

Khadam Hussain vs Union Territory Of J & K & Anr on 1 April, 2022

Sr. No.

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Bail App No. 10/2022
CrIM Nos. 40 & 41/2022

Reserved on: 22.03.2022
Pronounced on: 01.04.2022

Khadam Hussain

.....Petitioner(s)

Through :- Mr. Mehtab Gulzar, Advocate

v/s

Union Territory of J & K & Anr.

.....Respondent(s)

Through :- Mr. Ravinder Gupta, AAG

CORAM: HON'BLE MR. JUSTICE M.A. CHOWDHARY, JUDGE

ORDER

01.04.2022

1. Petitioner through the medium of this bail application under Section 439 of the Code of Criminal Procedure seeks to be admitted to bail in a case arising out of FIR No. 82/2021 registered at Police Station Reasi on 06.12.2021 for the commission of offences punishable under Sections 363, 376, 341, 109 IPC read with sections 4 and 7 of the POCSO Act.

2. Shorn of minute details, prosecution case is that on 27.04.2021 a written complaint was filed by the complainant at Police Station, Reasi mentioning therein that on 26.04.2021 complainant along with her minor daughter visited Bus Stand, Reasi for purchasing some domestic items and when they were shifting the purchased items in the bus, her minor daughter told her that she was going to purchase Ice Cream and as her daughter didn't return, complainant started looking for her but she was nowhere to be found; that one Mohd Riaz S/O Nizam Din R/O Kreni Tehsil & District Reasi who works in their village as laborer in nearby forest often chased her daughter; that complainant

and her husband also warned him to desist from doing so, but on 26.04.2021 the said Mohd Riaz with the help of other two persons namely Nizam Din S/O Din Mohd and Ashaq Ali S/O Sakhi Mohd, both R/O Kreni Tehsil & District Reasi kidnapped her daughter from Bus Stand, Reasi. On the basis of said complaint, the aforesaid FIR was registered at Police Station, Reasi.

3. During investigation, I.O collected the evidences and also got recorded the statement of the prosecutrix/victim U/S 164 Cr.P.C. On the basis of said statement, it was found that accused Mohd Riaz @ Riaz Khan forcibly took her to the spot where other accused Khadam Hussain- petitioner herein was waiting for him on the motorcycle bearing registration No. JK20A-6711, who drove the motorcycle and accused Mohd Riaz was sitting behind the minor victim; prosecutrix/victim also stated that she can identify the accused of the instant case who was involved in her kidnapping along with Mohd Riaz; she further stated that accused Khadam Hussain petitioner herein returned back to Reasi after dropping them at Udhampur and later on 27.04.2021 accused Mohd Riaz committed rape upon her. Both the accused have been arrested.

4. Petitioner moved an application for grant of bail before the Court of learned Principal Sessions Judge, Reasi, the same stands dismissed vide order dated 18.08.2021.

5. Respondents pursuant to notice, filed objections to this petition pleading inter alia that petitioner is involved in the commission of very heinous offences which are against the society at large. It has been further stated that during investigation in the instant case accused Khadam Hussain- petitioner herein was found guilty of committing offences of kidnapping and abetment; that the charge sheet has been filed against accused Khadam Hussain and co-accused Mohd Riaz U/S 363, 376, 341 IPC and 4 POCSO Act. He has further stated that the identity of the accused Khadam Hussain has been established and his involvement in the case is proved beyond reasonable doubt. It was prayed that the plea of bail, be rejected, in the interest of justice.

6. Heard learned counsel for both the sides and perused the case file.

7. Learned counsel for the petitioner vehemently argued that the FIR against the petitioner has been filed on the flimsy grounds and that the petitioner has been falsely implicated by the complainant as the name and role of the petitioner is not mentioned anywhere in the FIR. Later-on the complainant influenced her daughter/prosecutrix to mention the name of petitioner. He has further argued that in the statement of the prosecutrix/ victim recorded under Section 164 Cr.P.C victim has nowhere stated that there was any participation in the alleged commission of offence of rape on the part of the petitioner, as the rape has been allegedly committed by the main accused only. He has further argued that the petitioner has been in custody for the last more than 8 months; that the continued incarceration of the petitioner runs against his right of liberty, as the accused is innocent till the charge is proved against him being the basic cardinal of criminal jurisprudence. He prayed that the application be accepted and the petitioner be admitted to bail. In support of his arguments, learned counsel for the petitioner has relied upon the order dated 03.02.2020 passed by this Court in Bail App No. 17/2020, in case titled "Paltu vs UT of Jammu & Kashmir."

8. Mr. Ravinder Gupra, learned AAG, ex adverso, argued that allegations against petitioner are serious and any concession of bail in favour of the petitioner would not be in the interest of the society at large and in view of bar contained U/S 497-C Cr.P.C the bail cannot be granted. He has further argued that challan has been produced before the Court of learned Principal Sessions Judge, Reasi where the charges have already been framed and two prosecution witnesses have been examined. He has further argued that Section 29 of the POCSO Act states that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections, 3,5,7 and 9 of the Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may, unless the contrary is proved. It is prayed that the bail application be rejected.

9. Hon'ble the Supreme Court in a case titled "Anil Kumar Yadav vs State (NCT) of Delhi" reported as (2018) 12 SCC 129 has spelt out some of the significant considerations which may be placed in the balance in deciding whether to grant bail. Para 17 of the judgment is profitable to be extracted for ready reference:-

"17. While granting bail, the relevant considerations are:-

(i) nature of seriousness of the offence;

(ii) character of the evidence and circumstances which are peculiar to the accused;

(iii) likelihood of the accused fleeing from justice;

(iv) the impact that his release may make on the prosecution witnesses, its impact on the society; and

(v) likelihood of his tampering. No doubt, this list is not exhaustive. There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court."

10. The charge against the petitioner is that he had abetted the main accused in kidnapping of the prosecutrix from Reasi and dropping at Udampur. He is not stated to have participated in any other manner in the alleged rape or sexual assault on the prosecutrix. The prosecutrix had been recovered from the possession of the main accused, who was alleged to have ravished her sexually but there is no accusation against the petitioner herein to have participated in that or having abetted the commission of rape punishable under Indian Penal Code or under the Protection of Children from Sexual Offences Act.

11. The Trial Court vide order dated 11.12.2021 had rejected the bail application moved by the petitioner herein for the reasons that though the prosecutrix in her statement during trial has not attributed the commission of rape to the petitioner but he is stated to have facilitated the commission of rape on her by co-accused Riaz Ahmed, as such, his liability is coextensive with that

of main accused for the commission of offences as indicated in the FIR for which he has also been charged; that concession of bail in favour of the petitioner shall not be taken in good taste by the society and shall shatter the faith that a common man has in the criminal justice system.

12. The petitioner is stated to have been arrested in the month of April 2021, and he has been in custody for the last about one year. The liberty of an individual is the most sacrosanct being his fundamental right, which can be curtailed only through the process of law. Petitioner is alleged to have facilitated in kidnapping of the prosecutrix only, however, there was no role by him to have committed or abetted any other offence against the prosecutrix. A Co-ordinate Bench of this Court in a case titled "Paltu vs UT of J&K", which is relied upon by the learned counsel for the petitioner, had granted bail to the person who was alleged to have conspired in kidnapping of the minor girl. The said person had been granted bail after being in custody for more than 40 days.

13. The contention of learned counsel for the respondents that the bail cannot be granted in view of the provisions of section 497-C of Cr.P.C in a rape case, is mis-placed, as this provision was contained in the local Cr.P.C before the repealing of the same and in case registered under IPC, this provision is not applicable. There is no statutory bar to the grant of bail in this case.

14. Having regard to the individual liberty and the societal concerns, this Court is of the considered opinion that not granting of bail to the petitioner at this stage shall not serve the ends of justice as the prosecutrix and the main witnesses have already been examined during trial. Therefore, there is also no apprehension that the petitioner may tamper with the prosecution evidence in any manner.

15. For the foregoing reasons and the observations made hereinabove, this Court is of the considered opinion that the petitioner is entitled to be enlarged on bail, in view of the peculiar facts and circumstances of the case, with regard to the nature of the accusation against him and his incarceration of about one year

16. The application is, thus, allowed. The petitioner is admitted to bail, subject to following conditions that he shall:

(i) furnish bail and personal bonds to the tune of Rs. 50,000/- to the satisfaction of the Trial Court.

(ii) not leave the territorial jurisdiction of this Court without prior permission of the Trial Court.

(iii) not influence any of the prosecution witnesses to tamper the prosecution evidence.

17. Bail application along-with pending application(s), if any, is disposed of.

(M.A. Chowdhary) Judge JAMMU 01.04.2022 Vijay Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No