

A.F.R.

Court No. - 29

Case :- BAIL No. - 6572 of 2020

Applicant :- Dhermendra Yadav

Opposite Party :- State Of U.P. & Anr.

Counsel for Applicant :- Dhirendra Pratap Singh, Ajay Kumar Singh, Vijay Pratap Singh

Counsel for Opposite Party :- G.A., Jaikaran

With

Case :- BAIL No. - 6614 of 2020

Applicant :- Pankaj Kori

Opposite Party :- State Of U.P. & Anr.

Counsel for Applicant :- Dilip Kumar Pandey

Counsel for Opposite Party :- G.A., Jaikaran

(In chamber)

Hon'ble Vikas Kunvar Srivastav, J.

1. These two bail applications for releasing the accused persons on bail are moved before this Court under Section 439 of the Cr.P.C..

2. The accused-applicants, Pankaj Kori in Criminal Misc. Application No.6614 (B) of 2020 and Dhermendra Yadav in Criminal Misc. Application No.6572 (B) of 2020 are involved in Case Crime No.08/2020, under Sections 302/328/376D of I.P.C., Sections 5/6 of POCSO Act and Section 3(2)(5) of S.C./S.T. Act, registered at Police Station Fursatganj, District Amethi.

3. The accused-applicants, Pankaj Kori and Dharmendra Yadav moved their bail applications before the Special Judge, POCSO Act, Raebareli, respectively bail applications no.1109 of 2020 and 1100 of 2020 which were heard and rejected by a consolidated order dated 19.08.2020.

4. For the bail-applicant, Pankaj Kori, learned counsel Sri Dileep Kumar Pandey, Advocate and for the accused-applicant, Dharmendra Yadav, learned counsel Sri Dhirendra Pratap Singh, Advocate appeared through video conferencing for virtual hearing.

5. Learned A.G.A. on behalf of State Sri Rajiv Verma, Advocate also appeared before the Court in virtual hearing through video conferencing.

6. Since the matter pertains to Section 376-D of Indian Penal Code, 1860 and Section 5/6 of The Protection of Children from Sexual Offences (POCSO) Act, 2012 alongwith Section 3(2)(5) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 coupled with Section 302 and 328 of Indian Penal Code, 1860, therefore, pursuant to the order of the Court dated 23.09.2020, notice of bail applications was issued by the office to be served through Chief Judicial Magistrate, Sultanpur. Office has reported that the notice is served personally on the opposite party no.2, the father of the victim / informant. State has filed it's counter affidavit.

7. Briefly the case is that the Ram Kishor Pasi, resident of village Poore, Hanumat Mazare, Mohaiya Kesaria, Police Station Fursatganj, District Amethi complained before the Special Court, POCSO Act under Section 156(3) Cr.P.C. that his minor daughter aged about 16 years informed him on mobile phone on 29/30.04.2019 at about 12:30 A.M. that the accused, native villager of his village namely Pankaj Kori and Dharmendra Yadav respectively 25 years and 30 years of age committed rape on her and thereafter administered forcibly poison by reason of which, she is feeling extreme thirst of water and lying helpless below a mongo tree in the grove of Akhilesh. The complainant rushed up alongwith his wife and brother, Ram Bahadur on the spot and his daughter reiterated about incident as she had informed telephonically to him. She further told that the accused persons have filled up her vagina with soil. At that time, the informant's daughter, the victim was alive. He brought her at his home and after informing the police on their assurance, began to manage to take her to hospital. The entire family stayed waiting the police for a long but she could not be taken to the hospital until she was alive and suffering severe pain, ultimately she died. The police reached the complainant's home at about 06:00 A.M. after her death.

8. A complaint in writing against the accused persons was got written by the informant-father, the police carried away the dead body of the victim in police station, where accused persons were also found present, talking and whispering with S.I. Santosh Kumar Singh. Pursuant thereto, the S.I. started threatening to the informant and his

family members that they would be committed to jail by him and their report will not be registered nor the post mortem will be done unless his demand of Rs.15,000/- is not fulfilled. The informant under compulsion, any how managed the amount of Rs.15,000/- and paid to him. The S.I. got complainant's thumb impression on 3 to 4 blank papers, sent the body for post mortem but did not register the first information report. He began to avoid the informant and also did not handover the post mortem report to him, therefore, the informant-father of the deceased-victim had no option but to approach the District Magistrate, moved there an application, complaining the threat of life and limb on the part of accused and action not being taken by the police station. But when no action was taken, he dispatched the first information report of the incident on 02.07.2019 through registered post, addressed to the Police Superintendent, District Amethi but that too went in vain.

9. Compelled under the aforesaid circumstances, an application under Section 156(3) Cr.P.C. was moved before the competent court on 05.07.2019 which ultimately ordered by the Special Court (POCSO Act) on 26.10.2019 and the first information report was got registered.

10. The information reveals an incident of brutal and aggravated sexual assault on a minor girl, who belongs to a poor and down trodden family, suffering trauma, the victim girl died but the police of the locality behaved apathetically with insensitive inaction on it's part. The accused persons were named by the deceased-victim and reported to the police by her father. Minor in age, the girl was sexually assaulted and behaved inhumanly by filling up her vagina with soil. She was victimized in very gruesome manner that too cannot invoke the sensitivity of the local police. If the Special Court, POCSO Act does not come into action by allowing the application under Section 156(3) of Cr.P.C., the F.I.R. also could not be registered.

11. Contentions on behalf of accused

11.1 Learned counsel Sri Dilip Kumar Pandey, Advocate on behalf of accused-applicant-Pankaj Kori argued that before going into the first information report, it would be pertinent for the Court to look into at page 18 of the paper book, annexure no.2, which is moved to the Station House Officer, Police Station Fursatganj, District Amethi by the informant of the case, Ram Kishor to the effect that on

30.04.2019 at 02:30 A.M., his daughter aged about 17 years fallen in severe stomach ache and she died in the house as she got diarrhea, requesting not to proceed for legal action, if any.

11.2 Learned counsel further argued that the said letter reveals the real cause of the death of the victim and the first information report, pursuant to the order of the Court under Section 156(3) Cr.P.C. is subsequent development with ulterior motive and premeditated plan to falsely implicate the accused. He further drew attention towards the G.D. entry annexed by him as annexure no.3, reproducing the contents of annexure no.2, the alleged information by the informant-Ram Kishor. He further pressed on inquest report made annexure no.4 to the application, wherein the witnesses of the inquest and the S.I. have collectively opined that cause of death is not ascertained, therefore, post mortem of the dead body is necessary. He further drew attention towards annexure no.5, which is an information of death of the victim on 30.04.2019 at about 03:30 A.M. by reason of loose motion and vomiting. This letter was handed over to medical officer for post mortem.

11.3 Learned counsel for the applicant argued that the prosecution did not try to identify the accused-applicant who allegedly committed offence of rape upon the victim. He further argued that the statement of informant was recorded alongwith statement of informant's brother and wife, though, they stated that the victim while she was alive, informed telephonically to the informant about the commission of rape by accused persons namely Pankaj Kori and Dharmendra Yadav and thereafter administered her poison is not admissible in evidence.

11.4 Learned counsel for the applicant further argued that there is no corroboration of the alleged statement of victim by other evidences. There is no independent witness, therefore, it does not deserve to be relied on and believed.

11.5 Learned counsel further argued that the charge sheet is submitted excluding the co-accused Santosh Kumar, S.I. posted at Police Station Fursatganj, District Amethi as the evidence could established the allegation made against him by the informant as to his being in collusion with the present accused, as such on the basis of same evidence, the accused cannot be prosecuted.

11.6 Learned counsel further argued that the most vital fact of the case is that the victim was subjected to gang rape but neither the inquest report nor the post mortem report has affirmed the sign of gang rape, therefore, allegations in the first information report and in the statement of the prosecution witnesses have no lacks for want of medical evidences.

11.7 Learned counsel lastly argued that accused-applicants are lingering in jail since 02.07.2020 for no fault of them, therefore, they should be released.

11.8 On behalf of accused, Dharmendra Yadav, learned counsel Sri Dharendra Pratap Singh, Advocate submitted in agreement with the argument submitted by learned counsel Sri Dilip Kumar Pandey, Advocate subject to an addition that none of the accused persons were identified as the offender as well as their connection from the offence of gang rape over the victim, is not established by any evidence of the medical and forensic examination. The police tried to trace the location of accused from the mobile phone, getting C.D.R. reports from the tele-communication department but the location of the accused could not be traced from the spot of incident, where the offence has been committed.

11.9 On the basis of aforesaid facts and circumstances, learned counsels submitted that the entire prosecution story is nothing but false implication, therefore, the accused-applicants need be released on bail.

12. Contentions on behalf the Prosecution

12.1 Learned A.G.A., on the other hand, argued that accused-applicants are not innocent. The victim of the incident had her date of birth 08.07.2003, accordingly, as on the date of incident, she was nearly 15 years 9 months and 21 days old i.e. child under the definition clause of The Protection of Children from Sexual Offences (POCSO) Act, 2012. He drew the attention towards the statement of the father-complainant, recorded by the Investigating Officer under Section 161 Cr.P.C., where he has stated that the high school certificate for the purpose of showing date of birth and age of victim was hand over to the Investigating Officer. She was subjected to aggravative penetrative offence under Section 5/6 of The Protection of Children from Sexual Offences (POCSO) Act, 2012 as well as the

rape was committed by two persons simultaneously i.e. accused Pankaj Kori and Dharmendra Yadav, therefore, offence of Section 376-D I.P.C. read with Section 5/6 of POCSO Act is committed by them.

12.2 Learned A.G.A. argued that the victim narrated the whole incident on telephone to her father and to the mother and uncle when they reached alongwith father at the spot where she was lying helpless after the commission of rape below a mango tree in grove of one Akhilesh, a native villager. All of them have stated the same without any contradiction to the Investigating Officer that the accused persons, Pankaj Kori and Dharmendra Yadav committed rape on victim child, thereafter filled soil in her vagina and administered her poison. She was badly feeling thirsty by reason of poison.

12.3 Learned A.G.A. further argued that this is established by law from time to time in the judgment delivered by our own High Court and Hon'ble the Supreme Court that if the medical evidence is in deviation with the oral statement of witness particularly the statement of the victim who is at the pedestal of injured witness, the same could not be disbelieved even the medical report is liable to be discarded.

12.4 Learned A.G.A. further submitted that the entire situation reveals the high handedness and collusion, there is no whisper of examining the private parts while making autopsy over the dead body of deceased. Therefore, the report of post mortem seems to be prepared in collusion with person interested to get benefited from them.

13. After hearing to the rival contentions and arguments of the parties, the facts and evidence available on record should be considered for the decision on the issue of releasing the accused on bail.

14. Learned counsels for the applicants tried to divert attention of the Court to another approach of examining the incident suiting to them. He pressed on the annexure no.2, the information of death said to have been given by the father of the victim to the police station. On bare perusal of the said information, it does not emanate the Court to believe that the same was given by the father of the victim as information of death by reason of Diarrhoea to the police station. Neither date nor time of moving such application is entered thereon.

Moreover, under Section 154 of the Cr.P.C., where the Station House Officer of the police station is duty bound to get reduced into writing, if any information of unnatural death is given to him and a copy of the said writing is to be furnished to the informant under the seal of the officer. The said annexure no.2 is not in the form of any such document, it seems to have been procured by the accused-applicants as a 'writing' purported to exhibit it as the same is of the father of the victim, so as to suit their version of defense.

15. In this patriarchal and male dominated society, even the fundamental and human rights of women are often denied and invalidated. In villages, towns and semi-urban areas, there is no effect of women's awakening going on for centuries but traditionally women are unsecured, deprived of equal rights, deprived of right to redress in justice. Undue advantage of this environment are taken by tyrants of the society, who do not have fear and hesitation in making girl child, adolescent girls and minors, a victim of their lust. Instead of providing justice to the victim or the families of the victim, the responsible people of the society, the law enforcement authorities start following the reverse course of action. Non-writing of first information report by the police, not conducting relevant medical examination by the doctors etc. are example of this, which is nothing but negative activeness of such people and authorities to prevent the fact or evidences from coming to light usually in collusion with the accused. In the recent past, in September 2020, the nation has shockingly witnessed the Hathras gang rape case, where the victim faced an extreme bestiality of the accused and ultimately died.

16. The narration of incident to the father and other witnesses is dying declaration, which need no corroboration, if the statement is convincible with other evidence. The Forensic Science Laboratory has confirmed human blood found on salwar, which the deceased wore at the time of incident and human semen was also found. The chemical examination report confirms the statement of victim made to her family members when she was alive. The family members have stated the same. The narration by victim is sufficient to be a statement disclosing the cause of her death. There is no reason to disbelieve the said statement, if read alongwith the report of Forensic Science Laboratory at this stage.

17. This would be pertinent to state here that the accused-applicant's involvement in the crime became known to all only after the victim narrated the entire incident to her father, firstly on telephone and thereafter when the father and other witnesses reached to her at the spot of incident and brought her to home, she told the entire incident, how happened and who was the culprit, to her father (the informant), mother as well as to uncle. The father rushed up to police station instantly as he stated in his statement but the police did not come at once but opted to reach at the home of the victim at 06:00 A.M. Till then, the victim could not survive and died.

18. I perused on record, annexure no.6 on the paper book, the post mortem report wherein no external injury is reported as anti mortem injuries. Since cause of death could not be ascertained, the doctor preserved viscera for forensic examination. The viscera alongwith clothes wore by the deceased at the time of death were chemically examined in the Forensic Science Laboratory. The viscera report is made annexure no.11, which discloses that a considerable amount of Aluminum Phosphate poison is found. Likewise, the salwar, underwear, top, thread alongwith locket and nose-pin as item no.1 to 5 were sent for the chemical examination. The salwar, underwear and top was found stained with human blood and on the salwar, the human semen was also found. All these are clear and unambiguous evidence prima facie establishing the sexual assault on the victim.

19. The argument of learned counsel for the accused persons with regard to the statement of deceased-victim as to the commission of rape and her murder by poisoning is unbelievable as it is not recorded by the Magistrate on prescribed format is baseless as Hon'ble the Supreme Court in the case of *Shama Vs. State of Haryana*¹, it is held:-

"Law does not prescribe any format for recording dying declaration; and secondly, it also does not prescribe any specific authority to record it unless any special law or rule is enacted to that effect. On the other hand, perfect working and neatly structured dying declaration at times brings about an adverse impression and creates suspicion in mind of court, since dying declaration need not

1. (2017) 11 SCC 535

be drawn with mathematical precision. All that law requires is that declarant should be in a fit state of mind and be able to recollect the situation resulting in the available state of affairs in relation to the incident and the court should be satisfied that reliance ought to be placed thereon rather than distrust."

20. In the case of ***Sudhakar Vs. State of Madhya Pradesh***², it is laid down that :-

"20. The "dying declaration" is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration."

21. In order to deal with the argument of learned counsel for the accused-applicants that the prosecution could not proceed against them only on the basis of statement of deceased-victim, which was made to her family members only, it would be relevant to quote Section 32 (1) of the Indian Evidence Act, 1872, which is as follows:-

"Section 32 : Cases in which statements of relevant fact by person who is dead or cannot be found, etc., is relevant-*Statement, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:*

(1) When it relates to cause of death

2. (2012) 7 SCC 569

When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under the expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

22. The deceased victim narrated the incident of gang rape committed by the accused persons to her father, mother and uncle before her death. After her death that narration have assumed the status of dying declaration explaining cause of her death. Any corroborative evidence is not necessarily required to place reliance on it, provided it in itself appears to be readily true in the circumstances of the case free of doubts. Moreover, requirement of certificate provided by a doctor in respect of such state of deceased, is not essential in every case.

23. The reliance may be placed of in the judgment of Hon'ble the Supreme Court in case of ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat***³, where it is held that corroboration to the testimony of the victim of sexual offence is not required except corroboration by medical evidence, if available, no other corroborating evidence required if the victim's testimony is otherwise believable. Here the victim's statement as dying declaration is stated by her parents and uncle, which is supported by forensic science examination report.

24. During the investigation, the investigating officer has written the statement of mother, uncle and the first informant-father of the deceased victim and the father, in which the incident of brutal sexual violence happened to her and the perpetrators who caused the incident. There is no mutual contradiction, deviation or material contradiction in the statements of all of them.

25. Learned counsel for the accused-applicants vehemently argued that merely because of Forensic Science Laboratory report, the present accused-applicants could not be detailed as connected with the offence, as the report is inconclusive with regard to the semen found on the salwar, wore by the deceased at the time of incident.

3. (1983) 3 SCC 217

26. In a recent judgment of *Rajendra Pralhadrao Wasnik v. State of Maharashtra*⁴, Hon'ble the Supreme Court held that merely because the Forensic Science Laboratory report is inconclusive, it is not necessary that the irresistible conclusion is only one that the accused is not guilty.

27. In view of the above observation of Hon'ble the Supreme Court, it can be said that whatever stated in dying declaration by the deceased with regard to the cause of her death and the commission of gang rape upon her, told to her mother, father and uncle, deserves to be believed and relied on with credibility.

28. It would be pertinent to refer Section 29 and 30 of The Protection of Children from Sexual Offences (POCSO) Act, 2012, which is quoted as under:-

"29. Where a person is prosecuted for committing or abetting or attenuating to commit any offence under sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

30. (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.-In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."

29. The provision of Section 29 provides for a presumption as to certain offences. It provides that where a person is prosecuted for violating any of the provisions under Section 3, 5, 7 and 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 counter is proved. The offence against the accused-applicant bears a reverse burden of proof, therefore, their argument as

⁴. (2019) 12 SCC 460

to the lack of evidences against them for proving the offence committed by them is not tenable.

30. At the stage of hearing on the bail application of accused this court without going deep into the scrutiny of evidences collected by the investigating officer, is to assess them on "probability factor" only. The version of the victim about the incident of gang rape as stated by the witnesses finds corroboration from the forensic science lab's examination report of clothes (salwar) wore on the body of deceased, was found stained with human blood and human semen. Like wise the victim's version of administering her poison by the accused as stated by the witnesses also finds support as the viscera extracted from the dead body of deceased for forensic examination was found containing poison like Aluminum phosphate, sufficient to cause death. Informant-father of the deceased is not pleaded to be inimical with the accused since before the incident of rape. He is not blamed by the accused to be interested any how to falsely implicate to get them behind the bar. They are most natural witnesses. As such, the witnesses are prima facie reliable and credible, their statements as to dying declaration of the victim as stated by the witnesses sufficient to explain cause of her death by reason of administering poison to her by accused after committing brutal gang rape. The prosecution case, thus prima facie found established against the accused persons.

31. The manner in which the offence is committed, the nature and conduct of the accused-applicants, all are sufficient to raise apprehension of abusing their liberty in case of release on bail in adversely affecting witnesses and the family of the victim's so as to effect the trial.

32. Moreover, it would not be out of place to observe that from the very inception, just after the incident, the people of the locality, the police, all seem to had acted in protecting the accused-applicants from prosecution. The First Information Report was not got registered despite the fact that father of the victim approached the police instantly in the night of the incident, he was told to wait so that the victim may be sent to the women hospital for medical examination. The victim died but the police reached only thereafter at 06:00 A.M. in the morning. Despite the fact stated by the victim to her parents that she was brutally with aggravation subjected to gang rape by both the accused and their criminal animus was so aggravated and heinous that

they filled soil in her vagina and administered her poison, the Aluminum Phosphate to ensure her death. Therefore, the personal liberty of the accused is not to override, the right to life of the victim's family and for fair trial, the complainant would need a completely fear-free environment as a witness. He has the right to have a fair trial of the matter.

33. Hon'ble the Supreme Court further in the case of ***Sudha Singh Vs. The State of Uttar Pradesh & Anr.***⁵ held as follows:-

"12. There is no doubt that liberty is important, even that of a person charged with crime but it is important for the courts to recognise the potential threat to the life and liberty of victims/witnesses, if such accused is released on bail."

34. This would also not be irrelevant to mention that while the police officers were making inquest and doctors were doing autopsy on the body of the deceased in post mortem house, despite the fact, the blood stained salwar of the victim was sent to Forensic Science Laboratory for chemical examination, no private part of the deceased was examined so as to verify the allegations of gang rape with her. Neither the inquest report nor the post mortem report have made any such report.

35. All these facts, if they are true, sufficient to gather inference of high handedness of the accused-applicants affecting the things in their favour. Therefore, their release on bail at this stage cannot be considered.

36. The application of the bail moved on behalf of accused-applicants on the basis of above discussions is ***rejected***.

37. The trial court is required to examine as soon as possible, the prosecution witnesses and proceed further with the disposal of the case, therefore, a direction is hereby issued to the Court concerned to proceed expeditiously within one year, from the date, the certified copy of the order is placed before it.

38. It is further clarified that the learned trial court while deciding the case on merit, shall not swayed upon with the observation made by this Court in the order because occasion to make such observations arisen while dealing with the argument made at the stage of bail by learned counsels for the bail-applicants.

5. AIR 2021 SC 2149

39. The officers entrusted with the prosecution i.e. A.D.G. (Police) / Incharge of D.G. (Prosecution), State of U.P., Lucknow, Joint Director (Prosecution), Amethi and D.G.C. (Criminal), Amethi are directed to ensure the production of prosecution witness before the trial court expeditiously and get them examined so that the trial court may be able to decide the case expeditiously within a prescribed period of one year. They are further directed to ensure the protection of witnesses of prosecution.

40. The Senior Registrar of the Court to ensure the service and communication of order to (i) A.D.G. (Police) / Incharge of D.G. (Prosecution), State of U.P., Lucknow, (ii) Joint Director (Prosecution), Amethi and (iii) D.G.C. (Criminal), Amethi through email in addition to the usual course of communication and service of orders as prescribed under rules.

(Vikas Kunvar Srivastav,J.)

Order Date :- 13.7.2021

Saurabh