

# Arshad Ahmed Age 24 Years S/O Mohd. ... vs Union Territory Of Jammu & Kashmir ... on 27 March, 2023

**Author: Mohan Lal**

**Bench: Mohan Lal**

Sr. No.105

HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT JAMMU

Bail App No. 30/2023  
Reserved on : 15.03.2023  
Pronounced on: 27 .03.2023  
qp

C

Arshad Ahmed age 24 years S/o Mohd. Mansha,  
R/o Villalge Korhgah (Jindra) Udhampur  
(presently lodged in District Jail, Udhampur).  
Through :- Mr. Rajnesh Singh Parihar, Advocate  
V/s  
Union Territory of Jammu & Kashmir through

....Petiti

....Respondent(s)

SHO Police Station, Udhampur Through :- Mr. Sumeet Bhatia, GA.

Coram: HON'BLE MR. JUSTICE MOHAN LAL, JUDGE OR D E R 27.03.2023

1. Petitioner has invoked the jurisdiction of this Court in terms of Section 439 of the Code of Criminal Procedure (hereinafter referred to as the, "Code") for securing bail to him in FIR No. 640/2020 registered with Police Station Udhampur for commission of offences under Sections 366, 109 & 376 RPC. It is averred, that petitioner is a citizen of India and permanent resident of UT of Jammu and Kashmir and is entitled to the enjoyment of all the fundamental rights envisaged under part-III of the Constitution of India as well as the other legal and statutory rights framed there under; that the learned Additional Sessions Judge Udhampur has rejected the bail of the petitioner vide its order dated 04.01.2023; that the petitioner and the complainant/prosecutrix being major were having love affair with each other, which prompted them to marry each other out of their free will and without any force and coercion, the petitioner and the complainant/prosecutrix performed Nikah Nama with each other on 01.12.2020 in accordance with the rights and rituals of Muslim law and both of them declared themselves as legally wedded husband and wife, whereafter they entered into marital relation with each other out of their own free will and consent. It is further averred, that in pursuance to the said marriage, the petitioner and the prosecutrix executed marriage agreement and affidavit dated 02.12.2020 duly attested/registered by the public notary, petitioner and prosecutrix/complainant started living as husband and wife in Village Jindrah Jorgah Tehsil Dansal

District Jammu, but on 04.12.2020 within few days, the father and the relatives of the complainant/prosecutrix took away her forcibly without the consent of the petitioner, whereby, petitioner was constrained to file an application under Section 97 of the Code before the Court for issuance of search warrants for recovery of his wife, who was produced before the Court at Jammu, the father-in-law and other relatives instigated the wife of the petitioner to lodge a false and frivolous FIR as the petitioner had made them party in the said application under Section 97 of the Code before the Court of learned 2nd Additional Munsiff Jammu. It is averred, that after registration of the FIR against the petitioner, which was initially registered under Sections 366 and 109 of the IPC by the complainant/prosecutrix, the petitioner was arrested on 22.12.2020 and was granted bail by the Court on 28.12.2020, whereafter, on 01.01.2021, respondent got the statement of the complainant/prosecutrix recorded under Section 164 of the Code before the Court of learned Additional Special Mobile Magistrate Udhampur, wherein, respondent registered the offence of rape under Section 376 of the IPC against the petitioner, on 05.01.2021 respondent got medical examination of the prosecutrix conducted, however, on 16.04.2021 petitioner was again arrested by the police of police post Roun Udhampur in the aforesaid FIR in view of the subsequent offence added under Section 376 of the IPC against him, on which date petitioner was already on bail. It is moreso averred, that on the re-arrest of petitioner on 16-04-2021 for the last almost 2 years petitioner is languishing in District Jail Udhampur without any fault on his part, prayer has been made for grant of bail.

2. Respondent has opposed the bail on the grounds, that on 18.12.2020 SGCT- Beeru Ram No. 538/U of Police Post Roun Domail Udhampur recorded the statement of the prosecutrix/victim which reveals that on 28.11.2020 at about 2300 hours when prosecutrix went out of her house to attend nature's call she was kidnapped by the petitioner alongwith Haji Iqbal, Talib Hussain and Riaz Ahmed, and on 04.12.2020 she managed to flee from their clutches, but in between the said period the accused persons forcibly got the initials of the prosecutrix on some documents in the Court and told her that she is the wife of the petitioner, accordingly the case under Sections 366, 376 and 109 of the IPC was initially registered. It is contended, that the statement of the prosecutrix was recorded by the Investigating Officer under Section 164 of the Code whereby she narrated that she was subjected to rape by the petitioner, thereby the offence under Section 376 of the IPC was subsequently added, the trial Court has rejected the bail application of the petitioner, the allegations against the petitioner are serious in nature as the offence of rape carries severe punishment, there is every likelihood that the petitioner/accused may influence the prosecution witnesses, prayer has been made for refusal of bail.

3. Learned counsel for the petitioner/accused while supporting the case of petitioner for bail has vehemently canvassed arguments, that the date of occurrence pertains to 28.11.2020 whereas FIR was lodged on 18.12.2020 after unexplained delay of 20 days for commission of offence of kidnapping under Sections 366 & 109 IPC, whereafter the petitioner was arrested on 22.12.2020 and was bailed out on 28.12.2020. It is argued, that the statement of the prosecutrix was recorded u/s 164 Cr.pc by the I/O on 30.12.2020 after delay of more than one month from the date of occurrence and after the delay of 26 days from the date of 04.12.2020 when the prosecutrix got herself free from the clutches of the petitioner/accused, the delay in recording the FIR as well as the statement of the prosecutrix has remained unexplained which is seriously fatal for the prosecution.

It is also argued, that the petitioner was already on bail in the impugned FIR for the allegations of commission of offences u/ss 366/109, IPC by the Court of learned Munsiff Judicial Magistrate (Traffic) Udhampur, and when the offence of rape under Section 376 of the IPC was added on 30.12.2020 on the statement of the prosecutrix, the petitioner was re-arrested on 16.04.2021 when he was already on bail, even the respondent/State did not apply for cancellation of earlier bail and seeking the custody of the petitioner, the petitioner was re-arrested simply without following due procedure of law by the respondent No. 1 when the offence of rape under Section 376 of the IPC was added. It is strenuously argued, that re-arrest of the petitioner/accused is in violation of the provisions of Section 439(2) of the Code, as the State did not apply for cancellation of the earlier bail, and during the said period of the operation of earlier bail, petitioner/accused was re-arrested. To support his arguments, learned counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court rendered in Petition for Special Leave to Appeal (Crl.) No. 10179 of 2017 in C.R.L. WP No. 3582 of 2017 dated 07-05-2018 [Manoj Suresh Jadhav and Ors.--Petitioners Versus The State of Maharashtra-- Respondent].

4. Learned GA, Per-contra, has forcefully opposed the grant of bail to the petitioner by articulating arguments, that the offence u/s 376 IPC added against petitioner subsequently on the statement of the prosecutrix recorded u/s 164 Cr.pc is grave and heinous in nature and carries punishment upto life imprisonment, when the punishment is severe in nature there is every possibility of the accused absconding and fleeing from justice thereby jeopardizing the prosecution case. It is argued, that the offence of rape is against the weaker sex and society at large, therefore, larger public interest demands that bail may be refused to the petitioner.

5. I have heard Ld. Counsel for petitioner/accused and Ld. GA for respondents. I have also gone through the relevant law on the subject matter meticulously.

In "Data Ram Singh vs. State of Uttar Pradesh and ors., [2018 (3) SCC 22], the Hon'ble Supreme Court has encapsulated the concept of bail as under:-

1. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of 23:32:05 IST Reason:

bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

2. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

3. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in *In Re-Inhuman Conditions in 1382 Prisons*.

4. The historical background of the provision for bail has been elaborately and lucidly explained in a recent decision delivered in *Nikesh Tarachand Shah v.*

Union of India<sup>2</sup> going back to the days of the Magna Carta. In that decision, reference was made to *Gurbaksh Singh Sibbia v. State of Punjab* in which it is observed that it was held way back in *Nagendra Nath Chakravarti*, is that bail is not to be withheld as a punishment. Reference was also made to *Emperor v. Hutchinson* wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal interpretation to the provision for bail is almost a century old, going back to colonial days.

In *P. Chidambaram vs. Directorate of Enforcement* [Criminal Appeal No. 1831/2019 (arising out of SLP (Criminal) No. 10496/2019)] Hon'ble Supreme Court has further encapsulated the basic jurisprudence relating to the concept of bail as under:-

21. Thus from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed.

Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provides so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case to case basis on the facts involved therein and securing the presence of the accused to stand trial. Ratios of the judgments (Supra) of "Data Ram Singh" & "P. Chidambaram"

cases lay down an invariable principle of law that the basic jurisprudence relating to bail remains the same, inasmuch as, the "grant of bail is the rule" and "refusal is an exception". It is apt to reiterate here, that the scanned record depicts, that the petitioner/accused alongwith two co-accused namely Riaz Ahmed and Mohd. Mansha has been bailed out in the impugned FIR. The allegations as emerge out from the prosecution story against the petitioner are, that he alongwith the co-accused abducted the prosecutrix/victim on 28.12.2020 at 11.00 pm from their village and took her to Jammu. Initially, FIR was lodged against the petitioner and other co-accused persons for commission of offences u/ss 366/109 of IPC, wherein the petitioner and other two co-accused were granted bail by the Court of learned District Judicial Mobile Magistrate (Traffic) Udhampur on 28.12.2020. On 04.12.2020, when as per the prosecution story, the victim/prosecutrix managed to flee from the clutches of the petitioner/accused, she got her statement recorded under Section 164 Cr.pc before I/O on 30.12.2020 after delay of 26 days and got added the offence of rape u/s 376 of IPC against the petitioner who was re-arrested on 16.04.2021 for addition of offence u/s 376 IPC, and for the last almost 2 years is lying in incarceration in District Jail Udhampur. It is pertinent to mention here, that alongwith the bail application, petitioner has annexed certified copies of the Nikah Nama, marriage agreement and the Affidavits of himself and that of the prosecutrix. It appears that the marriage agreement between the petitioner and prosecutrix has been executed on 02.12.2020 at Jammu and duly attested by the Public Notary and the same bears the signatures and thumb impression of the petitioner and the prosecutrix. The affidavits sworn by the petitioner and the prosecutrix also bear their signatures and thumb impression. Both the documents of marriage agreement and the affidavits demonstrate/hint towards the fact of love affair between the petitioner and the prosecutrix/victim, which love affair severed into wrong side and landed the petitioner/accused in jail.

6. In Petition for Special Leave to Appeal (Crl.) No. 10179 of 2017 in C.R.L. WP No. 3582 of 2017 dated 07-05-2018 [Manoj Suresh Jadhav and Ors.-- Petitioners Versus The State of Maharashtra--Respondent] relied by Ld. Counsel for petitioner, Hon'ble Supreme Court while appreciating the provisions of Section 439(2) of Cr.pc held, that when the accused is already on bail in FIR and subsequently some offence is added, it is not permissible for the respondent/state to

simply re-arrest petitioner/accused by ignoring earlier bail order which was in force at that time, therefore, the State/respondent is at liberty to apply for cancellation of earlier bail and seek the custody of the accused in regard to the offence added. Ratio of the judgment (Supra) squarely applies to the facts of the case in hand. In the case in hand, in FIR No. 640/2020 petitioner/accused was already granted regular bail on 28.12.2020 by the Court of learned District Judicial Mobile Magistrate (Traffic) Udhampur for offences u/ss 366/109 IPC. With the addition of offence u/s 376 IPC against the petitioner/accused on the statement of prosecutrix recorded after a delay of about 26 days, the earlier bail order dated 28.12.2020 was subsisting/continuing/was in force, therefore, it was not permissible for respondent/investigating agency to simply arrest petitioner/accused on 16-04-2021, therefore, in terms of provision of section 439(2) Cr.pc, respondent/UT was at liberty to apply for cancellation of earlier bail dated 28-12-2020 and seek the custody of petitioner/accused with addition of offence of rape u/s 376 IPC against him. Scanned record submitted by the court below does not depict that such a procedure has been strictly complied by the respondent/UT, therefore, re-arrest of the petitioner/accused in the same FIR with addition of offence of rape against him under Section 376 of the IPC is not legally permissible. It is apt to reiterate here, for the last almost 2 years petitioner is languishing in incarceration in District Jail Udhampur. Record further demonstrates that in the FIR recorded at the earlier stage on 18.12.2020 there is no whisper of the commission of offence of rape. On 04.12.2020, when the prosecutrix got herself freed from the custody of the petitioner, she got her statement recorded on 30.12.2020 after the delay of 26 days which has remained unexplained. The marriage agreement and the affidavits sworn by the petitioner and the victim/prosecutrix are evidence of the fact that the love affair existed between them, moreso, the prosecutrix has herself admitted in her affidavit that she is wife of the petitioner. The allegations of rape against the petitioner are to be proved during the trial of the case. However, without commenting upon the merits of the case, the petitioner has carved out a strong case of grant of bail in his favour. Accordingly, the bail application is allowed and petitioner/accused is admitted to bail in the sum of Rs. 50,000/- to the satisfaction of the Registrar Judicial of this Court with a direction to furnish personal bond of like amount before the Superintendent/Incharge District Jail Udhampur where he is presently lodged. However, before parting, the following conditions are imposed upon the petitioner:-

(i) that the petitioner/accused shall appear before the trial court on each and every date of hearing unless exempted by the trial court;

(ii) that the petitioner/accused shall not directly or indirectly make an inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her/them from disclosing such facts to the Court or to any police officer;

7. Dispose of accordingly alongwith connected CMPs. Copy of this order be forthwith provided to the Trial Court/Superintendent District Jail Udhampur for information and compliance.

Jammu :  
27. 03.2023  
Ram Krishan

(Mohan Lal)  
Judge

Whether the order is speaking?

Yes/No

