

(2022) 08 J&K CK 0060
In the Jammu And Kashmir High Court
Case No : Bail Application No. 84 Of 2022

Ryeaz Ahmad Ganie

APPELLANT

Vs

Union Territory Of J&K

RESPONDENT

Date of Decision : 29-08-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 164, 439

Indian Penal Code, 1860 — Section 109, 363, 376

Protection Of Children From Sexual Offences Act, 2012 — Section 3, 4, 5, 7, 9, 17, 29, 30

Citation : (2022) 08 J&K CK 0060

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : M. I. Dar, Raees Ud Din Ganai

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.60/2020 for offences under Section 363, 376, 109 of IPC and Section 4/17 POCSO Act registered with Police Station, Kangan.

2) As per the prosecution story, on 12.08.2020, father of the prosecutrix lodged a written report with the Police, alleging therein that on the said date at about 8.30 PM, co-accused Ghulam Hussain Naikoo, who was travelling on a motorcycle, called his daughter and thereafter forcibly made her to board his motorcycle whereafter she was kidnapped by the aforementioned accused. In the report it was submitted that the age of the prosecutrix is 13 years and that she has been taken away by the aforementioned accused to some undisclosed location.

3) On the basis of aforesaid report, the FIR came to be registered and investigation of the case was set into motion. During the investigation of the

case, the prosecutrix was recovered from the custody of accused Ghulam Hussain Naikoo from a vacant house located at Village Hanjiwera. The aforementioned accused was arrested and the statement of the prosecutrix under Section 164 of the Cr. P. C was recorded. She was also subjected to medical examination.

4) In her statement recorded under Section 164 of the Cr. P. C, the prosecutrix deposed that on 12.08.2020 at about 8.30 PM, two persons, who were travelling on a motorcycle, came to her village and one of them, accused Ghulam Hussain Naikoo called her. She has further stated that accused Ghulam Hussain Naikoo was known to her as he had visited her house on one or two occasions. The two persons, namely, Ghulam Hussain Naikoo and Reyaz Ahmad Ganie, the petitioner herein, forcibly made her to board the motorcycle and she was taken to Budgam in the darkness of the night. She was made to stay in the house belonging to the sister of petitioner. During the night, she was kept in a separate room by accused Ghulam Hussain Naikoo who committed rape upon her. In the morning, accused Ghulam Hussain Naikoo and petitioner Reyaz Ahmad took her to Hanjiwera whereafter she was kept in a vacant house by accused Ghulam Hussain Naikoo. She has further stated that at about 11.00 AM, police raided that house and she was recovered whereas accused Ghulam Hussain was taken into custody by the police.

5) After investigation of the case, offences under Section 363, 376 of IPC and Section 4 of POCSO Act were found established against accused Ghulam Hussain Naikoo whereas offences under Section 366, 109 IPC and Section 4/17 of POCSO Act were found established against petitioner Reyaz Ahmad Ganie. Initially, the petitioner herein could not be arrested as he had absconded and the challan was presented before the trial court in his absence. During the trial of the case, the petitioner herein was arrested and brought before the trial court on 05.10.2021, whereafter charges for offences under Section 363 read with Section 109 of IPC and Section 17 of POCSO Act were framed against him on 06.11.2021. By that time, a number of prosecution witnesses including the prosecutrix had been examined by the prosecution. The petitioner through his counsel made a statement before the trial court on 06.11.2021 that he would not be cross-examining those prosecution witnesses who already been examined in the case and that he would cross-examine only those witnesses who are yet to be examined in the case.

6) It appears that the petitioner had approached the trial court for grant of bail but his application was dismissed by the trial court in terms of order dated 28.12.2021.

7) It has been contended by the petitioner that he is not involved in the alleged crime and that he has been falsely implicated in the case. It has been further contended that trial in the case is almost complete and that the petitioner cannot be denied the concession of bail as a measure of punishment. Lastly, the petitioner has submitted that in case he is enlarged on bail, he would comply

with all the conditions that may be imposed by this Court.

8) The respondents have contested the bail application on the ground that the petitioner is involved in a heinous offence and if he is enlarged on bail, he will tamper with prosecution witnesses. It has been further contended that interests of the society demand that the petitioner should not be enlarged on bail.

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

10) 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;

11) 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.

12) 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.

13) Coming to the facts of the instant case, the petitioner is alleged to have aided the main accused in kidnapping of the victim. It is not the case of the prosecution that the petitioner has committed sexual assault upon the victim. His role is confined to the assistance which he is alleged to have rendered to the main accused in kidnapping of the prosecutrix. That is why the petitioner has been charged only for offences under Section 363/109 of IPC and Section 17 of POCSO Act.

14) It has been contended by learned counsel for the petitioner that as per opinion of the doctor, who examined the prosecutrix on the very same day on which she is alleged to have been subjected to sexual assault by co-accused, there was no evidence of recent sexual intercourse with the prosecutrix and no spermatozoa were found in her vaginal swabs. On this ground, it has been contended that the story of sexual assault projected by the prosecution stands contradicted by the medical opinion. According to the learned counsel, there are several other contradictions in the statements of prosecution witnesses relating to essential aspects of the case.

15) 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 does appear that there is some substance in the arguments advanced by the learned counsel for the petitioner.

16) Apart from the above, a perusal of the trial court record reveals that most of the prosecution witnesses have been examined and only statements of four witnesses, out of 14 listed prosecution witnesses are to be recorded. These four witnesses are the witnesses to the seizure of motorcycle and the Investigating Officer. Thus, all the material witnesses stand examined by the prosecution and

only the formal witnesses are to be examined in the case. The petitioner has been in custody for the last more than ten months and he is not the main accused. Having regard to the stage of the trial, there is absolutely no chance of the witnesses getting intimidated or there being any apprehension of tampering with the prosecution evidence. In fact, 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 the similar offences.

17) 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.

18) 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.

19) The bail application shall stand disposed of.