which is crucial in understanding and appreciating with the cases of instant nature. It is crucial to accept the science and psychology of an adolescent and young adulthood at this juncture. This is because social and biological phenomena are widely recognised as determinates of human development, health and socio-economic attainment across the life course, but our understanding of the underlying pathways and processes remains limited. Therefore, a “bio-social approach” needs to be adopted and appreciated i.e. one that conceptualizes the biological and social requirements of two teenagers, who on account of mutual infatuation are attracted and decide for their future. Their decision could be impulsive, immature but certainly not sinful or tainted as branded in the F.I.R. or complaint of the informant.

15. Reverting back to the facts of the present case, when both the parties (boy as well as girl) who are in

their teens and college going, both of them met in the school during NCC parade, developed a natural inclination towards each other, thereafter cutting across the caste barrier between them eventually have decided to marry with each other. No doubt the girl was barely 14½ years on the date of incident. Both of them fled away, got married in a shiv Temple at Delhi and remained in company with each other for almost two years during which the girl has given birth to a baby, who is now 7-8 months old. She was clear in her mind that she does not want to go back with her parent but wants to remain in the company of the applicant, to whom she has accepted her husband. This relationship has given birth to a baby on 21.5.2021.

16. Assessing the totality of the circumstances, the childhood domestic training of the adolescent teenagers should be blamed and targeted, where their parent have miserably failed to inculcate the values of life, the family traditions, their focus towards the life and their priorities. It is the parent to be blamed for their complete inaction and their responsibilities qua their children. Lodging the F.I.R. would not be going to absolve them from their failure as parent. But all said and done, if these teens decided to enter into nuptial knot and now they have baby out of this relationship, certainly rigors of POCSO Act would not come in their way. The girl is not sexually abused or no sexual assault was made upon her, nor she has been sexually harassed by the applicant, as contemplated by the object of POCSO Act.

17. No doubt consent of minor girl has got no value in the eyes of law, but in the present scenario where the girl has given birth to a baby from the applicant and in her 164 statement, she has declined to go with her parent and from last 4-5 months residing at Rajkiya Balgrih (Balika) Khuldabad, Prayagraj in most inhuman condition with her infant baby, this by itself is pathetic and would amount to adding to her miseries.

18. This is extremely gloomy situation, where the applicant is in jail since 4.10.2021 for the alleged sin committed by him while marrying with a girl belonging to scheduled caste and both of them are peacefully residing as husband and wife. It is extremely harsh and inhuman to devoid that baby from the parental love and affection on account of the fact that both of them loved each other and decided to marry, when the girl was minor. Even today the boy (the applicant) is more than ready to keep his wife and baby with him and would take good care of both.

19. Thus, assessing the totality of facts and circumstances, in this extraordinary condition and keeping in view the nature of the offence, evidence on record regarding complicity of the accused and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

20. The In-Charge of Rajkiya Balgrih (Balika) Khuldabad, Prayagraj is hereby directed to release the victim/prosecutrix Ms. Anju Devi w/o

Atul Mishra (the applicant) with her baby forthwith.

21. Let the applicant **Atul Mishra**, who is involved in aforementioned case crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions. Further, before issuing the release order, the sureties be verified.

(I) IT IS TRUE THAT THE APPLICANT IS BEING BAILED OUT ON THE ASSURANCE GIVEN BY THE LEARNED COUNSEL FOR THE APPLICANT THAT THE APPLICANT IS MORE THAN READY AND WILLING TO KEEP HIS WIFE AND BABY WITH HIM. THE COURT FEELS TO SECURE THE FUTURE OF THE GIRL AND BABY, IT IS DIRECTED THAT AFTER THE RELEASE ON BAIL, THE APPLICANT SHALL PRODUCE A BANK DRAFT OF RS.5,00000/- (5 LACS) IN FAVOUR OF HIS WIFE MS. ANJU DEVI AND HER BABY, WHICH SHALL BE HANDED OVER TO THE VICTIM BEFORE THE COURT WITHIN A PERIOD OF SIX MONTHS FROM THE DATE OF HIS RELEASE ON BAIL, ELSE THE BAIL ORDER IS LIABLE TO BE CANCELLED BY THE COURT CONCERNED ITSELF WITHOUT REVERTING THE ORDERS TO THE COURT.

(ii) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT THAT HE SHALL NOT SEEK ANY ADJOURNMENT ON THE DATE FIXED FOR EVIDENCE WHEN THE WITNESSES ARE PRESENT IN COURT. IN CASE OF DEFAULT OF THIS CONDITION, IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT IT AS ABUSE OF LIBERTY OF BAIL AND PASS ORDERS IN ACCORDANCE WITH LAW.

(iii) THE APPLICANT SHALL REMAIN PRESENT BEFORE THE TRIAL COURT ON EACH DATE FIXED, EITHER PERSONALLY OR THROUGH HIS COUNSEL. IN CASE OF HIS ABSENCE, WITHOUT SUFFICIENT CAUSE, THE TRIAL COURT MAY PROCEED AGAINST

HIM UNDER SECTION 229-A IPC.

(iv) IN CASE, THE APPLICANT MISUSES THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE HIS PRESENCE PROCLAMATION UNDER SECTION 82 CR.P.C., MAY BE ISSUED AND IF APPLICANT FAILS TO APPEAR BEFORE THE COURT ON THE DATE FIXED IN SUCH PROCLAMATION, THEN, THE TRIAL COURT SHALL INITIATE PROCEEDINGS AGAINST HIM, IN ACCORDANCE WITH LAW, UNDER SECTION 174-A IPC.

(v) THE APPLICANT SHALL REMAIN PRESENT, IN PERSON, BEFORE THE TRIAL COURT ON DATES FIXED FOR (1) OPENING OF THE CASE, (2) FRAMING OF CHARGE AND (3) RECORDING OF STATEMENT UNDER SECTION 313 CR.P.C. IF IN THE OPINION OF THE TRIAL COURT ABSENCE OF THE APPLICANT IS DELIBERATE OR WITHOUT SUFFICIENT CAUSE, THEN IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT SUCH DEFAULT AS ABUSE OF LIBERTY OF BAIL AND PROCEED AGAINST HIM IN ACCORDANCE WITH LAW.

(vi) THE TRIAL COURT MAY MAKE ALL POSSIBLE EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANT.

In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

22. It is made clear that observations made in granting bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

23. Since the bail application has been decided under extra-ordinary circumstances, thus in the interest of justice following additional conditions are being imposed just to facilitate the applicant to be released on bail forthwith. Needless to mention that these

additional conditions are imposed to cope with emergent condition-:

1. The applicant shall be enlarged on bail on execution of personal bond without sureties till normal functioning of the courts is restored. The accused will furnish sureties to the satisfaction of the court below within a month after normal functioning of the courts are restored.

2. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

3. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

4. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

24. However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his/her bail so granted by this Court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

Order Date :- 25.1.2022

M. Kumar