

S. No.60
Suppl. cause list

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Bail Application No. 98/2021

Ishfaq Ahmad Mir

.....Petitioner(s)

Through: Mr. Waseem Shamas, Advocate

V/s

UT of J&K through Superintendent of Central Jail Srinagar & Anr.

Through: Ms. Asifa Padroo, AAG vice

Mr. B.A.Dar, Sr.AAG

..... Respondent(s)

CORAM:

HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

ORDER

20.12.2021

1. Petitioner has filed the present petition under Section 439 of Cr.PC seeking bail in FIR No.11/2021 for offences under Section 363, 376 IPC and 3/4 POCSO Act registered with Police Station, Rajbagh Srinagar.

2. It is averred in the petition, that the prosecutrix in her statement recorded under Section 164 Cr.PC, during the investigation of the case, has not 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 31.07.2021, on the ground, that the allegations against the

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petitioner are serious in nature and that no sufficient grounds exist for granting bail to him.

3. The bail application has been resisted by the respondents by filing reply thereto.

In their reply respondents have submitted that, on

02.03.2021, Police Station Rajbagh Srinagar, received a written complaint from one, Mohammad Sultan Lone, the father of the prosecutrix, that his daughter has been kidnapped by some unknown person with intention to commit rape upon her. Thus, FIR No.11 of 2021, for offences under Section 363 and 376 IPC, was registered and the investigation of the case was set into motion. During the course of investigation, the statements of the witnesses were recorded and it was

found that the prosecutrix had been kidnapped by the petitioner herein. The prosecutrix was ultimately recovered from Vilgam. After conducting her medical check-up, offences under Section 376 IPC and 3/4 POCSO Act, were added to the case.

The statement of the

prosecutrix was recorded under Section 164 Cr.P.C by the Judicial Magistrate 1st Class (City Munsiff) Srinagar.

The petitioner was

arrested on 12.04.2021. After investigation of the case offences under Sections 363, 376 IPC and 4 POCSO were found established against the petitioner and the challan was filed before the Special Court for trial of offence under POCSO Act (hereinafter referred to as the Special Court) on 13.09.2021.

It has been contended that the

petitioner has committed heinous offences which are against the society and that he has ruined the life of prosecutrix, as such, he does not deserve to be enlarged on bail.

4. I have heard learned counsel for the parties and perused the material on record including the trial court record.

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5. Before proceeding to analyse 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,
standing of the accused;

(vi)

likelihood of the offence being repeated;

position

and

(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 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 Cr.P.C. The other provisions of the POCSO Act, which

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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”.

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.

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8. The learned trial Court, while rejecting the bail application of the petitioner, has vide its order dated 20.08.2021 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.

9. There can be no quarrel with the proposition of law that Section 29 of 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 of the parties 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 that arises for consideration is whether an accused has, in law, any right or opportunity to rebut the aforesaid presumption, particularly when Section 29 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.

10. This Court in the case of Badri Nath v. Union Territory of J&K (Bail 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

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highlight

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circumstances/material or lack of it to show that

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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 annexed to the charge sheet that has

been laid before the Special Court against the petitioner, it is revealed that during the investigation of the case, statement of the victim girl under Section 164 Cr.P.C has been recorded. Statement of the father of the victim girl under Section 164 Cr.P.C has also been recorded. In her statement recorded under Section 164 Cr.P.C, the victim girl has stated that, in March, 2021, she alongwith her sister was residing in Rajbagh with their brother. She further stated that she was in relationship with the accused and while she was dialling the mobile number of accused, her sister noticed this and threatened to disclose it to her brother. She further stated that she got scared and left her home and proceeded to her maternal uncle's house at Tulmul

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where she stayed for three days. The victim girl has further stated that when she went to her maternal uncle's place, her family at her back, lodged FIR. She had clearly stated that she was not kidnapped by any one nor did the petitioner commit any crime against her. The father of the victim girl i.e, the complainant in the FIR has stated that he had lodged the missing report with Police Station Rajbagh after he found his daughter missing from home. He further stated that the girl returned after three days and she told him that she had gone to her maternal uncle's place at Tulmul. He further stated that his daughter narrated to him that the accused did not kidnap her nor did he commit any crime against her.

13.

During the pendency of these bail proceedings the counsel for the

complainant i.e father of the victim girl appeared before the Court and he conveyed his no objection to the grant of bail to the petitioner.

14.

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.

15.

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.

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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 they shall not tamper with prosecution witnesses.

16. Observations made hereinabove shall remain confined to the decision of the instant application only and shall not be construed as an opinion on the merits of the case.

(SANJAY DHAR)

JUDGE

SRINAGAR

20.12.2021

Sarveeda Nissar

Whether the order is speaking: Yes

Whether the order is reportable: Yes

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