

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

Bail App No. 47/2023

Ravi KumarAppellant(s)/Petitioner(s)

Through: Ms. Vasudha Sharma, Adv.

vs

Union Territory of J&K Respondent(s)

Through: Mr. Vishal Bharti, Dy.AG

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

ORDER

1. This is an application seeking bail in a case arising out of FIR bearing No. 45/2020 for offences under sections 363 and 109 IPC and Section 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) registered with Police Station, Vijaypur.
2. Record of the case shows that the accused/petitioner was arrested on 27.04.2020 in connection with the aforesaid case and charges against him were framed on 13.10.2021. Till date, the trial of the case has not been completed.
3. The petitioner, it appears, had approached the trial court by way of a bail application, but the same was dismissed by the trial court in terms of order dated 28.06.2022 on the ground that the statement of the prosecutrix is yet to be recorded. Thereafter, the petitioner moved this Court by way of a bail application bearing Bail App, No. 320/2022. The said bail application was disposed of by this Court in terms of order dated 30.09.2022 thereby giving liberty to the petitioner to approach the trial court afresh. While doing so, this Court after taking notice of the fact that earlier bail application of the petitioner had been rejected by the learned trial court on the ground that

statement of the prosecurix was yet to be recorded, a direction was issued to the respondents to take all necessary steps for ensuring the presence of the prosecutrix before the trial court on the next date of hearing or on date thereafter and to extend all necessary cooperation to the trial court in recording the statement of the prosecutrix. It was further observed that after recording the statement of the prosecutrix, it shall be open to the petitioner to make a fresh bail application before the trial court.

4. It seems that the petitioner again moved the trial court and filed the bail application on 21.12.2022. The same has again been dismissed by the trial court on the ground that only three witnesses have been examined by the prosecution and that the statement of the victim is yet to be recorded, meaning thereby that despite direction of this Court, the prosecution has failed to produce the victim before the trial court for recording her statement. This has compelled the petitioner to file the present application before this Court.
5. Heard learned counsel for the parties and perused the record.
6. As already noted, the petitioner is facing trial for offence under section 8 of the POCSO Act. The said offence carries maximum punishment of imprisonment of five years. As already noted, the petitioner has been in custody in the instant case since 24.04.2020, meaning thereby that he has spent more than three years in custody as on date.
7. Section 436-A of the Code of Criminal Procedure provides for maximum period for which an under trial prisoner can be detained. It reads as under:

“436-A. Maximum period for which an undertrial prisoner can be detained:-Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as

one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation-In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.”

8. From a perusal of the aforesaid provision, it is clear that an undertrial prisoner cannot be detained for a period more than one-half of the maximum punishment period of imprisonment specified in the offence in which he has been taken into custody and upon expiry of the said period, he has to be released by court on personal bond with or without sureties.
9. Learned counsel appearing for the respondent has submitted that despite best efforts, the Investigating Agency is unable to trace the prosecutrix as a result of which, she could not be produced before the Court below for recording her statement. This cannot form a reason for denying the statutory right that has accrued in favour of the petitioner by spending more than one-half of the maximum period of imprisonment specified for offence under section 8 of the POCSO Act. As already noted vide order dated 30.09.2022 passed in Bail Application No. 320/2022, the respondent was directed to ensure presence of the prosecutrix before the trial court but despite these directions, no effort seems to have been made by the Investigating Agency in producing

the victim before the trial court. Thus, the statutory right to bail granted to the petitioner in terms of provisions contained in Section 436-A of the Code of Criminal Procedure cannot be defeated by stating that despite best efforts, the victim could not be traced. The consideration of petitioner's plea for bail cannot be deferred indefinitely simply because the prosecutrix/victim is keeping herself away from appearing in court. It is not the case of the prosecution that trial is being delayed because of the conduct of the accused but it is a case where the victim is avoiding to step into the witness box. This conduct of the victim is sufficient to entitle the petitioner to concession of bail.

10. For the foregoing reasons, the instant petition is allowed and the petitioner is admitted to bail subject to the following conditions:

- (i) That he shall furnish personal bond in the amount of Rs.50,000/ with one surety of the like amount to the satisfaction of the trial court;
- (ii) That he shall appear before the trial court on each and every date of hearing;
- (iii) That he shall not leave the territorial limits of Union Territory of J&K without prior permission of the trial court;
- (iv) That he shall not intimidate or tamper with prosecution witnesses/evidence;
- (v) That he shall not indulge in similar activities.

11. The bail application shall stand **disposed** of.

(SANJAY DHAR)
JUDGE

Jammu

12.05.2023

Rakesh

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