

(2022) 07 J&K CK 0012
In the Jammu And Kashmir High Court
Case No : Bail Application No. 11 Of 2022

Aqib Ahmad Pinchoo

APPELLANT

Vs

Union Territory Of J&K

RESPONDENT

Date of Decision : 05-07-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 164, 439

Indian Penal Code, 1860 — Section 363, 376

Protection Of Children From Sexual Offences Act, 2012 — Section 3, 4, 5, 7, 9, 29, 30

Citation : (2022) 07 J&K CK 0012

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Faisal Javied, Sajad Ashraf

Final Decision : Disposed Of

Judgement

Sanjay Dhar, J

1) The petitioner has invoked the jurisdiction of this Court under Section 439 of the Cr. P. C seeking bail in a case arising out of FIR No.70/2021 for offences under Sections 363, 376 IPC and 4 POCSO Act registered with Police Station, Soura, Srinagar.

2) As per the prosecution case, on 06.07.2021, father of the prosecutrix lodged a written report with Police Station, Soura, alleging therein that on the said date in the afternoon, his daughter (hereinafter referred to as the prosecutrix) left her house but did not return. It was further submitted that she had been kidnapped by the petitioner herein by enticing her to go with him. The age of the prosecutrix was stated to be 16 years. It was also reported that the prosecutrix had taken with her cash and jewellery. On the basis of this report, the FIR came to be registered and investigation was set into motion.

3) During the course investigation, the prosecutrix was recovered from the custody of the petitioner from a place called Bemina Chowk and the petitioner

was arrested. The prosecutrix was subjected to medical examination and her statement under Section 164 of the Cr. P. C was also recorded. After investigation of the case, offences under Section 363, 376 IPC and Section 4 POCSO Act were found established against the petitioner and the challan was, accordingly, laid before the trial court.

4) It appears that the petitioner had approached the trial court for grant of bail but the same has been rejected by the trial court vide its order dated 30.12.2021. The record of the trial court reveals that the charges against the petitioner stand framed on 12.10.2021 and the statements of as many as three witnesses, out of nine witnesses cited in the challan, have been recorded.

5) It has been contended by the petitioner that he has not committed any offence and that he is languishing in jail for last about one year. It is further contended that the prosecutrix had attained the age of discretion at the time of the alleged occurrence and that even if it is assumed that she had accompanied the petitioner, the same was with her will and volition. It is further contended that the petitioner is a young man who has no criminal antecedents and, as such, he deserves the concession of bail. Lastly, it has been submitted that the petitioner undertakes to abide by all the conditions if this Court grants bail in his favour.

6) The bail application has been resisted by the respondent by filing a reply thereto. In the reply the facts relating to the prosecution case have been reiterated and it has been prayed that the application may be dismissed.

7) I have heard learned counsel for the parties and perused the material on record.

8) Before coming to the merits of the rival submissions made by the parties, it would be apt to notice the principles governing the grant or refusal of bail. The same have been elucidated in a number of judgments rendered by the Supreme Court and this High Court. These principles may be summarized as under:

- (i). The nature and gravity of the accusation and the exact role of the accused;
- (ii). The position and status of the accused vis-à-vis the victim/witnesses;
- (iii). The likelihood of the accused fleeing from justice;
- (iv). The possibility of the accused tampering with the evidence and/or witnesses and obstructing the course of justice;
- (v). The possibility of repetition of the offence;
- (vi) The prima facie satisfaction of the Court in support of the charge including frivolity of the charge;
- (vii) Stage of the investigation;
- (viii) Larger interest of the public or the State;

9) In the instant case the petitioner has also been booked for offence under POCSO Act. Therefore, while considering his bail application, we have to keep in mind the provisions contained in the said Act, particularly those contained in Section 29 and 30 of the said 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 state 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.

Explanation.--In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

10) From a perusal of Section 29, as quoted above, it is clear that where a person is prosecuted for committing or abetting or attempting to commit any offence under certain provisions of the Act, a presumption arises that such person has committed the said offence. Similarly, Section 30 raises a presumption of culpable mental state against an accused who is prosecuted under the said Act, which in other words means that once a person is prosecuted under certain offences of POCSO Act, the normal presumption of innocence attached to an accused does not come into play while considering his bail application but then there is no statutory bar to the grant of bail in a case where the accused is prosecuted for offences under a POCSO Act. Each case has to be decided on its own facts and circumstances by applying the well recognized principles for grant of bail as set out by the judicial precedents from time to time.

11) In the light of the aforesaid legal position, let us now analyze the facts of the instant case. The petitioner is alleged to have kidnapped the prosecutrix and thereafter committed rape upon her. It is also alleged that the prosecution was a minor at the relevant time. As per the birth certificate issued by Srinagar Municipal Corporation, the date of birth of the prosecutrix is 19.03.2004, meaning thereby that at the time of the alleged occurrence, she was above 17 years but below 18 years of age, which means that at the relevant time she was a minor but was about to attain the age of majority.

12) It has been contended by learned counsel for the petitioner that there was a long standing love affair going on between petitioner and the prosecutrix. In this

regard, learned counsel has referred to the statement of the prosecutrix recorded during the trial of the case in which she has admitted that the petitioner had about one year back sent a friend request to her and she had accepted it whereafter they were chatting with each other. Learned counsel has contended that having regard to the fact that both petitioner as well as prosecutrix are young and even though the prosecutrix was a minor, there was a love affair going on between the two. It is urged that while considering the bail plea of the petitioner, this aspect of the matter needs to be considered.

13) It has been further contended by learned counsel for the petitioner that in her statement recorded under Section 164 of Cr. P. C, the prosecutrix has nowhere stated that she was subjected to sexual assault by the petitioner.

14) A perusal of the statement of prosecutrix recorded under Section 164 of the Cr. P. C shows that she has stated that upon being called, she accompanied the petitioner in an auto rickshaw and both of them went to Bemina, Srinagar. She has further stated that on reaching Bemina, Srinagar, they were caught by police and she was brought back whereafter police allowed her to go because of her tender age whereas the petitioner was detained. The prosecutrix in her said statement has nowhere narrated that she was subjected to sexual assault by the petitioner. However, in her statement recorded during the trial of the case, the prosecutrix has stated that she was subjected to sexual assault inside auto rickshaw and that she did not narrate the said fact at the time when she made her statement under Section 164 of the Cr. P. C because of threat perception.

15) It has been contended by learned counsel for the petitioner that the prosecutrix has made improvement in her statement on a significant aspect of the matter which amounts to a contradiction on vital aspect of the case, therefore, her statement that she has been subjected to sexual assault by the petitioner cannot be accepted. The learned counsel has further submitted that the prosecutrix was subjected to medical examination on the very day on which sexual assault is alleged to have taken place upon her but the medical report and the report of the FSL do not suggest that she was subjected to sexual intercourse. On these grounds it has been urged that the offences under Section 4 of POCSO Act and Section 376 IPC are not made out against the petitioner.

16) Without commenting upon the merits of the contentions raised by the learned counsel for the petitioner on the aforesaid aspects of the matter, lest it may prejudice the case of the prosecution, it appears that there is some substance in the arguments advanced by the learned counsel for the petitioner. Thus, prima facie, the petitioner has succeeded in rebutting the presumption of culpability that has triggered against him with the presentation of the challan before the trial court.

17) Apart from the above, perusal of the trial court record reveals that statement of the prosecutrix as well as statements of her parents have already been recorded. It is only the statements of the formal witnesses like Doctor,

Investigating Officer and police officials, which are yet to be recorded. Thus, if the petitioner is enlarged on bail, there is absolutely no chance of the witnesses getting intimidated or there being any apprehension of tampering with the prosecution evidence. The prosecution has not placed on record any material to show that the petitioner is a habitual offender or that in case he is admitted to bail, he is likely to repeat similar offences.

18) For the foregoing reasons, the application is allowed and the petitioner is admitted to bail subject to the following conditions:

I. That he shall furnish personal bond in the amount of Rs.50,000/ with one surety of the like amount to the satisfaction of the learned trial court;

II. That he shall appear before the trial court on each and every date of hearing;

III. That he shall not leave the territorial limits of Union Territory of J&K without prior permission of the learned trial court;

IV. That he shall not tamper with prosecution witnesses.

19) Observations made hereinabove shall remain confined to the decision of the instant application only and shall not be construed as expression of an opinion on the merits of the case.

20) The bail application shall stand disposed of.