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

## **Bail Application No.158/2021**

Mudasir Ahmad Sheikh

.....Petitioner(s)

Through: Mr.Junaid Rashid, Advocate

V/s

UT of J&K through P/S Nigeen

..... Respondent(s)

Through: Mr.Sajad Ashraf, GA

**CORAM:** 

HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

**ORDER** 

22.04.2022

1. The petitioner has filed the present petition under Section 439 of the CrPC seeking bail in FIR No.78/2021 for offences under Section 363, 376 IPC and Section 4 of POCSO Act registered with Police Station, Nigeen Srinagar.

2. It is contended in the petition, that the prosecutrix neither in her statement recorded under Section 164 CrPC nor in her statement recorded during the trial of the case, has implicated the petitioner. It is also averred that the petitioner had approached the learned Special Court for grant of bail but his bail application was rejected by the said Court in terms of order dated 15.12.2021, without appreciating the law in its correct perspective. It is further contended that the petitioner has been falsely implicated in the case and that in case he is enlarged on bail he will abide by all the conditions that may be imposed by this Court upon him.

- 3. The bail application has been resisted by the respondent by filing reply thereto. In its reply, the respondent has submitted that, on 28.06.2021, Police Station Nigeen received a written complaint from the father of the prosecutrix alleging therein that his daughter has been kidnapped by the petitioner herein from his house at Meerakshah. On the basis of this report, a case for offence under Section 363 IPC was registered and investigation was set into motion. It is averred that during the investigation of the case, the statements of the witnesses were recorded and the prosecutrix was recovered from the possession of the petitioner. She was medically examined which confirmed that the prosecutrix has been subjected to sexual assault. Thus, offences under Section 376 IPC and Section 4 of POCSO Act were added to the case. It is further averred that the statements of the prosecutrix and her mother were recorded under Section 164 CrPC and the challan was filed against the petitioner for commission of offences under Section 376 IPC and Section 4 of POCSO Act before the Special Court. It has been contended that the petitioner has committed a heinous offence which is against the society, as such, he does not deserve concession of bail.
- **4.** I have heard learned counsel for the parties and perused the material on record including the trial court record.
- **5.** Before proceeding to analyze the rival submissions, it is necessary to restate the settled legal position about the matters 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.
- **6.** 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 CrPC 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 CrPC. 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. 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".
- 7. 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.

- 8. The learned trial Court, while refusing to grant the bail to the petitioner, has observed that the age of the victim at the time of the occurrence was around 13 years and considering her age it would not be legally just to grant bail in favour of the accused. The learned trial Court has also observed that the statement of the victim under Section 164 Cr.P.C reflects that she has out of her own will gone with the accused and she being minor, the accused cannot be absolved of the offence.
- 9. Section 29 of the POCSO Act raises a presumption of guilt against a person who is prosecuted for committing an offence of penetrative sexual assault which is punishable under Section 4 of POCSO Act. It is an admitted case that the petitioner has been prosecuted, *inter alia*, for commission of offence under Section 4 of POCSO Act, inasmuch as, challan against him already stands filed before the Special Court. The question arises whether an accused has, in law, any right or opportunity to rebut the aforesaid presumption, particularly when Section 4 of the POCSO Act clearly provides that unless the contrary is proved, the presumption has to be drawn against the accused once he is prosecuted for offences under Section 3, 5, 7 and 9 of the POCSO Act.
- App No.139/2020 decided on 11.12.2020), had an occasion to deal with this issue and after discussing the judgments of various High Courts and the Supreme Court on the subject, the Court made the following observations:

- "23. In the bail proceedings, even at pre-trial stage, it would open to an accused to highlight the circumstances/material or lack of it to show that foundational facts are not established and in this manner, the right available to an accused under the later part of the provision contained in Section 29 of the POCSO Act would get safeguarded.
- 24. For the foregoing reasons, I am of the considered opinion that at the time of considering the bail application of an accused, who has been booked for the offences under Sections 3,5,7 & 9 of the POCSO Act, the presumption under Section 29 of the said Act would come into play even at the pre-trial stage. The accused, of course, would have a right to bring to 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 established in the case.
- 11. Thus, it is in the light of aforesaid legal position, the facts and material of the instant case are required to be analyzed so as to determine whether or not foundational facts giving rise to presumption under Section 29 of the POCSO Act, are, *prima facie*, established.
- 12. If we have a look at the material on record, it is revealed that during the investigation of the case, statement of the victim girl has been recorded under Section 164 CrPC. Statement of her mother has also been recorded under Section 164 CrPC. In her statement recorded under Section 164 CrPC, the victim girl has stated that she was in a romantic relationship with the accused for last 5 to 6 years. According to her this was opposed by her family but she still continued to stay in touch with the accused with a view to enter into wedlock with him. She has stated that about 16 days back she,

out of her own free will, ran away from her home, boarded a bus at Nowhata, whereafter she went to Parimpora and boarded Tavera vehicle and proceeded to Bandipora. On reaching Bandipora, she called the accused on phone who came over there and took her to his house. The victim further went on to state that she stayed with the accused-petitioner for few days whereafter family of the accused called the parents of the victim and her mother came over there alongwith police. She has stated that she was taken to hospital for medical checkup. She has also stated that she had sexual intercourse with the petitioner during her stay with the accused-petitioner.

From the foregoing statement of the victim, it is clear that she out of **13.** her own will and volition, had left her home and joined the company of accused with whom she had sexual intercourse. The victim being minor, her consent in commission of sexual intercourse becomes immaterial. The matter does not rest here. The prosecutrix has been examined during the trial of the case. Certified true copy of her statement has been placed on record. In her statement the victim has stated that she was having affair with the petitioner but her family was against it. She has further stated that she has joined the company of the petitioner and left her home out of her own free will. She re-iterated that after leaving her home she boarded different vehicles to reach the home of the petitioner at Bandipora. She has stated that she stayed in the house of maternal uncle of the petitioner. She has gone on to state that when her family came to know about this, they lodged the report with the Police and she was taken into custody by the police alongwith the accused-petitioner. The witness was declared hostile by the prosecution and subjected to cross examination. In her cross examination she stated that she

was recovered from the house of maternal uncle of the petitioner. She admitted that she had sexual intercourse with the petitioner. She also admitted the correctness of the contents of her statement under Section 164 Cr.PC. The prosecutrix was cross examined by the defence counsel. In her cross examination by the defence counsel, she has stated that she was pressurizing the petitioner to enter into wedlock with her. She has further stated that her date of birth is April, 2004. She has gone on to state that she went out of her house on her own will. She has further clarified that she had affair with the petitioner but she had no physical relations with him. She has also stated that even her family members are now ready to get her married to the petitioner.

- 14. There is also on record the statement of the mother of the prosecutix recorded under Section 164 CrPC. In her statement she has stated that her daughter was having relations with the accused-petitioner but she was against this relationship. She has further stated that lateron she agreed to this relationship and that she has decided to get her daughter married to petitioner. She has also stated that her daughter had joined the company of the petitioner of her own free will and she was neither kidnapped nor raped. Both the victim as well as her mother have stated that the accused-petitioner should be enlarged on bail.
- 15. From the statements of the prosecutrix and her mother recorded under Section 164 CrPC and the statement of the prosecutrix recorded during the trial of the case, certain circumstances have come to the fore which tend to rebut the presumption under Section 29 of the POCSO Act against the petitioner. Prima facie it appears that the victim, even though she was

minor, has left her home without there being any inducement on the part of the petitioner. It also appears that the victim has given contradictory versions as regards the commission of sexual intercourse upon her in her different statements recorded at different stages.

- 16. In the face of the aforesaid material on record and without commenting upon merits of the case, lest it may prejudice the case of the prosecution, it appears that, *prima facie*, foundational facts that would give rise to the presumption under Section 29 of the POCSO Act against the petitioner, are not established in this case. Thus, *prima facie*, it appears that the presumption of guilt against the accused, in these circumstances, may not get triggered meaning thereby that there is no *prima facie* ground to believe that the petitioner has committed the alleged crime.
- 17. Apart from the above, the investigation in the case is complete and the trial of the case has commenced. In fact the statement of the prosecutrix has already been recorded by the trial court. Thus, if the petitioner, is admitted to bail at this stage, there is no apprehension of his tampering with the prosecution witnesses. Besides this the petitioner has been in custody for the last about ten months. Denying bail to him would amount to inflicting punishment upon him without trial. Thus a case for grant of bail to the petitioner is made out.
- **18.** For the foregoing reasons, the application of the petitioner deserves to be accepted. Accordingly, the application is allowed and the petitioner is admitted to bail subject to the following conditions:-

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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 learned 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 learned

trial court;

IV. That he shall not tamper with prosecution witnesses.

19. Observations made hereinabove, shall remain confined to the

decision of the instant application, and shall not be construed as an

opinion on the merits of the case.

(SANJAY DHAR) JUDGE

SRINAGAR 22.04.2022 Sarveeda Nissar

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