

**IN THE HIGH COURT OF JAMMU & KASHMIR AND  
LADAKH AT SRINAGAR**

**Bail App No.21/2023**

**NASEEMA BEGUM**

**... PETITIONER(S)**

*Through: - Mr. Sheikh Manzoor, Advocate*

Vs.

**UNION TERRITORY OF J&K**

**...RESPONDENT(S)**

*Through: - Mr. Sajad Ashraf, GA.*

**CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE**

**ORDER (ORAL)**  
**09.06.2023**

**1)** The petitioner has invoked jurisdiction of this Court under Section 439 of the Cr. P. C seeking bail in a case arising out of FIR No.210/2020 for offences under Section 363, 109 IPC and Section 16/17 of POCSO Act registered with Police Station, Kupwara.

**2)** As per the prosecution case, during investigation of FIR No.202/2020 for offence under Section 318 of IPC, the victim, a minor girl, was questioned and during her questioning, she disclosed that one Shabir Ahmad War with the help of her mother, the petitioner herein, has committed rape upon her on a number of occasions, as a result of which she became pregnant. Accordingly, the police registered FIR No.210/2020 for offences under Section 376, 109 of

IPC and started investigation of the case. During the course of investigation, the statement of the victim was recorded under Section 164 of the Cr. P. C, whereafter offences under Section 376, 109 of IPC and Section 17 of POCSO Act were found established against the accused Shabir Ahmad War, Imtiyaz Ahmad Lone, Waseem Ahmad Lone, Shabir Ahmad Chopan and the petitioner herein. Accordingly, the challan was laid before the trial court. During the trial of the case, two accused persons, namely, Waseem Ahmad and Shabir Ahmad Chopan have been admitted to bail whereas main accused, Shabir Ahmad War, and the petitioner herein are still under custody.

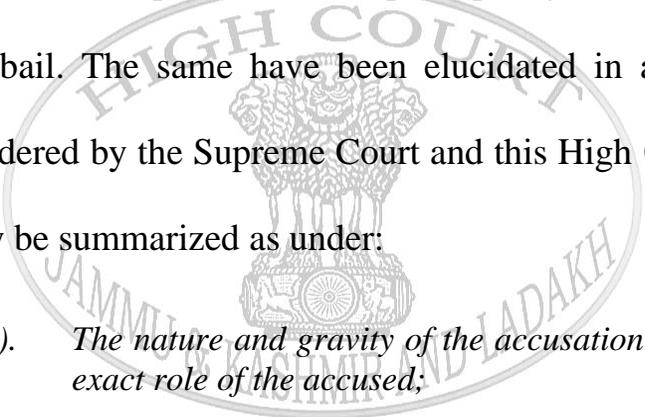
**3)** It appears that the petitioner had approached the trial court for grant of bail but her application was dismissed by the said court in terms of its order dated 26.12.2022.

**4)** It has been contended by the petitioner that the victim, who happens to be her daughter, was sexually assaulted by main accused Shabir Ahmad War, as a result of which she became pregnant. It has been submitted that during the investigation of the case, the victim was instigated to implicate the petitioner, as a result of which she made a statement under Section 164 of Cr. P. C implicating the petitioner. It has been submitted that during the course of trial of the case, three prosecution witnesses including the victim have been examined and on the basis of the statements of these witnesses, it has come to fore that the petitioner has been falsely implicated in the case. On these grounds, the petitioner has sought bail.

5) The bail application has been resisted by the respondent by filing a reply thereto. In its reply, the respondent, besides narrating the facts of the case, has contended that the petitioner has committed a heinous offence as she has aided and abetted the main accused in commission of rape upon her own daughter. Therefore, keeping in view severity of the crime which the petitioner has committed, she does not deserve to be enlarged on bail.

6) I have heard learned counsel for the parties and perused the material on record.

7) Before coming to the merits of the rival submissions made by the parties, it would be apt to notice the principles governing the grant or refusal of bail. The same have been elucidated in a number of judgments rendered by the Supreme Court and this High Court. These principles may be summarized as under:

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- (i). *The nature and gravity of the accusation and the exact role of the accused;*
  - (ii). *The position and status of the accused vis-à-vis the victim/witnesses;*
  - (iii). *The likelihood of the accused fleeing from justice;*
  - (iv). *The possibility of the accused tampering with the evidence and/or witnesses and obstructing the course of justice;*
  - (v). *The possibility of repetition of the offence;*
  - (vi). *The prima facie satisfaction of the Court in support of the charge including frivolity of the charge;*
  - (vii). *Stage of the investigation;*
  - (viii). *Larger interest of the public or the State;*

8) In the instant case the petitioner has also been booked for offences under POCSO Act. Therefore, while considering his bail application, we have to keep in mind the provisions contained in the said Act, particularly those contained in Section 29 and 30 of the said Act, which read as under:

***“29. Presumption as to certain offences:** Where a person is prosecuted for committing or abetting or attempting 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.Presumption of culpable mental state.** (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.*

9) From a perusal of Section 29, as quoted above, it is clear that where a person is prosecuted for committing or abetting or attempting to commit any offence under certain provisions of the Act, a presumption arises that such person has committed the said offence. Similarly, Section 30 raises a presumption of culpable mental state against an accused who is prosecuted under the said Act, which in other words means that once a person is prosecuted under certain offences of POCSO Act, the normal presumption of innocence

attached to an accused does not come into play while considering his bail application but then there is no statutory bar to the grant of bail in a case where the accused is prosecuted for offences under a POCSO Act. Each case has to be decided on its own facts and circumstances by applying the well recognized principles for grant of bail as set out by the judicial precedents from time to time.

**10)** In the light of the aforesaid legal position, let us now analyze the facts of the instant case. It is alleged by the prosecution that the victim was sexually assaulted by main accused Shabir Ahmad War and the petitioner, who happens to be the mother of the victim, has aided and abetted him. As per prosecution case, the victim has clearly implicated her mother, the petitioner herein, while making her statement under Section 164 of Cr. P. C.

**11)** The case of the petitioner is that during the trial of the case, the victim has resiled from her statement recorded under Section 164 of Cr. P. C and she has exonerated the petitioner.

**12)** If we have a look at the statement of the victim recorded during the trial of the case, she has, in her examination-in-chief, stated that Shabir Ahmad War, committed sexual intercourse upon her, as a result of which became pregnant. She has further stated that accused Shabir Ahmad War gave some medicine to her for terminating the pregnancy. She has also stated that accused Shabir Ahmad War asked her to implicate her mother in the crime and goaded her to make a statement that her mother administered medicine to her for

termination of pregnancy. In her cross-examination, she has stated that the petitioner never administered any medicine to her for making her unconscious. She has also stated that the petitioner does not have any knowledge about the occurrence and that she has made statement before the Magistrate under the influence of police. Thus, the most material witness i.e., the victim, has not supported the prosecution case so far as the same relates to involvement of the petitioner.

**13)** PW Farooq Ahmad Khan, the brother of the victim, has, in his statement, stated nothing against the petitioner. Another brother of the victim, PW Asmat Ali Khan has given a statement on similar lines and he has also not stated anything against the petitioner.

**14)** The learned trial court has, while rejecting bail application of the petitioner, observed that at this stage, in spite of depositions of the prosecution witnesses, it cannot be stated that prosecution story has become doubtful and, therefore, application of the petitioner for grant of bail cannot be accepted.

**15)** It is true that once a person is booked for an offence under Section 16/17 of POCSO Act, a presumption of guilt operates against him/her in view of the provisions contained in Section 29 of the POCSO Act but this presumption is rebuttable in nature and if an accused during the trial of the case is able to show to the Court that certain material has come on record which rebuts the presumption of guilt against him/her, such an accused can certainly be admitted to bail.

**16)** In the instant case, as already noted, the victim has clearly exonerated the petitioner and even her brothers have stated nothing against the petitioner in their statements during the trial of the case. Thus, *prima facie*, the petitioner has been able to rebut the presumption of guilt against her. The learned trial court without taking these aspects of the matter into consideration has simply rejected the bail application of the petitioner on the ground that the case of the prosecution has not become doubtful.

**17)** It is not a case where, for the purpose of deciding the bail application, this Court has been called upon to critically analyze the evidence led by prosecution during the trial of the case but it is a case where, on the face of it, the victim has denied involvement of the petitioner in the alleged crime. Therefore, the petitioner has been able to carve out a *prima facie* case for grant of bail in her favour. Even otherwise, the petitioner has suffered long incarceration during trial of the case and most of the material witnesses have been examined by the prosecution. Therefore, there is no apprehension of tampering of witnesses by the petitioner in case she is enlarged on bail.

**18)** Accordingly, the instant application is allowed and the petitioner is admitted to bail subject to the following conditions:

- I. *That she shall furnish personal bond in the amount of Rs.50,000/ with one surety of the like amount to the satisfaction of the learned trial court;*
- II. *That she shall appear before the trial court on each and every date of hearing;*

III. That she shall not leave the territorial limits of Union Territory of J&K without prior permission of the learned trial court;

IV. That she shall not tamper with prosecution witnesses.

**19)** The observations made hereinabove shall remain confined to the decision of the instant application only and shall not be construed as expression of an opinion on the merits of the case.

**20)** The bail application shall stand **disposed** of.

**(SANJAYDHAR)  
JUDGE**

**Srinagar,  
09.06.2023  
"Bhat Altaf, PS"**

Whether the order is speaking: **Yes/No**  
Whether the order is reportable: **Yes/No**

