## HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

Bail App. No. 88/2021

Reserved on 20.04.2022. Pronounced on 26 .04.2022

Amir Amin Dar.

...Petitioner/Appellant(s)

Through: Mr. Wajid Mohammad Haseeb, Advocate

Vs

UT of J&K & Anr.

...Respondent(s)

Through: Mr. Sajad Ashraf, GA

## CORAM: HON'BLE MR. JUSTICE M. A. CHOWDHARY, JUDGE ORDER 26.04. 2022

- Through the medium of instant petition filed under Section 439 Cr.
  P.C, petitioner seeks bail in a case pending before Special Court
  (POCSO cases) Srinagar, arising out of FIR No. 54/2021,
  registered at Police Station, Nigeen, Srinagar.
- implicated in the aforesaid case and there is nothing on the record of charge sheet that would even remotely suggest the involvement of the petitioner/accused in the alleged crime. It is further averred that the petitioner/accused has approached the court of learned Special Judge (POCSO cases) Srinagar for grant of bail but his application was rejected vide order dated 31<sup>st</sup> July, 2021, for the reason that there are serious offences alleged against the petitioner/accused and that there was not enough material on record at that stage for grant of bail.
- **3.** Pursuant to notice, the bail application has been resisted by the respondents by filing the objections thereto. In their objections, prosecution has narrated the incident which is the subject matter of

the case. It is stated that on 16<sup>th</sup> May, 2021, a written complaint was filed by proscutrix (name withheld to hide her identity) to the that she was being threatened by a person namely Amir Amin Dar (Petitioner herein) and that he was demanding sexual favours from her. It was further alleged that she had been sexually harassed by that person many times at his home; that on receipt of the said report, a case vide FIR No. 54/2021, for the commission of offences punishable under Sections 354-A, 376, 506 IPC was registered at Police Station Nigeen, Srinagar; that during investigation, it came to fore that the victim was below 18 years of age; that the petitioner/accused used his Auto Load Carrier bearing registration No. JK13E-2799 for the crime, committed by him and finally the charge sheet was laid against the petitioner before the court of Special Judge (POCSO cases) Srinagar on 17.07.2021, for the commission of offences punishable under Sections 354-A, 354-C, 506, 376 IPC, 76-B IT Act, 6 of POCSO Act and 207 M.V. Act.

- 4. It was further asserted that the circumstances involved in the case do not entitle the petitioner/accused to be enlarged on bail as the offences committed by him are heinous in nature, carrying severe punishment. It was also apprehended that the petitioner/accused in the event of bail may influence the prosecution witnesses. It was finally prayed that bail application be dismissed.
- 5. Heard learned counsel for both sides, perused the material on record and considered the matter.
- **6.** Before proceeding to analyse the rival submissions, it is necessary to restate the settled legal position about the factors to be

- considered for deciding the application for bail. These are as under:
- (i) Whether there is any prima facie or reasonable ground to believe that the accused has committed offence;
- (ii) Nature and gravity of the charge;
- (iii) Severity of punishment in the event of conviction;
- (iv) Danger of the accused absconding or fleeing after release on bail;
- (v) character, behaviour, 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 justice being thwarted by grant of bail.
- 8. 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 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 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. <u>Presumption as to certain offences</u> 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. <u>Presumption of culpable mental state</u>.-(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".
- 9. 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.
- 10. The learned trial Court, while rejecting the bail application of the petitioner, has vide its order dated 31<sup>st</sup> July, 2021, relied upon the provisions contained in Section 29 of the POCSO Act to observe that the culpability of offences under the said Act has a presumption attached to it.

- of POCSO Act raises a presumption of guilt against a person who is prosecuted for committing any of the offences punishable under Sections 3,5,7 and 9 of POCSO Act. It is an admitted case of the parties that the petitioner is being prosecuted, *inter alia*, for commission of offence under Section 6 of POCSO Act. Therefore, such a presumption is not available for an offence under Section 6 of the Act.
- 12. The prosecutrix was examined during investigation of the case in terms of Section 164 Cr. P.C, and also during trial. On perusal of the record, it appears that prosecutrix who had herself filed complaint against the petitioner/accused wavered in her statements at three stages, i.e., at the time of filing of the complaint, at the time of her examination in terms of Section 164 Cr. P.C, and also during examination as a witness in the trial court.
- 13. For the disposal of this application without commenting upon the merits of the statement of prosecutrix, it has been observed that prosecutrix of her own will accompanied the accused/petitioner to his home not once but on a number of times and stayed at his place. She has also stated that she had been in touch with the accused/petitioner over phone and had been meeting him frequently. She further deposed that she had filed similar complaint against another boy, namely Mohammad Ashraf of Khanshab Budgam, against whom the case had been filed at Budgam and later she had absolved him from the charge as his parents had apologized to her parents.

- 14. Since the prosecutrix had been examined and she was the sole material witness in the case, being victim as well as complainant herself therefore, there cannot be any apprehension of tampering of the evidence by the petitioner/accused in the court. Apart from this, there has been a delay in filing the FIR.
- 15. On consideration of all the factors and parameters for grant of bail, and without commenting further on the merits of the case, lest the same may influence the trial, this Court is of the considered opinion having regard to the aforestated principles/factors to be considered, with respect to charge, nature of accusation, severity of punishment on conviction that the petitioner/accused is entitled to be enlarged on bail in this case
- 16. For the forgoing reasons, the application is, accordingly, allowed and the petitioner/accused 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 Special Court (POCSO Cases) Srinagar;
  - (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 except prior permission of the learned trial court.
    - That he shall not tamper with the prosecution evidence in any manner whatsoever.

19. This order shall not be construed as an opinion upon the merits of the main case and the observations made hereinabove, shall remain confined for the disposal of the present application.

## 20. **Disposed of.**

(M. A. CHOWDHARY) JUDGE

SRINAGAR .04.2022

"Ab. Rashid"

