

(2019) 02 J&K CK 0020

In the Jammu And Kashmir High Court

Case No : Bail Application (B.A) No. 150 Of 2018

Mohammad Shafi Sheikh

APPELLANT

Vs

State Of Jammu & Kashmir Through SHO PS Budgam

RESPONDENT

Date of Decision : 06-02-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 164, 164A, 173
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 304B, 326A, 354, 363,
370, 375, 376, 376A, 376C, 376D, 376E
Code Of Criminal Procedure, 1898 — Section 497A, 497C, 540, 561A

Citation : (2019) 02 J&K CK 0020

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : R. A. Gadda

Final Decision : Dismissed

Judgement

1. Petitioner is facing trial in the court of Principal Sessions Judge, Budgam on the charges of commission of offence punishable under Section 363, 376 and 354 RPC. It is being stated in the petition that he was apprehended on 13-07-2017 and continues to be under detention

2. The grounds on which the bail is sought are precisely as under:

i) That the FIR has been lodged on the basis of the personal animosity by the complainant against accused.

ii) That all the prosecution witnesses have been examined by the court except investigating officer. The accused if engaged on bail cannot hamper the production of the prosecution witnesses.

iii) That it is evident from the FIR and copy of the challan that the accused has been booked under offences in sections 363, 376 and 354 RPC. At the inception, commission of offence was prima facie shown to have been made under Section 354 RPC, which is bailable and triable by judicial magistrate.

iv) That the statement of the prosecution witness No. 7 (Dr. Ahsan Sheikh) clearly indicated that the hymen of the victim was intact, no spermatozoa were seen and there were no marks of violence on the body of the victim including her private parts. It clearly indicates the accused has not committed any offence.

v) That it is fundamental principal of law that the liberty of an individual cannot be curtailed and an individual cannot be denied bail unless prima faciness of his guilt is proved. The accused is in jail in above FIR since more than 16 months which has affected not only his person but also his whole family.

vi) That it is well established law as propounded by the Hon'ble Supreme Court that court should avoid elaborate documentation of merits and detailed examination of evidence for grant of bail.

3. Respondents have filed the objections wherein it is stated that:

i) That the Police Station Budgam on a written complaint filed by one Habibullah Magloo S/o Ismail Magloo R/o Putlibagh stating therein that one Mohammad Shafi Sheikh gagged the mouth of her daughter Shazia Akhter and forcibly took her to a nearby Brick Kiln L-711 and committed a rape upon her. That the incident was narrated by the victim herself to the complainant on her return to home. Accordingly FIR No. 166/17 was lodged and investigation machinery was swung into motion. That during and in course of investigation, medical examination of the victim was carried out at District Hospital, Budgam and medical opinion was procured. Statements of witnesses were recorded u/s 161 Cr. PC. The Crime scene was examined and scanned and accordingly site plan was drafted. The torn clothes of the victim were also seized. The statement of victim was also recorded under Section 164-Cr. P. C. That accordingly the accused was arrested and also his potency test was carried out which was found to be positive. Later on challan was accordingly presented before the Hon'ble court below and as such the petitioner is facing trial in accordance with due process as established by law.

ii) That before granting of bail the petitioner has to come out of the rigor of Section 497-C Cr. PC. Pertinently, the said section shifts the burden of proof on to the accused, in this case the petitioner. That the petitioner/accused has used his own body as an instrument of abuse/weapon of offence. Therefore, allowing the accused the concession of bail, if at all, would mean letting the same instrument of abuse/weapon of offence out on the streets.

iii) That he petitioner is facing trial in due course of law and his presence is being availed on each and every date of hearing without fail. That the liberty of the petitioner has not been unjustifiably curtailed by his arrest. Hence the bail application merits rejection.

4. Attested copies of the record have been called and perused. It reflects that the petitioner having being found, prima facie guilty for commission of offence punishable under Section 363, 376, 354 RPC on 31-08-2017. He having pleaded

not guilty, prosecution had been directed to lead evidence. The prosecution had cited eight witnesses in support of its case and one of the prosecution witness who has not been examined so far has been directed to be summoned by the issuance of warrant. Perusal of the file further reveals that an application had been moved by the petitioner for grant of bail before the trial court who vide its order dated 31-07-2018 has rejected the same. The plea raised before the learned Principal Sessions Judge, Budgam had been that there had insufficient evidence in support of the charge and so the petitioner/accused could not be enlarged on bail. Notice of the fact had also been taken that the application was a successive one and it required change of circumstances. Arguments had been put forth on behalf of the petitioner that since Investigating Officer had been examined after rejection of earlier application and there was change in the circumstances. Learned Principal Sessions Judge also considered the other developments indicating the genesis of the prosecution case. The petition under Section 561-A Cr. PC had also been moved which had been rejected by this court. The application had been presented under Section 540 Cr. PC by the accused for examination of the witnesses, but the said application had been rejected. Against which revision was filed before the court and nothing fruitful had come out on filing of the same. Learned trial judge had also inferred from the conduct of the parties that there have been an attempt to bury the differences but the same was required to be taken note of at the time of conclusion of the trial. Wrapping up the order dated 31-07-2018, learned Principal Sessions Judge had opined that from the statement of prosecutrix, a probability of accused to have committed the offence with which he has been charged, is supported. The accused has not been able to overcome the bar created under Section 497-C Cr. PC for his enlargement on bail. Accused has not been able to establish that charges against him are prima facie not true, therefore the bail was not granted and the application was rejected by learned trial judge.

5. Learned counsel, for the petitioner while being heard contended that the accused is entitled to concession of bail as whatever evidence the prosecution has laid during the trial does not support the case as put forth by it. Innocence of the petitioner is being reiterated and it is contended that the complainant had also later on realized that petitioner was falsely implicated so had brought the said fact to the notice of the court. In this regard, affidavit of Habibullah Mugloo, Copy of the compromise and application of said Habibullah Mughloo for recording his statement afresh before the trial court are being relied on. Even the summary view of the FIR is indicative of the fact that the narration of the incident does not lead to believe according to him that any offence of rape has been committed. The opinion of the Medical Officer sounds the innocence of the accused as neither any sign of assault had been found nor there had been mark of aggression on any part of the body. Learned counsel for the petitioner has relied on below mentioned judgments and has reiterated that the petitioner be granted concession of bail:

i) Subli Hajam Vs. State 2003 CrLJ 281.

ii) Dilip and another Vs. State of MP 2001 Legal Eagle (Sc) 1294.

iii) Prem Singh Vs. State of J&K and anr. 2015 Legal Eagle (J&K) 225.

iv) Nira Radia Vs. Dheeraj Singh and anr. 2006 Legal Eagle (SC) 415

6. The stand taken by the learned counsel for the respondents in the objection is the seriousness of the offence, the victim being of nine years of age and the accused having used his whole body as weapon of violence to satisfy his evil intention and cannot be given concession of bail at all.

7. Considered the rival arguments and material placed on record.

8. It has been noticed hereinabove that that statements of all the prosecution witnesses had been recorded except SHO Budgam who had been summoned to appear in the court. The bail application presented before the learned Sessions Judge, had been considered and rejected as referred above. The application had been decided in light of the material as was available before the said court on the said date including the statement of the alleged victim who had been examined in the court and also produced before the Magistrate and her statement under Section 164 A Cr. PC recorded. The Investigating officer too had examined on the said date. Learned trial court had considered all the relevant aspects including about the conduct of the complainant party as is referred in the bail petition that he had been desirous to settle the matter. It has opined as said above that probability of accused to have committed the offence with which he has been charged, being supported, the accused has not been able to overcome the bar created under Section 497-C Cr. PC. It is also noted that the circumstances as are now referred on behalf of the accused may have some bearing on the outcome of the trial but at the stage of considering the bail application, these factors are hardly be of any consequences. It is underlined therein that the statement of the star witness i.e. of the alleged victim is of utmost significance.

9. For considering the merits of argument as is raised on behalf of the petitioner the implication of amendment carried out in the Criminal Procedure Code has to be noted, in terms of which Section 497-C has been incorporated as a special provision for bail in case of the offence of the rape. The definition of rape as is found under Section 375 RPC also stands changed. It would be proper herein to have a glance of both these sections as:

"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 section 304-B, 326A, 370, 376, 376A, 376C, 376D or 376E 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 497A 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)." 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 description:-

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.

Explanation 1:- For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2:- Consent means an unequivocal voluntary agreement when the

woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provide that, a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1:- A medical procedure or intervention shall not constitute rape.

Exception 2:- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

10. It is an admitted feature of the prosecution case that the victim allegedly subjected to sexual aggression is a minor of 9 years of age. The version is tendered by her immediately after the alleged occurrence. It has been recorded by the investigating agency through the first informant. The outline of allegation has been reiterated before the Magistrate in the statement under Section 164 A Cr.PC. Said version is reiterated before the court when her statement has been recorded as a prosecution witness. It is in this version that accused had gagged her mouth, torn her frock and trouser and had also undressed himself and then committed "Naijaiz".

11. The court is required in terms of Section 497-C Cr. PC, while considering the plea of bail, the reasonable grounds for believing the accusation against such person are not true. Having regard to the definition as has been inserted by way of amendment to Section 375 RPC, the argument that there have not been penetration as is evidenced by the Medical Officer would not be sufficient to opine that the case has been carved out for grant or bail. The said plea thus raised on behalf of the petitioner melts into insignificance.

12. For this, I am of the opinion that the learned trial court has properly dealt with the matter. It would be improper to dislodge the said view. As rightly stated by the learned trial court other developments in the matter may have relevance for its appreciation at the time when the matter is finally disposed of but this would not be a proper stage to have an in-depth scan of the evidence for disposing of the bail application as the rigor of Section 497- C Cr.PC has not been qualified. I as such do not find any ground for admission of the accused on bail,

13. Hence the instant application lacks merit and is accordingly dismissed.