

# Javaid Ahmad Dar vs State Of J&K; Through Advocate General on 14 December, 2018

**Author: Rashid Ali Dar**

**Bench: Rashid Ali Dar**

HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

B.A. No. 155/2018

Date of Decision: 14.

Javaid Ahmad Dar

Vs.

State of J&K through Advocate General

Coram:

Hon'ble Mr. Justice Rashid Ali Dar, Judge.

Appearing Counsel:

For Petitioner(s): Mr. Salih Pirzada. Advocate.

For Respondent(s): Mr. Saad Ganai, GA.

i) Whether approved for reporting in Law journals etc.: Yes / No

ii) Whether approved for publication in press: Yes / No

1. This is an application filed under Section 498 Cr.PC for grant of bail in favour of the petitioner on the ground that the petitioner has been implicated in a false and concocted FIR for having indulged in an unnatural offence against the female victim under Section 377 RPC.

2. It is set-forth in the petition that the petitioner came to be arrested on 03.09.2018 in a case FIR No. 163/2018 P/S Khansahib, Budgam under Section 377 RPC registered against him. The challan has been presented before the court of learned Judicial Magistrate, Budgam. Thereafter, on 30.10.2018, the learned Judicial Magistrate, Budgam has committed the case to the court of learned Principal Sessions Judge, Budgam and the petitioner was remanded to custody till 15.11.2018. According to the petitioner, the investigation of the case is complete, therefore approaches this Court for grant of bail in his favour.

3. The petitioner has annexed with the petition copies of FIR, site plan, medical examination reports and statement of prosecutrix etc.

4. It is the submission of the learned counsel for the petitioner that the petitioner is not involved in the commission of any offence and the allegation of having used criminal force against the alleged victim is untrue. The medical examination reports, annexed with the file, excludes rectal as well as

vaginal insertion and there is no visual or medical evidence to support the charge under Section 377 RPC, therefore, the allegation of molestation leveled against the petitioner is unfounded. It is further submitted that there is no direct evidence to support the statement of alleged victim recorded under Section 164-A Cr.PC in the court of learned Judicial Magistrate, Budgam on 17.09.2018 in absence of the statement under Section 161 Cr.PC.

5. On the other hand, learned Government Advocate, contended that the petitioner has committed a heinous crime and his release on bail would put several innocent females to the risk of sexual assault and molestation, therefore, concession of bail be not granted to him. Learned GA has also drawn the attention of this Court towards the memo prepared on 03.09.2018 by the Medical Officer, who has examined the victim, wherein it is clearly depicted that there were tears on post anal verge. More-so, the age of the victim, as per the said medical report, is recorded as 12 years approximately, meaning thereby that she is a minor. He has also contended that in the statement recorded under Section 164- A Cr.PC before the Judicial Magistrate, the prosecutrix has deposed that the accused had caught hold of her when she along-with her friend namely Maryam, student of 3rd standard, were on the way to the fields and the accused untied her clothes and threatened her of dire consequences if she discloses the same to anybody and thereafter committed wrong on her. The prosecutrix was taken to the Police Post, Waterhal, by her parents, where she narrated the said incident.

6. Heard and considered the rival contentions of learned counsel for the parties. I have also perused the material available on record.

7. On perusal of the final report prepared by the police, annexed with file, it transpires that during the investigation of the case it was established that the accused had committed the offence under Sections 376, 341 & 506 RPC. The fact remains that the concerned Sessions Court, which is seized of the matter, has not been approached for considering the entitlement of accused (petitioner) to bail. Admittedly the petitioner is in custody who is required to be produced in the court so as to face the trial. He could conveniently on his appearance pray before the said court to consider his entitlement to bail. Nonetheless, the fact that the High Court has concurrent powers with the Sessions court under Section 498 Cr.PC to consider bail application, a person claiming bail should invariably approach the Sessions Court unless otherwise a special case is made out for bypassing the said Forum. Be it so, the argument of learned counsel for the petitioner is that the High Court has concurrent powers along-with the Sessions court and so this Court should examine the entitlement of petitioner to bail. It may also require a mention here that the objections have not been filed till date by the other side and further time is sought for the same. However, emphasis has been laid by learned counsel for the petitioner to consider the case of the petitioner for grant of (interim) bail as reasonable opportunity was afforded to other side for file objections.

8. As noted above, it is forcefully pleaded on behalf of the petitioner that there being no corroboration by the Medical Officer regarding commission of offence, the allegations leveled against the petitioner are to be treated as untrue. However, in her statement before the learned Magistrate, as noted supra, the alleged victim has deposed that 'the accused(petitioner) caught hold of her against her will. He overpowered her laid her on the ground and turned her face towards the sky and sat on her body then removed her trousers. Thereafter, he overturned her and committed

wrong. She cried but the accused(petitioner) threatened her. Then the accused(petitioner) left the scene leaving the victim in pain.'

9. On the examination by the Medical officer on 03.09.2018, it is noted that 'tears have been seen on the post anal verge', however, opinion has been reserved by the Medical Officer (Dr.Snober Malik), who had examined the victim. Then in the medical report prepared on 04.09.2018, it has been noted: - "fissure posteriorly midline". Another report prepared on 06.09.2018, it is noted that 'no evidence of sexual assault vaginal or rectal seen at the time of examination. Slides taken from both vaginal and anus are negative for spermatozoa. Age of the victim has been estimated by radiologist as 12 years.' So, it could be only the Medical officers who can give better explanations about the notes prepared by them at different times of examinations. The notes so prepared on 03.09.2018 and 04.09.2018 prima facie cannot be said to be antithesis of the case as portrayed by alleged victim. Be it so, the definition of rape under Section 375 RPC, as inserted by amendment, does not require the penetration to any extent in vagina, anus or mouth of a woman but include manipulation of any part of the body of a woman so as to cause penetration. For this, at this stage contention raised by learned counsel that as medical evidence does not point out any act of penetration, cannot be concluded to be vouching for frivolity of allegation. It would be proper to quote the definition of rape under Section 375 RPC:

"375. Rape- A man is said to commit rape if he-

- a) Penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or
- b) Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so, with him or any other person; or
- c) Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- d) Applies his mouth to the vagina, anus or urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions;-

First- against her will;

Secondly- without her consent;

Thirdly- with her consent when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt;

Fourthly -with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes to be lawfully married;

Fifthly- with her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that action to which she gives consent;

Sixthly- with or without her consent, when she is under eighteen years of age;

Seventhly- when she is unable to communicate consent."

10. Section 497-C. Cr.PC requires the court to record satisfaction for grant of bail in offence of the nature indicated therein. Quite apposite it would be to reproduce the said Section:-

"497-C. Special provision regarding bail in certain offences against women etc.-

(1) Notwithstanding anything contained in this Code no person accused of an offence punishable under Sections 304-B, 326-A, 370, 376, 376-A, 376-C, 376-D or 376-E of Ranbir Penal Code, shall if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code, is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(2) The restrictions on granting of bail specified in sub-section(1) shall be in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(3) Nothing in Section 497-A of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence specified in sub-

section(1)."

11. On the basis of the material produced by the accused(petitioner) herein, the satisfaction that there are reasonable grounds for believing that the accusation against the accused are prima facie untrue, cannot be made at this stage. The alleged victim is yet to be examined in the trial court and so other witnesses including the Medical Officer. I, as such, am of the opinion that no ground has been made out for the grant of bail in favour of the accused(petitioner). Resultantly, petition merits

dismissal, as such, is dismissed. It is apt to mention here that the accused(petitioner) will not be precluded to approach afresh for considering his entitlement to bail on change of circumstances.

12. Ordered accordingly.

(Rashid Ali Dar) Judge Srinagar 14.12.2018 Muzammil. Q