2026:AHC-LKO:34643

HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW

AFR

APPLICATION U/S 482 No. - 2922 of 2026

Nanke @ Sahabuddin And 2 Others

.....Applicant(s)

Versus

State Of U.P. Thru. Prin. Secy. Home Lko. And 2 Others

.....Opposite Party(s)

Counsel for Applicant(s)	:	Amar Singh
Counsel for Opposite Party(s)	:	G.A., Pawan Kumar Trivedi

Court No. - 16

HON'BLE SHREE PRAKASH SINGH, J.

1. Short counter affidavit filed today by Mr. Pawan Kumar Trivedi, counsel for opposite party no. 2 is taken on record.

2. Heard Mr. Amar Singh, learned counsel for the applicants, Mr. Pawan Kumar Trivedi, learned counsel for opposite party no. 2, Mr Sushil Kumar Pandey, learned A.G.A. for the State and perused the records.

3. The present application has been filed with the prayer, to quash the impugned order 23.02.2026, passed by Learned Additional Session Judge/Special Judge (POCSO Act), District-Gonda, in Session Case No. 412/2021, arising out of F.I.R No./Case Crime No. 194 of 2020, Police Station-Paraspur, District- Gonda, by means of which the charge for the offences punishable under section 376 DA I.P.C and 5 (g)/6 POCSO Act was proposed to be framed and further applicants were directed to appear before the Learned Trial Court and to obtain bail, as contained in Annexure No. 1 to this petition, in the interest of justice.

4. The contentions put forth by learned counsel appearing for the applicants

is that the First Information Report (FIR) was lodged on 02/08/2020 by the opposite party no. 2, bearing FIR no. 0194/2020, under sections 354(ka) and 506 IPC at Police Station Paraspur District Gonda, whereafter, the statement of the alleged prosecutrix was recorded under section 161 of CrPC, wherein, no allegation of rape is raised by the prosecutrix and on 05/08/2020 she refused to undergo the medical examination. He submitted that the statement of the prosecutrix was recorded under section 164 of CrPC, on 20/08/2020, wherein, the opposite party no. 2 alleged that on 10/08/2020, the applicants had committed rape upon her, whereas, in the FIR which was lodged on 02/08/2020, showing the date of the incident as 02/08/2020, no such allegation of committing rape upon the applicants.

5. He argued that subsequent thereof on 13.08.2020, the father of the alleged prosecutrix, has also moved an application under section 156(3) of CrPC against the applicants, in the court of the Chief Judicial Magistrate, Gonda, alleging that on 10/08/2020, the applicants committed rape upon prosecutrix and prayed for direction to be issued for lodging the first information report. He submitted that the prosecutrix was called upon for getting her statement recorded under section 200 of CrPC, to which she did not respond, and as a result thereof, the complaint was dismissed for want of prosecution. He submitted that after the investigation in case crime number 0194 of 2020, the investigating officer filed the charge sheet on 14/09/2020, bearing charge sheet number 01/2020 under sections 354(ka) and 506 of IPC and 7/8 of the POCSO Act. He added that after the chargesheet was filed, the applicants appeared and they have been bailed out, whereafter, the statement of the PW1 was recorded on 04/09/2025 and the special prosecutor, after the statement was recorded, moved an application under section 216 of CrPC, requested for alteration of the charges, to which the trial court considered and rejected the application and proceeded suo moto in the matter and has passed the order dated 23/02/2026 impugned herein.

6. It is argued by counsel for the applicants that while passing the order, the trial court prima facie found from perusal of the statement of the victim that there are prima facie charges of offense under section 376 DA of IPC and under section 5 (g)/6 POCSO Act, therefore, the applicants were called upon to put their side on the proposed alteration of the charges and it was also opened in the order that the pleader of applicants be appeared for arguments. He submitted that up to this stage, the order might be correct, but so far as the direction that the applicants would appear and get themselves bailed out, is erroneous and is no way justified, more so, as the criminal procedure code is concerned, there is no such provision. Further submitted that there is no law settled by the court of record that in such circumstances, the proposed accused for altered charges, without adding of the offence, is required to appear and to get him bailed out.

7. Concluding his arguments, he submitted that unless the charge of offense are added or altered, there is no need for getting bail of the proposed accused. He added that it is an admitted position that if the charges are altered by adding the offenses/sections, such accused is required to get him bailed out, therefore, fresh bail bonds and sureties are required as per the gravity of nature of the offenses, therefore, submission is that the order dated 23/02/2026, impugned herein, is erroneous to the extent above.

8. On the other hand, learned counsel appearing for the State has opposed the contentions aforesaid and submitted that the trial court, while passing the order dated 23/02/2026, has prima facie reaches to the conclusion that the charges under section 376DA of IPC and 5 (g)/6 POCSO Act can be added, as there are sufficient evidence available. He submitted that the statement of PW1 is enough to show that the ingredients of sections 376DA and 5 (g)/6 POCSO Act are attracted in the present matter.

9. In support of his contention, he has placed reliance on the judgment

rendered in the cases of **Bijendra and Ors Vs. State of U.P. and Ors** reported in **2006 SCC OnLine All 258** and has referred paragraph 24 and 25, which are quoted hereinunder:-

"24. Learned AGA on the contrary submitted that since the offence is triable by the court of sessions and it has been held by the apex court in the aforesaid judgment of Prahlad Singh Bhati (supra) that it would be proper and appropriate that in such case the Magistrate directs the accused persons to approach court of sessions for purposes of detting relief of bail is the law laid down by the Supreme Court and therefore, anything Contrary to it will be illegal.

25. After hearing the learned Counsels for the both sides at a great length and after analyzing Section 437 Cr. P. C. it transpires that Section 437 relates with bail in cases of non-bailable offence by the magistrate. So far as the first contention which the learned Counsel for the applicants advanced, that because the bail has been granted in the same crime number and therefore by mere change of section accused cannot be sent to jail is concerned it is to be noted that case crime number is nowhere mentioned in the aforesaid section, which is the number of police for identification of the case and is a procedural number of the police station. Crime number has no relation with bail under Cr. P. C. In this view of the matter the contention of learned Counsel for the applicant cannot be accepted and is therefore rejected.

Coming to the second contention of the learned Counsel for the applicant that there is no bar for this Court to direct the Magistrate to accept fresh bail bonds for the newly added offence triable by Court of Session's it is noted that this direction will amount to asking the Magistrate to do something de-hors the law. The contention is devoid of merit. Section 437 Cr.P.C. relates to an offence, therefore, on addition of a new offence, the accused is required to appear before the court and seek bail. His bail cannot be considered unless and until he surrenders and is in custody in that offence. Any accused who is not in custody in an offence can not be granted bail. Custody is sine qua non for consideration of bail prayer. Consequently when the accused is guilty of an added offence and is not on bail, he cannot be allowed to furnish bond without being in Custody in that offence. For getting bail in newly added offences the accused has to surrendered in that offence. Thus asking the Magistrate to accept fresh bail bonds in newly added offence will mean granting of bail to the accused in the newly added offences without he being taken into custody for the said offence and that is not permissible under the Moreover there is another difficulty, which cannot be alleviated by the counsel for the applicants. Under the IV provise to Section 437(1), which has been Inserted by the Code of Criminal Procedure (Amendment) Act No. 25 of 2005, the offence of under Section 325 and 308 IPC are punishable with seven years of

imprisonment and consequently without giving an opportunity of hearing to the public prosecutor they cannot be allowed to furnish fresh bail bonds. The IV proviso, which has been inserted in the year 2005 now mandates that if a person is guilty of an offence punishable with imprisonment of seven years or more then, Public Prosecutor must be given an opportunity of being heard. If this Court, in exercise of its inherent jurisdiction Under Section 482 Cr. P. C. allows, to the accused to file fresh bail bonds for the offences punishable with seven years and triable by session's court then it takes away the right of the public prosecutor to oppose the bail, and the said order will be against the provisions of law."

10. Referring the aforesaid, he submitted that it has been held that any accused who is not in custody, cannot be granted bail and further submitted that fresh bail bonds are required, once the charges are added or altered. He again has placed reliance on the judgment rendered in the case of **Hamida Vs. Rashid and Ors.** reported in **2008 (1) SCC 474** and has referred to paragraphs 10 to 12 of the above-said judgment, which are quoted herein under:-

"10. In the case in hand, the accused respondents could apply for bail afresh after the offence had been converted into one under Section 304 IPC. They deliberately did not do so and filed a petition under Section 482 Cr.P.C. in order to circumvent the procedure whereunder they would have been required to surrender as the bail application could be entertained and heard only if the accused were in custody. It is important to note that no order adverse to the accused respondents had been passed by any Court nor there was any miscarriage of justice or any illegality. In such circumstances, the High Court committed manifest error of law in entertaining a petition under Section 482 Cr.P.C. and issuing a direction to the subordinate court to accept the sureties and bail bonds for the offence under Section 304 IPC. The effect of the order passed by the High Court is that the accused after getting bail in an offence under Section 324, 352 and 506 IPC on the very day on which they were taken into custody, got an order of bail in their favour even after the injured had succumbed to his injuries and the case had been converted into one under Section 304 IPC without any Court examining the case on merits, as it stood after conversion of the offence. The procedure laid down for grant of bail under Section 439 Cr.P.C., though available to the accused respondents, having not been availed of, the exercise of power by the High Court under Section 482 Cr.P.C. is clearly illegal and the impugned order passed by it has to be set aside.

11. learned Counsel for the appellant has submitted that charge under Section 302

IPC has been framed against the accused respondents by the trial court and some subsequent orders were passed by the High Court by which the accused were ordered to remain on bail for the offence under Section 302 read with Section 34 IPC on furnishing fresh sureties and bail bounds only on the ground that they were on bail in the offence under Section 304 IPC. These orders also deserve to be set aside on the same ground.

12. In the result, the appeal is allowed. The impugned order dated 1.7.2005 passed by the High Court and all other subsequent orders whereby the accused respondents were directed to remain on bail for the offence under Section 302 read with Section 34 IPC on furnishing fresh sureties and bail bonds are set aside. The accused respondents shall be taken into custody forthwith. It is, however, made clear that it will be open to the accused respondents to apply for bail for the offences for which they are charged before the appropriate Court and in accordance with law."

11. Placing reliance on the above-said judgment, he submits that it has been held in so many words, by the Hon'ble Apex Court that the accused has to apply for bail afresh, after the offense is converted into serious and higher nature. He submitted that, in fact, the order impugned dated 23/02/2026 reveals that the trial court has reached to the conclusion to alter/add the charges and that too is of serious in nature, therefore, the applicants are required to appear and get themselves bailed out, therefore, submission is that no interference is warranted, in order impugned.

12. Mr. Pawan Kumar Trivedi, learned counsel appearing for the opposite party no. 2 has also supported the version of counsel for the State and submitted that the statement of the victim was not properly recorded by the investigating officer and once the statement of the prosecutrix was recorded as PW1 before the trial court, the trial court proceeded to add/alter the charges. He next submitted that there is no ambiguity or erroneousness in the order passed by the trial court, as the trial court has gone through the statement of the alleged victim and then reached to the conclusion to convert the charges.

13. In support of his contentions, he has also placed reliance on the judgment

rendered in the case of **Pradeep Ram Versus State of Jharkhand And Another** reported in **(2019) 17 SCC 326** and has referred to paragraphs 29 to 31, which are quoted herein under:-

"29. Relying on the abovesaid order, the learned counsel for the appellant submits that the respondent State ought to get first the order dated 10-3-20162 granting bail to the appellant cancelled before seeking custody of the appellant. It may be true that by mere addition of an offence in a criminal case, in which the accused is bailed out, investigating authorities itself may not proceed to arrest the accused and need to obtain an order from the court, which has released the accused on the bail. It is also open for the accused, who is already on bail and with regard to whom serious offences have been added to apply for bail in respect of new offences added and the court after applying the mind may either refuse the bail or grant the bail with regard to new offences. In a case, bail application of the accused for newly added offences is rejected, the accused can very well be arrested. In all cases, where the accused is bailed out under orders of the court and new offences are added including offences of serious nature, it is not necessary that in all cases earlier bail should be cancelled by the court before granting permission to arrest an accused on the basis of new offences. The powers under Sections 437(5) and 439(2) are wide powers granted to the court by the legislature under which the court can permit an accused to be arrested and commit him to custody without even cancelling the bail with regard to earlier offences. Sections 437(5) and 439(2) cannot be read into restricted manner that order for arresting the accused and to commit him to custody can only be passed by the court after cancelling the earlier bail.

30. Coming back to the present case, the appellant was already into jail custody with regard to another case and the investigating agency applied before the Special Judge, NIA Court to grant production warrant to produce the accused before the Court. The Special Judge having accepted the prayer of grant of production warrant, the accused was produced before the Court on 26-6-2018 and remanded to custody. Thus, in the present case, production of the accused was with the permission of the Court. Thus, the present is not a case where investigating agency itself has taken into custody the appellant after addition of new offences rather the accused was produced in the Court in pursuance of production warrant obtained from the Court by the investigating agency. We. thus do not find any error in the procedure which was adopted by the Special Judge. NIA Court with regard to production of the appellant before the Court. In the facts of the present case, it was not necessary for the Special Judge to pass an order cancelling the bail dated 10-3-20162 granted to the appellant before permitting the appellant-accused to be produced before it or remanding him to the judicial custody.

31. In view of the foregoing discussions, we arrive at the following conclusions in respect of a circumstance where after grant of bail to an accused, further cognizable and non-bailable offences are added:

31.1. The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested.

31.2. The investigating agency can seek order from the court under Section 437(5) or 439(2) CrPC for arrest of the accused and his custody.

31.3". The court, in exercise of power under Section 437(5) or 439(2) CrPC, can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The court in exercise of power under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-bailable offences which may not be necessary always with order of cancelling of earlier bail.

31.4. In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it needs to obtain an order to arrest the accused from the court which had granted the bail."

14. Referring the aforesaid, he submitted that the law has already been settled by the Apex Court that when there is reason to alter the charge to the serious offenses and subsequently the charges are added, such accused has to move bail application in respect of newly added offenses, in the court concerned.

15. He next has placed reliance on the judgment rendered in the case of **Sumit Versus State of U.P. and Anr** reported in **2026 SCC OnLine SC 186** and has referred paragraphs 31 & 34, which are read as under:-

"31. The aforesaid question was looked into and answered by this Court in Pradeep Ram vs. State of Jharkhand and another reported in 2019 Crl. L.J. 3801, wherein this Court after discussing various decisions, more particularly, the decision in Prahlad Singh Bhati vs. NCT Delhi and another reported in (2001) 4 SCC 280 held that with

the addition of a new cognizable and nonbailable offence more particularly of a serious nature, the accused becomes disentitled to the liberty earlier granted to him in relation to the offences for which the FIR came to be registered.

34. In such circumstances referred to above, we arrive at following conclusions in respect of a circumstance whereafter the grant of bail to an accused, further cognizable and nonbailable offences are added: -

(i) The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In the event of refusal of bail, the accused can certainly be arrested. (ii) The investigating agency can seek order from the court under Sections 437(5) or 439(2) of Cr.P.C. respectively for arrest of the accused and his custody.

(iii) The Court, in exercise of its power under Sections 437(5) or 439(2) of Cr.P.C. respectively, can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The Court in exercise of its power under Section 437(5) as well as Section 439(2) respectively can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-cognizable offences which may not be necessary always with order of cancelling of earlier bail. (iv) In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it needs to obtain an order to arrest the accused from the Court which had granted the bail."

16. Placing reliance on the above-said judgment, he submitted that it has been held that in case of adding or altering the charges, of non-bailable and cognizable offenses or more serious offences, the accused has to move a bail application, therefore, the learned trial court has rightly considered the statement of PW1 and on the basis of said statement, the offenses under sections 376DA of IPC and 5 (g)/6 POCSO Act have been proposed to be altered, therefore, the applicants are not entitled for any relief.

17. Upon considering the submissions of counsel for the parties and after perusal of the material placed on record, it transpires that when the alleged prosecutrix has lodged the first information report, on 02.08.2020, there was no allegation regarding committal of rape upon her, whereas the story

subsequently has been twisted. Fact remains that the father of the prosecutrix had also instituted an application under section 156(3) of CrPC, though the complainant never went to the court to get statement recorded, under Section 200 of CrPC, which resulted into the dismissal of the application for want of prosecution.

18. After the statement of the prosecutrix was recorded before the trial court, as PW1 and the allegation of the committal of rape was levelled, the public prosecutor moved an application, under Section 216 of CrPC, whereas the trial court while rejecting the application, has rightly proceeded suo moto, to consider the alteration of the charges.

19. The question herein is, that whether at the stage of proposed alteration/conversion of the charges under section 216 of CrPC, the accused has to apply for bail, while surrendering him before the trial court? When this court examines the aforesaid questions in facts and law, it is apparent that, undoubtedly, the trial court has the power to alter or convert the charge thereby invoking the powers under Section 216 of CrPC. The trial court, while passing the order impugned herein, has directed the applicant/accused persons so as to surrender them and get them bailed out.

20. From perusal of the impugned order, it is apparent that the proceeding of alteration/addition of the charges is underway. The charges has still not been altered, though, those are proposed of, under section 376DA of IPC and 5 (g)/6 POCSO Act. The order clearly discloses that the trial court has still not reached to the final conclusion that the charges would be altered and added under the aforementioned sections/offenses. Meaning thereby that there is no alteration of charges at this stage and the applicants are still the proposed accused persons, for the charges under sections 376DA of IPC and 5 (g)/6 POCSO Act.

21. The law relied upon by the counsel for the State in Hamida (supra) and Bijendra (supra) are very clear in its terms. The ratio is apparent that only those accused persons will apply for bail afresh, once the offenses/sections are converted into higher charges/offenses. It is not the ratio that prior addition or alteration of the charges, such accused are required to get him bailed out, therefore, the ratio of abovenoted judgments would not apply so far as the factual matrix of the present case is concerned.

22. Secondly, the law referred by counsel for opposite party no. 2, of Pradeep Ram (supra) and Sumit(supra), has also laid down that for the newly added offenses, such accused persons can be arrested and has to apply for bail. But the situation is all together different herein, as the procedure undertaken, invoking the provision of section 216 of CrPC, is not matured and is underway, therefore, the law cited by the counsel for the opposite party no. 2 also do not cover the field of the present case.

23. It is long settled law that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. In fact, those precedents should be followed if it marks the path of justice and, therefore, the Judgment of court should not be read mechanically. The ratio of any decision can be interpreted in the background of facts of the case. Hon'ble Apex Court has settled this issue in the case of **Government of Karnataka Vs. Gowramma** reported in **AIR 2008 SC 863.** Thus it is apt to say that the aforenoted laws, discussed above, are not applicable in the facts and circumstances of the present matter.

24. So long as the factual matrix of the present case is concerned, the trial court, vide the impugned order, has directed the applicants to appear and obtain bail though the charge under Section 376 (d) A of IPC and 5 (g) 6 of POCSO Act has still not been framed. The Court has afforded the opportunity of hearing to the applicant on the proposed alteration of the

charges, which infact mean that the charges may or may not be altered. Therefore, at this stage, there seems to be no justiciability or lawfulness for direction to the applicants to surrender and get them bailed out.

25. In the aforesaid background, this Court finds that the order impugned is erroneous and against the settled proposition of law, thus, the same is unsustainable.

26. Consequently, the order dated 23-02-2026 is hereby set aside, to the extent of the direction made to the applicants/accused persons, to get them bailed out.

27. It is clarified that the rest of the order shall remain intact and the trial court is directed to proceed in accordance with law.

28. With the aforesaid observations, the present application is hereby **partly allowed,** at the admission stage, as the question of law is hereby decided.

May 13, 2026
Mayank

(Shree Prakash Singh,J.)