

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

Reserved on: 30.03.2022
Pronounced on: 01.04.2022

**Bail App No.133/2021
CrlM No.1287/2021**

SHAHID AHMAD SHEIKH ... PETITIONER(S)

Through: - M. Asma Rashid, Advocate.

Vs.

UNION TERRITORY OF J&K ...RESPONDENT(S)

*Through: - Mr. Satinder Singh Kala, AAG
I.O, ASI Mushtaq Ahmad, present in
person.*

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

JUDGMENT

1) Through the medium of instant petition, the petitioner has sought bail in anticipation of arrest in FIR No.10/2021 for offences under Section 366, 376, and 109 IPC registered with Police Station, Beerwah.

2) The facts giving rise to the filing of the instant petition are that the aforesaid FIR came to be registered on the basis of a complaint made by one Ghulam Mohammad Ganai, the father of the prosecutrix. In the complaint, the complainant submitted that his daughter, who is

aged 22 years, left her home on 26th January, 2021, but did not return in the evening. It was further submitted in the complaint that despite making efforts to trace out the prosecutrix, she could not be traced. It was also alleged that the complainant had come to know that the prosecutrix has been kidnapped by the petitioner herein. During investigation of the case, the prosecutrix was recovered on 18.02.2021 from the custody of the accused/petitioner and her statement under Section 164 of Cr. P. C came to be recorded by Judicial Magistrate, 1st Class, Beerwah. In her statement recorded under Section 164 of Cr. P. C, the prosecutrix narrated that on 26th of January, 2021 at about 3.30 PM, when she had gone out of her house to fetch water from a tube well, the petitioner came from behind, tied a cloth on her mouth and forcibly made her to board a vehicle whereafter she was taken to an unknown place and kept over there from 10/15 days. The prosecutrix further stated that the petitioner committed forcible sexual intercourse upon her. She went on to state that she was taken by the petitioner to Otligam where, when they were waiting for a vehicle, police came over there and the petitioner ran away and she was taken by police and handed over to her father. It seems that statement of the prosecutrix under Section 164 of Cr. P. C was once again recorded on 2nd July, 2021. This statement of the prosecutrix is more or less on similar lines.

3) It appears that relatives of the petitioner filed a writ petition bearing WP(C) No.1332/2021 before this Court contending therein

that the prosecutrix has entered into a wedlock with the petitioner which has annoyed the father of the prosecutrix and that the police have registered an FIR, on the basis of which they are being harassed.

4) This Court vide order dated 12.07.2021 passed an interim order observing that there cannot be any reason for the official respondents to harass the petitioners because of the fact that their close relation is married to the prosecutrix. On 16.08.2021, the Writ Court directed SHO, P/S Beerwah, to produce the prosecutrix before the Court. Accordingly, on 23.08.2021, the prosecutrix was produced before the Writ Court. In the order dated 23.03.2021, passed by the Writ Court, it has been recorded that the girl has reiterated the statement made by her before the Judicial Magistrate, 1st Class, Beerwah.

5) The respondent has contested the bail application by filing a reply thereto. In its reply, the respondent has reiterated the facts which have been narrated hereinbefore and it has been contended that the petitioner has committed a heinous offence, as such, he does not deserve the concession of bail.

6) It has been contended by learned counsel for the petitioner that the prosecutrix has entered into a wedlock with the petitioner out of her own will and volition and, as such, the allegations made in the FIR are absolutely false. The petitioner has placed on record a copy of the marriage agreement and copy of the Nikah Nama to substantiate these contentions. It has been further contended that the investigating agency has never called the petitioner nor has the investigating agency

felt any need to arrest the petitioner, which clearly shows that the petitioner is not required for the investigation. In support of these contentions, learned counsel for the petitioner has relied upon the following judgments:

- (I) *Haji Umar Din v. UT of J&K & others, Bail App No.351/2021 decided on 24.02.2022;*
- (II) *Ashok Kumar vs. UT of J&K, Bail App No.206/2021 decided on 21.02.2022;*
- (III) *Farooq Ahmad v. UT of J&K, Bail App No.373/2021 decided on 31.12.2021;*

7) *Per contra*, it has been contended by learned counsel for the respondent that the petitioner is avoiding his arrest and on this ground alone, his application deserves to be rejected. According to the respondent, the earlier bail application of the petitioner was rejected by the learned Additional Sessions Judge, Budgam, and there is no reason to enlarge the petitioner on bail by taking a different view.

8) I have heard learned counsel for the parties and perused the record of the case including the Case Diary.

9) So far as the principles for grant of bail in anticipation of arrest are concerned, the same have been laid down by a Constitution Bench of the Supreme Court in the case of **Gurbaksh Singh Sibbia and ors. vs. State of Punjab, (1980) 2 Supreme Court Cases 565**. The Court has, while observing that the question, whether to grant bail or not, depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict, held as under:

*“In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the state" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in *The State v. Captain Jagjit Singh*, which, though, was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail”.*

10) Relying upon the aforesaid judgment, the Supreme Court in the case of **Siddharam Satlingappa Mhetre vs State of Maharashtra And Ors, (2011) 1 Supreme Court Cases 694** has, while observing

that no inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail, held that the following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

“(i). The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii). The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii). The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or the other offences.

(v). Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi). Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii). The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii). While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix). The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant; and

(x). 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”.

11) In the light of the afore-quoted principles laid down by the Supreme Court, let me now proceed to analyze the facts of the instant case.

12) As already noted, the prosecutrix has, in her statement recorded under Section 164 of Cr. P. C on two occasions, clearly implicated the petitioner by stating that she was kidnapped by him whereafter she was taken to some unknown place and subjected to forcible sexual assault.

13) It has been contended by learned counsel for the petitioner that the prosecutrix has entered into wedlock with the petitioner and because of pressure from her parents, she has made a false statement against the petitioner. The contention of learned counsel for the petitioner cannot be accepted for the reason that while considering a bail application, the Court has to attach presumption of correctness to the statement of a witness recorded during the investigation of the case, particularly when the said statement has been recorded by a Judicial Magistrate. Even otherwise, the prosecutrix has reiterated her allegations against the petitioner when she was brought before the

High Court during the proceedings in the writ petition. The prosecutrix has not admitted her marriage with the petitioner in any of her statements. Therefore, it cannot be stated that the prosecution launched against the petitioner is frivolous. The ratio laid down in the judgments relied upon by the petitioner is not applicable as the same are distinguishable on facts.

14) Another factor which needs to be taken into account while considering an application for grant of anticipatory bail is the possibility of the accused to flee from justice. It has been specifically pleaded by the respondent that the petitioner is avoiding his arrest. In fact, a perusal of the Case Diary reveals that the investigating agency has made strenuous efforts to trace out and arrest the petitioner but their efforts so far have not met with success. In such circumstances, when the petitioner is dodging the investigating agency and has not made himself available before the investigating agency, if he is enlarged on anticipatory bail, there is every likelihood that he may flee from justice.

15) Apart from the above, another factor which goes against the petitioner is the nature and gravity of the accusation and his role in the alleged crime. The petitioner has been booked for having committed the offences under Section 366/376 IPC, which is a serious offence. The investigating agency has collected material to support the allegations made against the petitioner who happens to be the main accused. The offences of this kind are very grave in nature and cannot

be taken lightly otherwise perpetrators of sexual assault upon women would get encouraged.

16) For the forgoing reasons, the petitioner cannot be extended the concession of anticipatory bail. The petition is, therefore, dismissed along with connected CrIM.

17) CD file be returned to the learned counsel for the respondent.

**(SANJAY DHAR)
JUDGE**

**Srinagar,
01.04.2022
"Bhat Altaf, PS"**

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

