HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

Bail App No. 279/2023 Reserved on : 29.01.2024

Pronounced on: 09.02.2024

Shonki Lal, age 48 years, S/o Sh.Appellant(s)/Petitioner(s)

Fangari R/o Village Bharnara, Tehsil Majalta District, Udhampur

Through: Mr. Abhinav Sharma, Sr. Advocate with

Ms. Parkhi, Advocate

VS

1. The Union Territory of Jammu and Kashmir through Station House Officer, Police Station Billawar, Kathua.

2. Suram Chand, S/o Babu Ram, R/o Village Gurah Kalyal Tehsil Ramkot.

Through: Mr. Dewakar Sharma, Dy.AG

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE JUDGMENT

- 1) The petitioner has filed the instant application under Section 439 of the Code of Criminal Procedure seeking bail in a case arising out of FIR No. 100/2023 for offences under Sections 376/511, 354, 354-B, 354-C IPC and Section 8 of POCSO Act registered with Police Station, Billawar, Kathua.
- <u>2)</u> The facts leading to filing of present bail application are that the complainant, who happens to be the father of the victim, lodged a report with the Police Station, Billawar alleging therein that on 09.07.2023, he alongwith his daughter had gone to attend the marriage ceremony in their mohallah. He further alleged that the petitioner, who was working as a driver with Bus No/JK02AX-

5083 had come over there with the Barat. It was further alleged that when the victim went behind the tent for urination, the petitioner who was waiting over there carried the victim to a field alongwith him. It was further alleged in the report that when the complainant could not find her daughter, he went out to search for her and found her in the field without cloths on her body. The victim told the complainant that she had been taken away by the petitioner to the field and thereafter, he had torn apart her apparels and tried to commit rape upon her.

- <u>3)</u> On the basis of the aforesaid report, FIR No. 100/2023 for commission of offences under Sections 376/511, 354, 354-B, 354-C IPC and Section 8 of POCSO Act came to be registered and investigation was set into motion. During investigation of the case, the statement of the victim under Section 164 Cr. P.C. was also recorded.
- In her statement under Section 164 Cr. P.C, the victim stated that in the month of July, 2023 on a Sunday, when she alongwith her parents and siblings, had gone to attend a marriage, upon arrival of the Barat, she went behind the tent to urinate and in the meantime, a person came over there, who caught hold of her arm and gagged her month and thereafter she was taken to a field. She further stated that she was pushed on the ground by the said person and he opened her trouser and unzipped his pant. She went on to state that the said person forced himself upon her and with great difficulty she was able to get herself free from his clutches. She also stated that when the people came over there, the assailant ran away from the spot, leaving his towel behind. The victim also stated that the assailant expressed his desire to marry her.

- <u>5)</u> During investigation of the case, material regarding age of the victim was collected and it was found that the victim was aged 10 years at the relevant time. After investigation of the case, offences under Sections 376/511, 354, 354-B, 354-C IPC and Section 8 of POCSO Act were established against the petitioner and the challan was laid before the Court.
- 6) It appears that the petitioner had approached the learned trial court for grant of bail but his bail application has been dismissed by the learned trial court vide its order dated 20.10.2023.
- The petitioner has sought bail on the grounds that there is ambiguity in the statement of the victim. It has been also contended that the order of rejection of bail application passed by the learned trial court is bereft of any reasons. It has been further contended that offence under Sections 376/511 IPC as also offence under Section 8 of the POCSO Act are not made out against the petitioner. It has also been contended that even if the allegations made in the charge sheet are assumed to be correct, still then the petitioner has not committed any offence, which carries a severe punishment, as such, he deserves to be admitted to bail. Lastly, it has been contended that the charge sheet has already been produced before the trial court and even if the petitioner is admitted to bail, no prejudice is going to be caused to the official respondent, who has already completed the investigation of the case.
- 8) The respondents have resisted the bail application on the ground that the petitioner has committed serious offences and in case concession of bail is extended to him, the same would not be in the interests of the society at large. It

has also been contended that there is likelihood of the petitioner of tampering with the prosecution witnesses.

- <u>9)</u> I have heard learned counsel for the parties and perused the record of the case.
- <u>10)</u> Before coming to the contentions raised by the parties, it would be apt to notice the settled legal position about the matter 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 the 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.
- 11) When it comes to offences punishable under the POCSO Act, certain other considerations are to be kept in mind while deciding the bail application. Section 31 of the POCSO 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, 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 POCSO Act. However, under the provisions of the POCSO Act, there are certain other provisions, which are also required to be kept in mind. These include Sections 29 and 30 of the Act, 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".
- 12) From a perusal of the aforesaid provisions of the POCSO Act, it is clear that Section 29 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 raises a presumption with regard to existence of culpable mental state against an accused, who has been prosecuted under any offence of 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.
- 13) This Court in the case of **Badri Nath vs. Union Territory of J&K**, **2020** (6) **JKJ 255** has held 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, however, 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.

- Coming to the facts of the instant case, the victim in her statement recorded under Section 164 Cr. P.C. has clearly stated that one person, who has been identified as the petitioner herein, has on the fateful day, tried to molest her. She has stated that she was un-dressed by the petitioner by removing her trouser and thereafter the petitioner also unzipped his pant and forced himself upon her. This statement of the victim when read in conjunction with the statements of the witnesses recorded under Section 161 Cr. PC, which include the statements of the parents of the victim *prima facie* go on to suggest that the petitioner has committed an offence defined under Section 7 of the POCSO Act, which is punishable under Section 8 of the POCSO Act.
- 15) Therefore, during investigation of the case, investigating agency has been able to collect the material to support the foundational facts for raising the presumption under Section 29 of the POCSO Act that the petitioner has committed offence defined under Section 7 of the POCSO Act, which is punishable under Section 8 of the said Act. Thus, the contention of the learned Senior Counsel appearing for the petitioner that presumption of innocence is attached to the petitioner because he is yet to be tried and convicted of the offences for which he has been booked, is without any merit. The Supreme Court in the case of **State of Bihar vs. Rajballav (2017) 2 SCC 178** has held

that the presumption of innocence of an accused is not applicable to the cases where there is contrary statutory presumption of his guilt such as when prosecuted under Sections 3,5,7 & 9 of the Act. To hold that presumption of innocence is available even to the petitioner, who has been booked for offences under POCSO Act, would be contrary to the ratio laid down by the Supreme Court in the aforesaid case.

- Learned Senior Counsel appearing for the petitioner has vehemently contended that offence under Section 376/511 IPC is not made out against the petitioner, even if the allegations contained in the charge sheet are assumed to be correct. By placing reliance upon the judgment of this Court in **Fayaz Ahmad Dar vs. Union Territory of J&K, 2021(3) JKJ 400**, the learned Senior Counsel has contended that in similar circumstances, bail was granted to the petitioner in the said case.
- 17) So far as judgment passed by the Co-ordinate Bench of this Court in the case of Fayaz Ahmad Dar (supra) that has been relied upon by the learned Senior Counsel for the petitioner is concerned, the provisions of Section 29 of the POCSO Act, it seems, were not brought to the notice of the Court, as a result of which, the effect of said provisions on the plea of innocence which is generally attached to an accused booked under normal offences, has not been discussed. Apart from this, the facts of the instant case are quite different from the facts of the case that was subject matter of the judgment relied upon by the petitioner. These distinguishing facts are being noted hereinafter.

- An important aspect of the matter pertaining to the instant case, which is required to be taken note of is that the petitioner is aged about 48 years, whereas the victim is aged only 10 years. Thus, it is not an ordinary offence where an accused has tried to molest a major woman or where a teen age boy has, out of passion, tried to establish sexual relations with a teenage girl, but it is a case where the petitioner, who is a middle aged man, has committed sexual assault upon a girl child, who is about 1/5Th of his age. The gap in age of the petitioner and the victim makes his 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 more heinous. Thus, merely because the offence alleged to have been committed by the petitioner is punishable with maximum imprisonment of 5 years/7 years does not make the said offence less heinous.
- dismissed by the learned trial court on 20.10.2023 and less than fifteen days thereafter, the petitioner has approached this Court by way of present application, without there being any change of circumstances. This Court is conscious of the fact that there is no bar to filing of a successive bail application before a superior court, yet this Court cannot lose sight of the fact that after dismissal of the earlier bail application by the learned Sessions Judge, there has been no change of circumstance and in fact, a perusal of the trial court record shows that the charges are yet to be framed and statement of the victim has not been recorded so far. In these circumstances, if the petitioner is admitted to bail at this stage, exertion of pressure upon the victim, who is of a tender age, by the petitioner so as to coerce her not to depose against him before the trial Court

cannot be ruled out. Therefore, granting bail to the petitioner at this stage, at least till the statement of the victim is recorded before the trial Court, would thwart the course of justice.

20) For all the foregoing reasons, I do not find it a fit case where the petitioner can be enlarged on bail at this stage. The application is, therefore, dismissed, leaving it open to the petitioner to file a fresh bail application before the trial court after the statement of the victim is recorded. The respondent-prosecution shall cooperate with the trial court in ensuring the presence of the victim before the said court at the commencement of the trial.

(SANJAY DHAR) JUDGE

Jammu
09. 02.2024
Karam Chand/Secy.

Whether the order is speaking: Whether the order is reportable:

Yes Yes