

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

Reserved on: 07.05.2022

Pronounced on:21.05.2022

Bail App No.08/2022

MRS. ZUBEEDA

... PETITIONER(S)

*Through: - Mr. B. A. Bashir, Sr. Advocate.
with Ms. Falak Bashir, Advocate.*

Vs.

UNION TERRITORY OF J&K

...RESPONDENT(S)

Through: - Mr. Sajad Ashraf, GA.

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

JUDGMENT

1) The petitioner has invoked the jurisdiction of this Court under Section 439 of the Cr. P. C seeking bail in a case arising out of FIR No.69/2021 for offences under Sections 376, 109 IPC and 4 POCSO Act registered with Police Station, Shergari, Srinagar.

2) As per the prosecution case, on 08.08.2021, the victim along with her father lodged a complaint with Police Station, Shergari, alleging therein that the victim, who is aged about 14 years, was sent by her father to the house of accused Arif Waza, who happens to be the husband of the petitioner herein, for learning embroidery work. It was alleged that after eight days, the victim came back to her home

and two days thereafter, accused Mohammad Arif Waza called her on telephone, whereafter the victim started crying. The father of the victim enquired about the reason and the victim narrated that she had been raped by accused Arif Waza after making her unconscious. The police registered the FIR and started investigation of the case.

3) During investigation of the case, statement of the victim under Section 164 of the Cr. P. C was recorded. In her statement she has stated that during her stay in the house of the accused, she was raped twice by the husband of the petitioner. She has further stated that as a result of sexual assault, she suffered bleeding and when she narrated the incident to the petitioner, she was told by her that she deserved the same treatment. She also stated that something was sprinkled on her mouth by the petitioner which made her unconscious and when she regained her senses, she found herself in a naked position. She further stated that the petitioner is a bad charactered woman who is having illicit relation with one of the cousins of her grandfather. The victim has also stated that when she talked to the husband of the petitioner on telephone, he told her that if she gets impregnated, he will bear the expenses of terminating the pregnancy. She went on to state that husband of the petitioner offered Rs.4000/ to 5000/ to her father to settle the matter but they did not accede to this request.

4) After investigation of the case, role of the petitioner as an abettor came to the fore and, as such, offence under Section 109 IPC was added to offences under Section 376 IPC and 4 of POCSO Act.

The charge sheet was, accordingly, laid before the trial court against the petitioner and her husband and they are facing trial for offences under Section 376, 109 IPC read with Sections 4 and 17 of the POCSO Act.

5) It appears that the petitioner had approached the trial court for grant of bail but the same has been rejected by the trial court vide its order dated 31.12.2021. The record of the trial court reveals that the charges against the petitioner stand framed on 27.11.2021 and till date statement of only the victim girl has been recorded. The statements of other prosecution witnesses have not been recorded so far.

6) It has been contended by the petitioner that she has been falsely implicated in the case and that she is languishing in jail since 08.08.2021. It is further contended that the story projected by the victim in her statement recorded under Section 164 of the Cr. P. C is highly improbable and that the same is concocted. According to the petitioner, it is a case of honey trap and exploitation. It has been further contended that there are contradictions in the statements of the victim recorded under Section 161 of Cr. P. C, 164 of Cr. P. C and her statement recorded during the trial of the case. It is also contended that statements of the prosecution witnesses recorded during the investigation of the case are also contradictory in nature. Finally, it has been submitted that the petitioner is a woman and, as such, she is entitled to leniency while considering her prayer for grant of bail.

7) The bail application has been resisted by the respondent by filing a reply thereto. In its reply, the respondent has reiterated the facts of the case and has submitted that the bail application deserves outright rejection. It has been contended that the detailed discussion of the evidence and documentation has to be avoided at the time of considering the bail application. It is also contended that a minor victim, aged about 14 years, has been subjected to repeated sexual assaults by the husband of the petitioner with the active aid and assistance of the petitioner, as such, no leniency can be shown in the instant case.

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

9) 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:

- 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;*

10) When it comes to offences punishable under a special enactment, such as POCSO Act, something more is required to be kept in mind in view of the special provisions contained in the said enactment. Section 31 of the said Act makes the provisions of the Code of Criminal Procedure applicable to the proceedings before a Special Court and it provides that the provisions of the aforesaid Code including the provisions as to bail and bonds shall apply to the proceedings before a Special Court. It further provides that the Special Court shall be deemed to be a Court of Sessions. Thus, it is clear that the provisions of Cr. P. C including the provisions as to grant of bail are applicable to the proceedings in respect of offences under the POSCO Act. The present application is, therefore, required to be dealt with by this Court in accordance with the provisions contained in Section 439 of the Cr. P. C. The other provisions of the POCSO Act, which are also required to be kept in mind, are Sections 29 and 30, 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 stage 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”.

11) Section 29 quoted above raises a presumption of commission of an offence under Sections 3, 5, 7 and 9 of the POCSO Act against a person who is prosecuted for commission of the said offence, unless contrary is proved. Similarly, Section 30 quoted above raises a presumption with regard to existence of culpable mental state against an accused in prosecution of any offence under the Act which requires a culpable mental state on the part of the accused. Again, the accused in such a case has been given a right to prove the fact that he had no such mental state.

12) Coming to the facts of the instant case, the petitioner is alleged to have aided and abetted her husband, the main accused, in commission of rape upon the prosecutrix, who, as per the prosecution case, was aged about 14 years at the relevant time. The prosecutrix has clearly implicated the petitioner and her husband in her statement recorded under Section 164 of the Cr. P. C. According to her, the petitioner sprinkled something on her mouth which made her unconscious. She has also stated that she was made to sleep in between the petitioner and her husband in the same room. In her statement recorded during the trial of the case, the prosecutrix has

repeated these allegations against the petitioner and her husband. The only deviation in her said statement is that she has stated that she was administered some medicine by the petitioner to make her unconscious. In her statement recorded under Section 161 of Cr. P. C also, the prosecutrix has stated that she was made to go unconscious.

13) There may be certain contradictions in the statement of the prosecutrix recorded during trial of the case when the same is compared with her statements recorded during investigation of the case, but it is not open to this Court to minutely examine and weigh the evidence at the time of considering the bail plea of the petitioner. The fact of the matter remains that the prosecutrix, in her statement recorded during the trial of the case, has supported the prosecution case and she has reiterated that she was raped twice by the husband of the petitioner with the aid and assistance of the petitioner herein. To that extent there are no contradictions in the statement of the prosecutrix. So, it is not a case where the prosecutrix has resiled from the material aspect of the prosecution case during the trial of the case but it is a case where she has substantially supported the version of occurrence given in the challan. Therefore, the petitioner as on date has been unable to rebut the presumption arising against her in terms of Section 29 of the POCSO Act. The same has triggered against the petitioner with the presentation of the challan against the accused and subsequent framing of charges against them. Thus, the presumption of

innocence is not attached to the petitioner in the facts and circumstances of the instant case.

14) From a perusal of the record, it is clear that there is material on record to suggest that the petitioner is involved in commission of offence under Section 376/109 IPC read with Sections 4 and 17 of the POCSO Act. Abetment of an offence carries the same punishment as is provided for that offence. Section 376(3) IPC provides punishment in a case where rape has been committed upon a woman under 16 years of age. As per this provision, the punishment provided for such offence is not less than 20 years, which may extend to imprisonment for life. Thus, the offences for which the petitioner is facing trial are serious in nature.

15) The petitioner is aged about 63 years whereas her husband is aged about 65 years. The victim in this case is aged only 14 years. The material on record shows that the victim was sent by her father to the house of the petitioner to learn embroidery work. Thus, the victim was under guardianship of the petitioner and her husband. A bond of trust and confidence must have been reposed by the victim upon the petitioner and her husband. By indulging in abhorrent behavior with the child victim, the petitioner and her husband have shaken her trust and confidence and brought a bad name to the relationship of a child with her guardian who were as good as her parents. It is not an ordinary offence where the perpetrator of the crime is a young boy but it is a case where the perpetrators of the crime happen to be the

persons aged more than four times that of the age of the victim. The gap in the age of the accused and the victim makes their alleged act more heinous and it shows an element of perversion in the offence alleged. The position of the petitioner qua the victim makes the offence all the more heinous. Thus, merely because the petitioner happens to be a woman does not entitle her to concession of bail in these circumstances.

16) So far as the trial of the case is concerned, the same is still at its inception and only statement of the victim has been recorded so far. The statements of other prosecution witnesses including the father and three more relatives of the prosecutrix are yet to be recorded. If the petitioner is admitted to bail at this stage, there is every apprehension that the prosecution witnesses, who happen to be the close relatives of the victim, would be influenced by the petitioner.

17) The Supreme Court in the case of **State of Bihar vs. Rajballav**, (2017) 2 SCC 178, while considering the question of grant of bail to an accused who was alleged to have committed offence under the provisions of POCSO Act against a child victim, placed reliance upon the ratio laid down in the case of **Ramesh v. State of Haryana**, (2017) 1 SCC 529, and referred to the following observations made by the Court in the said case:

46. Justifying the measures to be taken for witness protection to enable the witnesses to depose truthfully and without fear, Justice Malimath Committee Report on Reforms of Criminal Justice System, 2003 has remarked as under:

'11.3. Another major problem is about safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise.... Time has come for a comprehensive law being enacted for protection of the witness and members of his family.'

47. Almost to similar effect are the observations of the Law Commission of India in its 198th Report (Report on 'witness identity protection and witness protection programmes'), as can be seen from the following discussion therein:

"The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Penal Code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Penal Code, 1860. It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several general statutes in other countries provide for victim and witness protection."

18) The Court, after noticing the aforequoted ratio laid down in **Ramesh's** case, observed as under:

“No doubt, the prosecutrix has already been examined. However, few other material witnesses, including father and sister of the prosecutrix, have yet to be examined. As per the records, threats were extended to the prosecutrix as well as her family members. Therefore, we feel that the High Court should not have granted bail to the respondent ignoring all the material and substantial aspects pointed out by us, which were the relevant considerations.”

19) In view of the aforesaid ratio laid down by the Supreme Court, it is clear that in the cases involving offences of serious nature falling under IPC or POCSO Act, where the victim happens to be a minor child, the Court has to be alive to the need for protecting the victims and the witnesses and it is duty of the Court to ensure that victim and witnesses, in such serious matters, are made to feel secure while deposing before the Court. This can be ensured only if the statements of the victim and the material witnesses are recorded while keeping the accused behind the bars.

20) Apart from the above, a perusal of the record shows that the learned trial court has rejected the bail application of the petitioner on 31.12.2021 and by that time statement of the prosecutrix had already been recorded. Without there being any change of circumstances, the petitioner has rushed to this Court and filed the instant bail application. It is true that this Court is vested with the jurisdiction to entertain a bail application under Section 439 of the Cr. P. C even in a case where the trial court has refused to grant bail without there being any change in circumstances but then at least it was incumbent upon the petitioner to bring to the notice of this Court any circumstance that would persuade this Court to take a view different from the one taken

by the learned trial court. The petitioner has miserably failed to point out any such circumstance. On this ground also, the bail application deserves to be rejected.

21) For the foregoing reasons, I do not find any merit in this application. The same is, accordingly, dismissed. The petitioner shall, however, be at liberty to move a fresh bail application upon any change in the circumstances.

**(SANJAYDHAR)
JUDGE**

**Srinagar,
21.05.2022
"Bhat Altaf, PS"**

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