

# Razak Hussain vs Ut Of J&K Through Sho on 29 September, 2023

HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
ATJAMMU

Case:-B.A. No. 359/2021  
CrLM Nos. 188/2022, 2289/2021 &  
1110/2023  
c/w  
CRM(M) No. 706/2021  
CrLM No. 2062/2021  
CRM(M) No. 564/2022  
CrLM Nos. 1143/2022 & 1489/2022

Reserved on: 25.09.2023

Pronounced on: 29.09.2023

B.A. No. 359/2021,  
CrLM Nos. 188/2022, 2289/2021 &  
1110/2023

1. Razak Hussain, Age 25 years,  
S/O Bilal Hussain.
2. Bilal Hussain, Age 44 years,  
S/O Noor Hussain.
3. Surayya Bibi, Age 41 years,  
W/O Bilal Hussain.
4. Waseem Akram, Age 22 years,  
S/O Bilal Hussain.
5. Sahil Chaudhary, Age 18 years,  
S/O Mohd. Yaqub  
All residents of Meen Sarkar, Kartholi,  
Bari Brahmana, I/Complex, Jammu.

.....Petitioner(s)

Through :- Mr. G.S. Thakur, Advocate &  
Mr. Satyajeet, Advocate.

v/s

1. UT of J&K Through SHO,  
Police Station, Bahu Fort, Jammu.
2. Asifa Bano, Age 23 years,  
D/O Sh. Abdul Hanief,  
W/O Razak Hussain, R/O Village  
Raika, Narwal Bala, Jammu.

.....Respondent(s)

Through :- Mr. Pawan Dev Singh, Dy. AG for R-1.  
Ms. Deepika Pushkar Nath, Advocate &  
Mr. Mohd. Arshad Chowdhary, Adv for  
R-2.

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B.A. No. 359/2023

CRM(M) No. 706/2021

CrIM No. 2062/2021

1. Razak Hussain, Age 25 years, .....Petitioner(s)  
S/O Bilal Hussain.
2. Bilal Hussain, Age 44 years,  
S/O Noor Hussain.
3. Surayya Bibi, Age 41 years,  
W/O Bilal Hussain.
4. Waseem Akram, Age 22 years,  
S/O Bilal Hussain.
5. Sahil Chaudhary, Age 18 years,  
S/O Mohd. Yaqub.

All residents of Meen Sarkar, Kartholi,  
Bari Brahmana, I/Complex, Jammu.

Through:- Mr. G.S. Thakur, Advocate &  
Mr. Satyajeet, Advocate.

1. UT of J&K Through Commissioner Secretary .....Respondent(s)  
Home, Civil Secretariat, Srinagar/Jammu.
2. Senior Superintendent of Police, Jammu.
3. SHO, Police Station, Bahu Fort, Jammu.
4. Asifa Bano, Age, 23 years,  
D/O Sh. Abdul Hanief,  
W/O Razak Hussain, R/O Village  
Raika, Narwal Bala, Jammu.

Through:- Mr. Pawan Dev Singh, Dy. AG for  
R-1 to 3.  
Ms. Deepika Pushkar Nath, Adv.&  
Mr. Mohd. Arshad Chowdhary, Adv.  
for R-4.

CRM(M) No. 564/2021

CrIM Nos. 1143/2022 & 1489/2022

Asifa Bano, Age, 23 years,  
D/O Sh. Abdul Hanief,  
W/O Razak Hussain, R/O Village  
Raika, Narwal Bala, Jammu.

Through:- Ms. Deepika Pushkar Nath, Adv. &  
Mr. Mohd. Arshad Chowdhary, Adv.

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B.A. No. 359/2023

1. UT of J&K Through its Principal Secretary (Home), Civil Secretariat, Jammu/Srinagar. . . . .Respondent (s)
2. Director General of Police, J&K, Police Headquarters, Gulshan Ground, Gandhi Nagar, Jammu.
3. Inspector General of Police, Jammu Zone, Jammu.
4. Senior Superintendent of Police, Jammu.
5. SHO, Police Station, Bahu Fort, Jammu.

Through:- Mr. Pawan Dev Singh, Dy. AG.

CORAM:

HON'BLE MR. JUSTICE M A CHOWDHARY, JUDGE

#### JUDGMENT

1. Petitioners through the medium of this bail application filed under Section 438 of the Code of Criminal Procedure seeks bail in anticipation of their arrest in case FIR No. 351/2021 registered at Police Station, Bahu Fort, Jammu at the instance of the respondent No. 2 (wife of the petitioner No. 1) for commission of offences punishable under Sections 354, 342, 498, 498-A, 504 & 506 IPC, asserting therein that the marriage of petitioner No. 1 was solemnized on 23.10.2020 and after performance of the rituals, the respondent No. 2-wife of the petitioner No. 1 joined his company at her matrimonial house; that the marriage between them was dowryless except some gift items like fridge, A.C, washing machine, furniture and utensils; that the father of the respondent No. 2, who is a superstitious person, forced the petitioners to take her to a tantrik at Sunjwan, Jammu and when she was taken there, she and her sister began to create a drama and the father of his wife abused and insulted the petitioners publically; that in April, 2021, the wife's father told the petitioners to take her to Kishtwar for offering prayers at Dargah, so the petitioners alongwith her nephew and brother went there; that in July, 2021, she again got ill and her father called the petitioner No. 1 and told him to take her again to the same tantrik, to which the petitioner No. 1 refused, however, his father-in-law again began to torture and compel the petitioners to take her to tantrik, after which in order to calm the situation, the petitioner Nos. 1 to 3 took her to a Dargah in Badori, where she offered prayers and she was given holy water to drink by the Molvi; that the wife of the petitioner No. 1 started misbehaving and abusing petitioner Nos. 2 to 4 without any reasonable cause and forced the petitioner No. 1 to permanently get separately from his family members and caused mental cruelty to petitioner No. 1 and his family members. Though petitioner No. 1 tried his tooth and nail to reconcile the situation, yet as his wife was abetted and instigated by her parents, conditions got worsened and the relationship between them got deteriorated.

2. It was alleged that on 08.09.2021, wife of the petitioner No. 1 created a scene while being restrained from clicking photographs at Shrine of Kaller Shariet and without any reasonable cause, did not return to her matrimonial house despite intervention from the members of the community. It was further alleged that the impugned FIR is based on concocted story, which the wife of the petitioner No. 1 has lodged after a lapse of about two months after leaving the house of the

petitioner No. 1; that the petitioners are being unnecessarily harassed due to her ulterior motives; that the allegations leveled in the impugned FIR are completely baseless, false and frivolous besides being with ulterior motives. It was finally prayed that the petitioners be admitted to bail in anticipation of their arrest in the case.

3. This Court vide interim order dated 12.11.2021 admitted the petitioners to interim bail. The complainant was impleaded as respondent No. 2 in the petition in terms of order dated 22.03.2022.

4. The official respondents filed the objections, asserting therein that the petitioners cannot claim bail as a matter of right, because they are involved in heinous offences punishable under Sections 354, 342, 498, 498-A, 504 & 506 IPC registered at Police Station, Bahu Fort, Jammu; that the liberty of the accused is subservient to the interests of public at large and in order to restore the confidence of the public in the justice delivery system, it is imperative that the accused involved in serious crimes should be denied the bail. It has been further pleaded that on a written complaint on 28.10.2021, a case was registered at Police Station, Bahu Fort, Jammu vide FIR No. 351/2021 for commission of offences punishable under Sections 354, 352, 498, 498-A, 504 & 506 IPC, however, during investigation of the case, the statement of the prosecutrix was recorded and offence punishable under Section 376 IPC was added against three accused, namely, Wasim Akram, Sahil Choudhary besides an unknown tantrik and it was prayed that the bail application moved by the petitioners be dismissed.

5. During the pendency of this petition, an application came to be filed on behalf of Officer Incharge, Police Station, Bahu Fort, Jammu, seeking cancellation of bail granted to the accused, asserting therein that the initial FIR was registered for commission of offences punishable under Sections 354, 352, 498, 498-A, 504 & 506 IPC, however, offence under Section 376 IPC was added after the statement of the victim under Section 164-A CrPC was recorded; that the allegations in the case are quite serious in nature and there being involvement of more persons in the crime including tantrik, whose identity is yet to be ascertained and in order to conduct thorough investigation, the custodial interrogation of the accused is necessary and their liberty severely affects the chances of fair investigation to be conducted against them. It was finally prayed that the bail granted to the accused in the aforementioned FIR be cancelled, in the interest of justice.

6. Objections to this application have been filed on behalf of the petitioners, asserting therein that the bail granted to the petitioners cannot be sought to be cancelled on a plea that serious offence punishable under Section 376 IPC has been added, based on the statement of the victim recorded during investigation, as this is an afterthought by the complainant, who in her detailed application moved to the police officer of the rank of, not less than Inspector General of Police, had not made any such accusation of rape, therefore, the interim bail granted in favour of the petitioners be made absolute.

7. Mr. G.S. Thakur, learned counsel for the petitioners has, vehemently, argued that it was simply a matter of marital discord between the petitioner No. 1 and respondent No. 2, who had got married in the year 2020 and that due to this marital discord between them, the respondent No. 2 has not only implicated her husband-petitioner No. 1, but his entire family in a false and frivolous case. He

has further argued that the respondent No. 2/complainant in the application moved to the Inspector General of Police, Jammu had alleged that she has been subjected to cruelty, with no allegation of rape having been committed against her person by any of the accused/petitioners. Therefore, her allegation later, with regard to rape or gang rape in her statement recorded under Section 164 CrPC is an afterthought, just making pressure and project the offence as rape, so that the petitioners are denied grant of bail in anticipation of their arrest. He has also argued that there are different principles governing grant of bail and for cancellation of bail. He has further argued that the Apex Court in case titled, "Dolatram Vs. State of Haryana, reported in 1995 (1) SCC 349" had held that „rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are:

interference of attempt to interfere with the due course of administration of justice or evasion of attempt to evade the due course of justice of abuse of the concession granted to the accused in any manner. He has further argued that the application for grant of bail moved by the petitioners be allowed and the interim order admitting them to interim bail be made absolute in the interest of justice and the application moved for cancellation of bail, be rejected.

8. The case diary has been produced by the Mr. Pawan Dev Singh, learned Dy. AG for perusal. The statement of the victim/prosecutrix is perused for her exact allegations about her sexual abuse, which reveals that the petitioners, namely, Waseem Akram and Sahil Choudhary had raped her on different occasions and the unknown tantrik of Badori, Bari Brahamana had also sexually abused her and videographed this activity.

9. Mr. Pawan Dev Singh, learned Dy. AG appearing for the official respondents argued that the petitioner Nos. 4 & 5, namely, Waseem Akram and Sahil Choudhary, besides an unknown tantrik had been accused of the commission of offence punishable under Section 376-D IPC (gang rape), in view of the statement of the prosecutrix during the investigation. He has also argued that the registration of the case is not the end of a story, as during investigation of the case based on the statement of the victim or the witnesses, the relevant provisions of the offences can be added to ensure the fair investigation. He has further argued that supervening developments/facts with regard to accusation made by the prosecutrix, during investigation against three of the accused including the petitioner Nos. 4 & 5 for grave offence of gang rape have compelled the investigating agency to move an application for cancellation of bail, besides the allegations that the petitioners after obtaining the interim bail have not cooperated with the investigating agency in any manner, so much so that the identity of the tantrik, who had been accused of the sexual offences is yet to be ascertained.

10. Ms. Deepika Pushkar Nath, learned counsel for the respondent No. 2 argued that the assertion of the learned counsel for the petitioners that there was no allegation in the application moved by the respondent No. 2 based on which the impugned FIR was registered, is not correct, as the complainant/respondent No. 2 had made allegations in her detailed complaint that „the

parents-in-law of the complainant are in the habit of visiting Tantriks and Godmen and they tried all in their power to destroy the life of the complainant. In the month of July, August, the accused persons crossed all limits of humanity and morality when they took the complainant to a Tantrik in village Badori. There the complainant was put to not only torture but great humiliation and sexual assault. The Tantrik, on making of the accused, first made the complainant smell some Babhuti and then after the complainant became drowsy, the Tantrik took off her clothes with the help of accused No. 2 and 3 and touched her on all the private parts of her body. Despite being drowsy, the complainant tried to protest and run away from that place, but the accused No. 2 and accused No. 3 caught hold off her while the Tantrik was forcibly applying oil to her private parts and sexually assaulted her. She has also argued that the complainant had clearly stated that she had been tortured and sexually assaulted, therefore, to say that her allegation of rape having been committed by her person was afterthought later during investigation, is not correct. She has further argued that the offence of rape/gang rape should have been invoked by the police at the very outset. She further submits that, even if some fact has not been recorded in the compliant, the offence based on such fact can be added later, in view of the law clearly laid down by the Apex Court in case titled, "Superintendent of Police, CBI & Ors. vs. Tapan Kumar Singh, reported in 2003 (6) SCC 175" that „the First Information Report is not an encyclopedia to disclose all facts and details relating to the offence reported. She has finally prayed that the application moved by the petitioners for grant of bail in anticipation of their arrest be rejected and the application moved by the SHO, Police Station, Bahu Fort, Jammu, be allowed and the interim bail granted in favour of the petitioners be revoked.

11. Heard, perused and considered.

12. Learned counsel for the petitioners has argued that this Court vide order interim dated 14.12.2022 has already considered the aspect of addition of offence punishable under Section 376 IPC against two of the accused, namely, Waseem Akram and Sahil Choudhary and has extended the interim bail granted in favour of all the petitioners with a direction to them to necessarily join the investigation within two days of passing of the order and on failure to do so by the petitioners, the Investigating Officer had been directed to report to the Court, as such, this aspect cannot be reviewed now. Alongside this bail application, the petitioners had already moved a petition under Section 482 CrPC, invoking inherent jurisdiction of this Court to quash the impugned FIR. The respondent No. 2/complainant had also moved a similar petition with a prayer that investigation of the case be monitored or transferred to some other agency for fair investigation.

13. On a keen perusal of the complaint initially lodged by the complainant/prosecutrix, i.e., respondent No. 2, it is evident that she had alleged to have been subjected to sexual assault by a tantrik and in her statement recorded under Section 164 CrPC, she again deposed that she was subjected to sexual abuse by a tantrik and two of the accused, namely, Waseem Akram and Sahil Choudhary.

14. Since it is trite in law that FIR is not an encyclopedia in itself, even if some specific allegations are found missing in the impugned FIR, that does not mean that the offences, as disclosed by the victim in her statement are not required to be invoked or even if invoked, does not carry any value. The Apex Court in Tapan Kumar s case (Supra) held in para-20 as under:-

"20. It is well settled that a First Information Report is not an encyclopedia, which must disclose all facts and details relating to the offence reported. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eye witness so as to be able to disclose in great details all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed. ...."

15. The contention of the learned counsel for the petitioners that the bail once granted cannot be cancelled later, as the principles governing grant of bail and cancellation of bail are different, pales into insignificance, having regard to accusations made by the complainant in her initial complaint with regard to sexual abuse and later reiterated in her statement under Section 164 CrPC during investigation is supervening effect, as emerged on the record of investigation that two of the petitioners, namely, Waseem Akram and Sahil Choudhary alongwith an unknown tantrik had been involved in the commission of gang rape with her. The offence of gang rape is a grave offence, which attracts rigorous imprisonment of not less than twenty (20) years and which may extend to life imprisonment, that too, for whole of the remaining life of the convict. Since it is not a case of bail having been granted, as only an interim bail had been granted in favour of the petitioners, therefore, the principles governing cancellation of bail, as submitted by the learned counsel for the petitioner are not applicable in the case. The interim bail is an interim arrangement till bail application is decided, on its merits.

16. Having regard to the totality of the facts, as projected and after hearing rival submissions, this Court is of the considered opinion that the petitioner Nos. 1 to 3 are entitled to be admitted to bail in anticipation of their arrest, however, the petitioner No. 4, namely, Waseem Akram and petitioner No. 5, namely, Sahil Choudhary, in view of the grave offence of gang rape against them are not entitled to be admitted to bail in anticipation of their arrest.

17. For the foregoing reasons and observations made hereinabove, the plea for grant of bail by petitioner Nos. 4 and 5, namely, Waseem Akram and Sahil Choudhary is rejected and interim bail in their favour is revoked.

18. Bail application alongwith pending application(s) is, thus, disposed of, in the above terms.

Learned counsel for the petitioners submits that in view of the progress of investigation into the case, he has instructions to withdraw this petition. His statement is taken on record.

The writ petition is, accordingly, dismissed as withdrawn alongwith connected applications. However, the petitioners shall be at liberty to move such a petition, in case need arises again.

Interim direction, if any, shall stand vacated.

Learned counsel for the petitioner submits that in view of the progress of investigation into the case, she has instructions to withdraw this petition, in view of apparent fair investigation of the case by the police. Her statement is taken on record.

Writ petition is, accordingly, dismissed as withdrawn alongwith connected applications.

Interim direction, if any, shall stand vacated.

(M A Chowdhary) Judge JAMMU 29.09.2023 Ram Krishan Whether the order is speaking: Yes  
Whether the order is reportable: Yes