

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Bail App No. 416/2021
Reserved on :18.03.2023
Pronounced on:31.03.2023

....Petitioner(s)

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Versus

1. UT of J&K through Secretary to Government,
2. Home Department, Civil Secretariat, Jammu/Kashmir,
3. SHO Police Station Katra District Reasi,

....Respondent(s)

CORAM: HON'BLE MR. JUSTICE MOHAN LAL, JUDGE

O R D E R
31 – 03 -2023

1. Petitioner has sought regular bail in terms of Section 439 of the Code of Criminal Procedure (*hereinafter referred to as the 'Code'*) in case FIR No. 112/2021 registered with Police Station Katra for commission of offences punishable under sections 376 IPC r/w Section 4 of POCSO Act. It is averred, that petitioner has been falsely implicated in the case, respondent No.3 filed a false and frivolous complaint against the petitioner on instigation by respondent No.4 who is working as teacher and manipulates a story to dragged the petitioner in heinous offence, whereby, petitioner has been arrested on 24.06.2021 after six (6) days from the date of alleged occurrence of 18.06.2021; petitioner is an innocent person has done nothing in connection with crime, in fact dispute between the petitioner and respondents. 3 & 4 is civil in nature in regard to a passage towards the house of respondent No.4 which does not exist in revenue records, however, they were quarreling and fighting for the said dispute but compromised amicably on 26.06.2021. It is averred, that the petitioner was working as a laborer, few years back from the date of alleged occurrence he decamped stones with the tractor trolley near his house where the

passage passed through towards the house of respondent Nos. 3 & 4, on this they were irritated and had a planned to put the petitioner behind the bar, ultimately with the help of police they succeeded and detained him illegally in police custody in Police Station Katra since 24.06.2021 and now he is languishing in District Jail Reasi, petitioner is the only earning members of the family and due to his arrest, the family members are at the verge of starvation, Challan is pending in the court of Ld. Principal Sessions Judge Reasi, petitioner is ready to furnish personal and surety bonds to the satisfaction of this Court and undertakes to abide by all the terms and conditions imposed by this court.

- 2.** Respondent/UT of J&K has opposed the bail on the grounds, that accused has committed heinous offence against society and any concession of bail to him would not be in the interest of the society at large. It is contended, that on 24.06.2021 complainant
alongwith his minor
daughter whose age is approximately 10 years came in Police Post Kakryal, filed an application written in Urdu to I/C P/P Kakryal, wherein it stated that on 18th of June in the afternoon his daughter/prosecutrix went at 'Nali' for taking water with her younger brother aged 05 years, and at that time the complainant was at his home, in the meantime, suddenly one person namely came on the
spot and committed rape with his daughter/prosecutrix forcefully, and threatened her that if she disclose about the incident at home, he will kill her. It is contended, that his daughter is underage and is not aware of social cause, effect and she did not narrate at home about the incident, and on 23rd of June her daughter narrated about the incident, due to which he delayed to give report, on the basis of application, offences under section 376 IPC and 4-POCSO Act have been made out and the report of cognizable offence entered in the Daily Diary and DD extract submitted to SHO Police Station Katra through SPO Karan Singh No. 562-RSI with request to lodge FIR. It is stated, that as per the contents of DD extract and request of I/C PP Kakryal, a case FIR No. 112/2021 under section 376 IPC & 4-POCSO Act stands registered and investigation of the case was entrusted to I/C P/P Kakryal Inspector Vishal Dogra PID No. ExJ-109535, during

investigation of the case I.O visited the spot, prepared the site plan, I.O got conducted the medical examination of the victim through MO CHC Katra, I.O collected the vaginal slides of the victim sent at FSL Jammu for chemical analysis and expert opinion, during further course of investigation I.O recorded the statement of the victim u/s 164 CrPC before the competent court and other witnesses u/s 161 CrPC, after that the potency test of the accused was conducted by the MO at CHC Katra and obtained the report, I.O got the FSL report and final medical opinion from the Gynecologist CHC Katra and on the basis of site plan, statement of the victim as well as the statement of other witnesses recorded u/s 161 CrPC and the medical report, offences u/s 376 IPC, 4-POCSO Act have been established against the accused on 01.09.2021 after completion of investigation Challan of the case has been produced before the Court of Ld. Principal Sessions Judge Reasi, prayer has been made for rejection of the bail.

- 3. Ld. Counsel for petitioner** has vehemently sought release of accused on bail by canvassing arguments, that the FIR in question is motivated and tainted with personal gauge, as such, the incident as alleged in the FIR has never occurred and a totally false and frivolous story has been projected, which is far away from the truth. It is argued, that for the last more than one 1 year & 9 months petitioner is languishing in District Jail Reasi, “bail is a rule” and “refusal is an exception”, personal liberty of accused is of paramount importance as he is presumed to be innocent till guilt is proved against him, keeping of accused in incarceration in the jail for indefinite period would amount to inflicting pre-trial punishment to him which is against the basic principle of criminal jurisprudence, accused is resident of [redacted] has deep roots in [redacted] the society and therefore does not possess the golden wings to flee from justice. Prayer has been made for enlargement of the petitioner on bail.
- 4. Ld. GA for the official respondents** with Counsel for private respondents have opposed the bail by vehemently articulating arguments, that the prosecutrix/victim at the time of occurrence on 18-06-2021 was minor child of about 10 years of age, accused has committed rape upon the minor child and the criminal act of accused is squarely covered by the definition

of Section 3(b) of POCSO Act 2012 as petitioner/accused has inserted his finger into the vagina of the prosecutrix/victim. It is argued, that prosecutrix in her statement recorded before the trial court has not ruled out the complicity of accused from commission of crime, accused has created sensational threat in the society against weaker sex, granting of bail at this stage would shake the confidence of people in the society, offence indicted against accused is punishable u/s 4(2) of POCSO Act and the maximum imprisonment is for life which means the natural life of a person, whereas, the minimum imprisonment shall not be less than 20 years and taking into account the gravity of offence and the severity of punishment, there is every likelihood that the accused will abscond during trial and flee from justice. It is moreso argued, that to constitute an offence of rape, it is not necessary that there should always be penetration by penis and even by the definition of penetrative assault u/s 3(b) of POCSO Act 2012, a person is said to commit offence of penetrative sexual assault (rape) by inserting to any extent any object or part of body not being the penis into the vagina of the victim, therefore, even the medical reports that there is not rupture of hymen or emission of semen, fully support the case of prosecution as by inserting a finger no semens can be ejected.

5. Heard Ld. Counsel for petitioner/accused, & Ld. GA with counsel for private respondents. I have pursued the contents of bail application, certified copy of the statement made by the prosecutrix/victim before the trial court, bestowed my thoughtful consideration to material aspects involved in the case and have also gone through the relevant law on the subject matter meticulously.
6. Before deciding the case in hand, I would like to enumerate the factors which should be taken in consideration while granting or refusing bail in a non-bailable case. Hon'ble Supreme Court of India in a case law titled State of U.P vs Amarmani Tripathy, reported in 2005 (8) SCC 21, vide paragraph-18 has culled out certain factors to be taken in consideration while deciding bail application in non-bailable offences as under:-

"It is well settled that the matters to be considered in an application for the bail are:-

- (i) whether there is any prima-facie or reasonable ground to believe that the accused has committed the offence;

- (ii) nature and gravity of charge;
- (iii) severity of the punishment in the event of conviction;
- (iv) danger of the accused absconding or fleeing if released on bail;
- (v) character, behavior, means, position and standing of the accused;
- (vi) likelihood of the offence being repeated;
- (vii) reasonable apprehension of the witnesses being tampered with; and
- (viii) danger, of-course the justice being thwarted by grant of bail.

Indeed, these guidelines are not exhaustive, nonetheless, these have to be considered while passing an order in a bail application in a non-bailable offence. The aforementioned factors for grant or refusal of bail in non-bailable offences are discussed in the case in hand, under the following headings.

7. Prima-facie or reasonable ground to believe that the accused has Committed the offence:-

It is profitable to reiterate here, that law was set into motion by lodging FIR No. 112/2021 u/s 376 IPC r/w Section 4 of POCSO Act in Police Station Katra to the effect, that on 18-06-2021 in the afternoon when prosecutrix went at Nali for fetching water with her younger brother age 5 years, petitioner/accused came on spot and committed rape upon her and threatened her that if she disclosed about the incident at home she would be killed. Therefore, there is a prima-faice or reasonable ground to believe that the petitioner/accused has committed the offence of rape upon the prosecutrix.

8. Nature and gravity of charge:-

The nature and gravity of charge is very serious, as the petitioner/accused committed rape upon the prosecutrix. The lustful designs of the petitioner/accused crossed all borders of indecency as he raped the minor victim unmindful of the shattering mental trauma the later suffered, as a raspiest not only causes physical injuries upon the possession of a women, but more indelibly leaves a scar on her dignity, chastity, honour and reputation in the society. Enlargement of the petitioner/accused on bail in the case in hand at this stage when the trial is yet incomplete, is sure to shake the confidence of the people at large whose interests are involved in the case. Instant case is a case of huge public importance.

In AIR 2007 S.C 451(Rajesh Ranjan Yadav @ Pappu Yadav Vs. C.B.I through its Director), Hon'ble Apex Court, while comparing the general interest of society with individual liberty of a person enshrined in Article 21 of the Constitution of India, in head note of the case law, held

as under:-

"While it is true that Article 21 of the constitution of India is of great importance because it enshrined the fundamental right to individual liberty, but at the same time a balance has to be struck between the right to individual liberty and interest of society. No right can be absolute, and reasonable restrictions can be placed on them. While it is true that one of the considerations in deciding, whether to grant bail to an accused or not is, whether he has been in Jail for a long time, the court has also to take into consideration other facts and circumstance, such as the interest of the society. Thus, grant of bail depends on facts and circumstances of each case and it cannot be said there is any absolute rule that because a long period of imprisonment has expired bail must necessarily be granted."

In AIR 2004 S.C 433 (State of Karnataka...Appellant Vs. Putaraja..Respondent) Hon'ble Mr. Justice Arjit Pasayat(His Lordships the then was Judge of Supreme Court) **while describing the gravity and magnitude of offence of rape against minors**, in paragraph-1 held as under:-

"A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, chastity, honour and reputation. The deprivation of such animals in human form reach the rock bottom of morality when they sexually assault children, minors and like the case in hand."

In AIR 1996 S.C 922, Hon'ble Mr. Justice Kuldeep Singh and Hon'ble Mr. Justice S. Sagir Ahmed(Their Lordships then were Judges of Supreme Court) while describing rape as most hated crime in the society observed as under:-

"Rape is not only a crime against the person of a woman (victim) it is crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crises. It is only her sheer will power that she rehabilitates herself in the society which oncoming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is crime against basic human rights and is also violative of victims most cherished of the Fundamental Rights namely the Right to life contained in Article-21."

In AIR 1996 SCW 998 in para 20, the Apex court while describing the gravity of offence of rape, held as under:-

"Rape is not merely a physical assault, it is often destructive of the whole personality a victim, a murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The court, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of

the prosecutrix."

The tests of law and the ratios of the Judgments (supra), make it abundantly clear, that rape is the most hated crime in the society which leaves a scar upon the most cherished personality of a victim, and, therefore, no self-respecting woman would normally concoct a story of rape. In the case in hand, the crime alleged against the petitioner/accused has a deleterious effect on the civilized society. Gravity of crime is to be necessarily assessed from the nature of crime. A crime may be grave, but the nature of the crime may not be so grave. Similarly, a crime may not be so grave but the nature of the crime may be very grave. It is unambiguously reiterated here, that since rape leaves a permanent scar on the most cherished possession of woman and serious psychological impact on the victim and her family, the prosecutrix as in the case in hand, would not therefore, have concocted story of rape against petitioner/accused to falsely implicate him by putting her honour, character, reputation and her future marriage prospects on stake in the society. Ordinarily, the offence of rape is grave by its nature.

9. Severity of Punishment and danger of accused absconding or fleeing if released on bail:-

The maximum punishment provided for the offence of penetrative sexual assault u/s 4(2) of POCSO Act indicted against petitioner/accused, when the victim child is below 16 years of age is life imprisonment which shall mean imprisonment for the remainder of natural life of a person, and the minimum imprisonment shall not be less than 20 years. Where the punishment provided for an offence is severe in nature, there is every danger of the accused absconding or fleeing from justice if released on bail. More severe the punishment is, more are the chances of the accused to abscond during to the trial or flee from justice if released on bail. In the case in hand, the prosecutrix during trial in her deposition before the trial court has not ruled out the complicity of accused in the crime as she has not turned hostile. There is every danger that the petitioner/accused will abscond or flee during trial if enlarged on bail.

10. Character, behavior, means and position of the accused:-

Petitioner/accused does not enjoy special status in the society as compared to the victim as both of them are residents of Katra District Reasi and

none of them enjoy special status in the society. As per the allegations against petitioner/accused, on 24-06-2021 he committed the crime of penetrative sexual assault upon minor prosecutrix aged 10 years. No self-respecting woman would normally concoct a story of rape just to falsely implicate a person. Petitioner/accused therefore does not enjoy any special status in the society so as to succeed in his case for grant of bail.

11. Likelihood of the offence being repeated:-

In view of the aforesaid discussion, it is clearly gatherable, that there is prima-facie or reasonable ground to believe that the petitioner/accused has committed the offence indicted against him. Punishment provided for offence of rape u/s 4(2) of POCSO Act is life imprisonment. More grave is the offence, more are the chances of the accused absconding and fleeing from justice. If the petitioner/accused is enlarged on bail, there is every likelihood of the offence being repeated by him, as grant of bail would encourage the petitioner/accused in repeating the offence.

12. Reasonable apprehension of the witnesses being tempered with:-

It is profitable to reiterate here, that Challan against petitioner/accused is pending trial before the Court of Ld. Pr. Sessions Judge Reasi. Charges have been framed wherein petitioner/accused has pleaded not guilty and preferred trial. Prosecutrix/victim has deposed before the trial court as prosecution witness, wherein she has not turned hostile and has not ruled out the complicity of petitioner/accused in the crime. The remaining witnesses of the prosecution are yet to be examined, therefore, there is reasonable apprehension that if enlarged on bail, petitioner/accused may influence/win over the remaining witnesses and temper the prosecution evidence.

13. Danger, of the course of justice being thwarted by grant of bail:-

In view of the plethora of judgments referred above, it can be safely held, that a balance has to be struck between the 'right to individual liberty' and 'interest of the society' and no right can be absolute and reasonable restriction can be placed on it. The grant of bail depends upon facts and circumstances of each case, and it cannot be said, that there is absolute rule that because a long period of imprisonment has expired, bail must necessarily be granted. Rape has been considered as a scar on the dignity, chastity, honour and reputation of a woman, and a crime against the entire society, and is violative of the most cherished fundamental right of the

victim, namely " Right to Life" contained in Article 21 of the constitution of India. It is profitable to reiterate here, that the petitioner/accused has been arrested on 24-06-2021 and at present is lying in Judicial Custody in District Jail Reasi for the last more than 1 ½ years . In view of the ratio of judgment rendered in AIR 2007 S.C 451 (Rajesh Ranjan Yadav @ Pappu Yadav v.s CBI through its Director), Hon'ble Supreme Court has held, "that the interest of society outweighs the individual interest of a person, and the longer period of imprisonment cannot be a ground for grant of bail", and therefore, while applying the ratio of judgment (supra), the longer period of incarceration of the petitioner/accused in the case in hand, is not a ground for his enlargement on bail. There is every danger of the course of justice being thwarted, if the petitioner/accused is enlarged on bail.

14. Courts cannot loose sight of the fact that crime of violence upon women and minor children are on increase and therefore the perpetrators of the crime must be dealt with iron hands. A dastardly, diabolic and fiendish manner in which the crime has been committed by the petitioner/accused upon the prosecutrix, sends the shivers down to the spines of everybody who is concerned with the administration of justice and maintenance of rule of law. Leniency in matters involving sexual offences is not only undesirable, but also against public interest. Such types of offences are to be dealt with severity and with iron hands. Showing leniency in such matters would be really a case of misplaced sympathy. The act of petitioner/accused is not only shocking, but outrageous in contours. The granting of bail to the petitioner/accused would lead to the danger of the course of justice being thwarted. There is no plea for grant of bail on health grounds, therefore, I hold that this is a fittest case where, "**Jail**" and not "**Bail**", is the appropriate remedy. The basic law of bail can be found in 1962 SC 253 (Capitan Jagjit Singh's case) and then in the most-talked about the case reported in 1978 SC 429 (GudikantiNarasimula and others, Appellants v. Public Prosecutor, High Court of Andhra Pradesh, Respondent) on the basis of which a sacred citation usually echoes in all the courts of country, viz; "**Bail or Jail**", has also been mis-understood and mis-applied on various occasions. These Judgments, do not lay down an invariable law that it is always the "**BAIL**" that should be awarded by the

court hearing a bail petition in a non-bailable case. I am afraid, if that were the intention of legislature, then there ought not to be two categories of offences, viz; **“bailable”** and **“non-bailable”**.

15. On these considerations and in view of the aforesaid discussion, I am of the considered opinion, that this is the fittest case, where bail ought not be granted and petitioner/accused too has failed to carve out a strong case for bail in his favour. The bail application being utterly misconceived under law, is disallowed, rejected and dismissed. As the speedy trial is the fundamental right of an accused enshrined in Article 21 of the Constitution of India, the Trial Court is directed to conclude the trial as expeditiously as possible.

16. Dispose of accordingly.

Jammu:
31.03.2023
Vijay

(Mohan Lal)
Judge

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

