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

Reserved on: 21.02.2022

Pronounced on: 02.03.2022

Bail App No.152/2021

Mubarak Ali Wani

...PETITIONER(S)

Through: Mr. Zahoor A. Shah, Advocate.

Vs.

**Union Territory through Police Station ...RESPONDENT(S)
Pantha Chowk**

Through: Mr. Sajad Ashraf, GA.

**CORAM:HON'BLE MR. JUSTICE JAVED IQBAL WANI,JUDGE
JUDGMENT**

1) The petitioner through the medium of instant application seeks bail in FIR No. 88/2021 dated 23.08.2021 registered with Police Station Pantha Chowk for commission of offences punishable under Sections 363, 376 IPC and Section 3/4 of POCSO Act.

2) According to the prosecution version, on 23.08.2021 the complainant victim namely "X" accompanied by her father filed a written complaint in the Police Station to the effect that on evening of 20.08.2021 complainant along with her mother went to attend the Moharam/Alam Sharief procession and due to huge gatherings/rush of the people she got separated from her mother and taking advantage of the same as also of the darkness, she was kidnapped by two persons namely Mubarak Ali Wani S/o Mohd Amin Wani R/o Balhama and Majid Ahmad Sofi S/o Gh Mohd Sofi R/o Balhama, and was taken to an unknown place and that she was made unconscious by forcing her to take a drink and thereafter rape was

WWW.LIVELAW.IN

committed upon her and on next morning on regaining consciousness, she saw her clothes stained with blood and that she thereafter went to her friend's home where her parents also came and she narrated whole incident to them.

3) Upon setting into motion the investigation, medical examination is stated to have been conducted of the victim and samples thereof sent to FSL for expert opinion besides statements of the witnesses were recorded as also statement of the victim under Section 164 Cr.PC and that the victim is 15 years of age (minor) and upon completion of the investigation offences under Section 363, 376 IPC and Sections 3/4 of the POCSO Act were found to have been made out against the accused persons besides offences under Section 363 IPC and Section 17 of POCSO the Act were found to have been made against the accused Mubarak Ali.

4) A charge sheet is stated to have been filed before the competent court (Fast track court POCSO cases Srinagar) (hereinafter for short the trial court).

5) The case setup by the petitioner in the instant application while praying for bail is that the prosecution case does not disclose the commission of offence either under IPC or POCSO Act against the petitioner and that the investigation conducted is not in accordance with law and norms and involvement of the petitioner is not proved beyond any shadow of doubt and that the evidence including medical evidence does not connect the petitioner with the commission of alleged offence, in view of the opinion of the medical officer who is stated to have said that it

WWW.LIVELAW.IN
cannot be commented as to whether intercourse has taken place or not and that FIR in question has been lodged after 3 days of disappearance of the victim and that there is no explanation thereto and that the petitioner/accused is not required for custodial investigation and that charge sheet has been laid before the competent court and that accused petitioner is a young student belonging to a well-to-do family and his detention will harm and destroy his career and enlarging him on bail will not cause any prejudice to the trial.

6) Per contra, respondents have filed objections to the bail application and oppose the same *inter-alia* on the grounds that chargesheet reflects in clear terms the involvement of the accused persons in the commission of offences of rape with common intention and that the offences are grave and heinous in nature and that the victim is 15 years old (minor) and that the trial is yet to commence and witnesses yet to appear in the witness box, as such, application is liable to be dismissed.

Heard learned counsel for the parties and perused the record.

7) Before advertent to the rival submissions of the counsel for the parties, it becomes imperative in the facts and circumstances of the case to refer to the law laid down by the Apex court on the subject of bail and issues connected thereto. The Apex court in case titled **“Neeru Yadav Vs. State of Uttar Pradesh and Another”**, reported in 2014 (16) SCC 508, has laid down at para 9 and 10 as under: -

“9. In this context, a fruitful reference be made to the pronouncement in Ram Govind Upadhyay V. Sudarshan Singh, wherein this court has observed that grant of b

WWW.LIVELAW.IN

although discretionary in nature, yet such exercise cannot be arbitrary, capricious and injudicious, for the heinous nature of the crime warrants more caution and there is greater chance of rejection

of bail, though, however dependent on the factual matrix of the matter. In the said decision, reference was made to Prahlad Singh Bhati v. NCT of Delhi and the court opined thus: (Sudarshan Singh case, SCC p.602, para 4)

- (a) *“While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.*
- (b) *Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.*
- (c) *While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.*
- (d) *Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail”*

“10. In Chaman Lal v. State of U.P., the court has laid down certain factors, namely, the nature of accusation, severity of punishment in case of conviction and the character of supporting evidence, reasonable apprehension of tampering with

the witness or apprehension of threat to the complainant, and prima facie satisfaction of the court in support of the charge, which are to be kept in mind.” “16. The issue that is presented before us is whether this court can annul the order passed by the High Court and curtail the liberty of the second respondent? We are not oblivious of the fact that liberty is a priceless treasure for a human being. It is founded on the bedrock of the constitutional right and accentuated further on the human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have

fought for liberty, for absence of liberty causes a sense of emptiness. The sanctity of liberty is the fulcrum of any civilized society. It is a cardinal value on which the civilization rests. It cannot be allowed to be paralyzed and immobilized. Deprivation of liberty of a person has a enormous impact on his mind as well as body. A democratic body polity which is wedded

WWW.LIVELAW.IN

to the rule of

law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. Society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the society. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law.”

8) In so far as the offences, the petitioner is alleged to have committed under Section 3 & 4 of the POCSO Act, a reference hereunder to Section 29 of the Act becomes imperative being relevant and germane herein: -

“29. 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.”

9) As is evident from above, Section 29 raises a presumption of commission of offences under Section 3, 5, 7 and 9 of the Act against a person who is prosecuted against the same, unless contrary is proved.

10) According to the leaned counsel for the petitioner, the presumption envisaged under Section 29 of the Act is not available in a case at pre trial

WWW.LIVELAW.IN

stage and therefore, the said presumption cannot be made applicable by this court while considering the instant bail application.

A Coordinate Bench of this court in case titled as “**Badri Nath Vs. Union Territory of J&K reported in 2020 (6) JKJ (HC) 255**” has however, ruled that the presumption under Section 29 of the Act comes into play even at pre trial stage, although the accused would have a right to bring into the notice of the court the material or lack of it to show that the foundational facts giving rise to the presumption are *prima-facie* not establishing in the case.

Having regard to the facts and circumstances of the case and the record available, this court fully agrees with the view expressed by the Coordinate Bench of this court about the applicability of the presumption under Section 29 of the Act at pre-trial stage inasmuch as while considering a bail application thereto.

11) Keeping in mind the law laid down by the Apex court in the judgement supra qua the bails inasmuch as the applicability of Section 29 of the Act, the grounds urged for grant of bail may be considered.

The first ground urged in the application is that the final report does not disclose the commission of alleged offence by the petitioner. However, a bare perusal of the statement made by the victim under Section 164 Cr.PC on 28.08.2021 in explicit terms implicates the petitioner in the commission of offence along with the co-accused which statement cannot be overlooked by this court at this stage, as such, the grounds are turned down.

WWW.LIVELAW.IN

In so far as the next ground urged by the petitioner is concerned that the medical opinion has not categorically opined about the happening of the alleged intercourse with the victim may not be attracted at this stage while considering the instant bail application, in that, the said issue would be gone into by the trial court during the course of trial before the trial court, while taking into account any other corroborative evidence, more so in view of settled law that whether rape has occurred or not is a legal conclusion and not a medical one. This court, as such, will not be in a position to express any opinion in this regard while considering the instant bail application. The ground accordingly is rejected.

In so far as the plea/ground regarding delay in the registration of FIR is concerned, the law is no more *res-integra* that delay in lodging a report in the case of sexual assault cannot be equated with a case involving other offences. The delay in registration of FIR in rape case cannot be said to be of much significance as victim has to muster courage to come out in open and expose herself in a conservative social milieu. A reference to Para 17 of the judgment of the Apex court passed in case titled as “**Wahid Khan Vs. State of Madhya Pradesh reported in 2010 (2) SCC 9**” would be relevant and advantageous which reads as under: -

It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing there from. If she is found to be false, she would be looked at by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracized by the society. It

would indeed be difficult for her to survive in Indian society which is, of course, not as forwardlooking as the western countries are.”

The ground urged in view of above has no merit.

12) Perusal of the record tends to show that there is material on record *prima-facie* suggesting involvement of the petitioner in the alleged offences and having regard to the principles and propositions of law laid down by the Apex court on the subject of bail as noticed above, particularly keeping in view the nature of accusation, severity of punishment so on and so forth, the petitioner is held not entitled to bail at this stage, more so in view of an excerpt referred by the Apex court in the case of **Neeru Yadav** supra which is extracted and reproduced here under in response to the question of liberty raised by the counsel for the petitioner supported by various case laws. The excerpt reads as under: -

.....A democratic body polity which is wedded to the rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. Society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the society. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the sem of social stream. It is impermissible. Therefore, an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has duty. It cannot abandon its sacrosanct obligation and pass an

WWW.LIVELAW.IN
order at its own whim or caprice. It has to be guided by the established parameters of law.”

The question of liberty raised by the counsel for the petitioner and judgements referred in support thereof in view of above position pales into insignificance.

13) For all that has been observed and discussed above, the instant application merits dismissal, as such, is accordingly, **dismissed**.

14) It is made clear that nothing hereinabove shall be construed to be expression of any opinion about the guilt or innocence of accused/petitioner herein as the same will be decided by the trial court on its merits after analysing the evidence that surfaces on record during the trial of the case.

(Javed Iqbal Wani)
Judge

Srinagar
02.03.2022
“Ishaq”

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