

**IN THE HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

Reserved on:07.07.2021
Pronounced on:12.07.2021

Bail App No.36/2021

Fayaz Ahmad Dar ...PETITIONER(S)

Through: Mr. N.H.Kuchai, Advocate.

Vs.

UT of J&KRESPONDENT(S)

Through: Mr.Asif Maqbool, Dy. AG vice
Mr. Mir Suhail, AAG

CORAM:HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1) The petitioner, who is arrested in FIR No.457/2020 under Sections 376, 354, 511 IPC and Section 8 of Protection of Children from Sexual Offences Act, 2012 (“POCSO Act”), seeks his enlargement on bail on the ground that he is a law abiding citizen of India and has been falsely implicated in the crime, which he ever committed.

2) It is claimed that a neighbours of the petitioner, namely, Rafiq Ahmed Sheikh and his family, who belong to a different sect of Islam, harbour ill will against the petitioner and have, with a view to settle scores, lodged a false and frivolous FIR in Police Station, Budgam. The petitioner was arrested by the police of Police Station, Budgam on 16.12.2020 and ever since he is in judicial custody and has been

languishing in central jail, Srinagar. It is submitted that the police has completed the investigation in the case and has presented the Final Report (challan) before the Court of Learned Sessions Judge, Budgam (“the trial Court”). The petitioner also seeks his release from custody on the ground that going by and accepting the contents of the FIR, lodged against him, as gospel truth, no offence under Section 376/511 IPC or under Section 8 of POCSO Act is made out. The petitioner, therefore, urges this Court to enlarge him on bail subject to such terms and conditions as this Court may deem fit and that he undertakes to abide by the same in letter and spirit.

3) It is contended that the petitioner had, in the first instance, approached the trial Court, but his bail plea was rejected by the trial Court vide its order dated 16.03.2021. The order of rejection passed by the trial Court is cryptic and does not dwell upon the well-established parameters to be taken into consideration while considering bail plea in non-bailable offences.

4) Heard learned counsel for the parties and perused the record.

5) It may be pertinent to note that this Court vide its order dated 02.04.2021 passed in this application had desired the learned counsel for the petitioner to argue on the maintainability of the instant successive bail application after dismissal of his bail application by the trial Court. Learned counsel for the petitioner argues that this question need not detain this Court, for, the issue raised by this Court is now well settled. Successive bail application after the dismissal of

bail application by the lower Court is maintainable before the High Court. There is no denying the fact that under Section 439 of the Code of Criminal Procedure, the High Court and the Court of Sessions have concurrent jurisdiction to grant bail and in case a person in custody in connection with the commission of offence of the nature specified in Sub Section 3 of Section 437 of Cr.P.C. moves the Court of Sessions for grant of bail and his bail plea is rejected, he shall be entitled to file a fresh bail application before the High Court on the same grounds. While doing so, he may also point out the illegality or infirmity in the order of learned Sessions Judge rejecting his bail plea. The Court hearing the successive bail application is obliged to consider the findings of the Court given while rejecting earlier bail application. However, if successive bail application is moved before the same Court, then it is incumbent upon the applicant to plead and demonstrate change of circumstances.

6 Adverting to the merits of the bail plea of the petitioner, it is seen that on the basis of a written complaint made by the complainant Rafiq Ahmad Dar in the Police Station, Budgam to the effect that his niece, a student, had gone to the house of the petitioner for buying mobile charger and that the petitioner took his niece to the attic of the house, took of her clothes and made an attempt to rape her, a case FIR No.457/2020 for offences under Sections 376, 354, 511 IPC and Section 8 of POCSO Act was registered in the Police Station concerned. Investigation was set in motion.

7) During the course of investigation site plan was prepared, statements of the witnesses were recorded and the victim was subjected to medical checkup. As per the medical opinion, no intercourse had taken place nor was there any mark of violence on the body or any private part. The statement of the victim girl was also recorded in terms of Section 164-A Cr.P.C before the Court of Judicial Magistrate 1st Class, Budgam. The police also obtained birth certificate of the victim girl and found that she was 10 years and nine months old. On the basis of the investigation conducted and the statement of the victim recorded, the petitioner was arrested and challan was presented before the Court of Sessions Judge, Budgam on 31.12.2020. The police also claims that the complainant has also produced a CD and a mobile phone before the Investigating Officer and claims that it is an essential piece of evidence. Accordingly, the trial Court has been approached for permission to investigate the matter further and file supplementary challan.

8) As per the statement of the victim recorded under Section 164 Cr.P.C, the victim, as is claimed by her, went to the house of the petitioner, who happens to be her neighbour, to get mobile lead as the petitioner deals with mobile accessories. The petitioner met her in the courtyard of the house and took her to the attic of the house. He gave her mobile lead and thereafter gagged her mouth with a tape, took off her trousers and also removed his own trousers. However, in the meanwhile, younger brother of the petitioner reached on spot. The

petitioner removed the tape from the mouth of the victim and went to other side. It is, however, stated by the victim that she covered her legs with her shirt and the brother of the petitioner could not see her. She further stated that the petitioner threatened her not to tell about this incident to anyone. She, accordingly, did not narrate the story to anyone for two days. It was only when a similar incident took place in the locality, she also narrated her story to her family members. The petitioner, when confronted, apologized for his act before the maternal aunt of the victim. This is the long and short of the statement of the victim recorded under Section 164 Cr.P.C. and the basis of challan presented by the police before the trial Court for commission of offence punishable under Section 376/511, 354, 506 IPC and Section 8 of POCSO Act.

9) Analyzing the statement of the victim in light of the definition of rape given in Section 375 IPC, indisputably, the act of petitioner does not, by any stretch of reasoning, amount to rape. However, the question that begs an answer in this case is, “whether the act of the petitioner taking off the trousers of the victim as also is own trousers would amount to an attempt to rape punishable under Section 511 of the IPC”.

10) Hon’ble the Supreme Court in the case of **Tarkeshwar Sahu v. State of Bihar, (2006) 8 SCC 560**, in paragraph No.17 of the judgment, held thus:-

17. A similar case was decided by Mirza and Broomfield JJ. of the Bombay High Court in **Ahmed AsaltMirkhan, Cri A No.161 of 1930, decided on 12.08.1930 in Law of Crimes by RatanlalDhirajlal, p.922**. In that case the complainant, a milkmaid, aged 12 or 13 years, who was hawking milk, entered the accused house to deliver milk. The accused got up from the bed on which he was lying and chained the door from inside. He then removed his clothes and the girl's petticoat, picked her up, laid her on the bed, and sat on her chest. He put his hand over her mouth to prevent her crying and placed his private part against hers. There was no penetration. The girl struggled and cried and so the accused desisted and she got up, unchained the door and went out. It was held that the accused was not guilty of attempt to commit rape but of indecent assault. The point of distinction between an offence to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he is just going to have sexual connection with her.

11) There is, thus, fine distinction between preparation and attempt to commit offence and the different between the two lies primary in the greater degree of determination and it is, therefore, necessary to be proved in an offence of attempt to commit rape that the accused has gone beyond the stage of preparation. In the instant case, the petitioner had allegedly stripped the victim naked and had also taken off his trousers. This was, thus, an effort of making preparation for

committing an attempt. Without there being any further act committed by the petitioner, it is difficult to arrive at a conclusion that the petitioner intended to commit rape or that the act attributed to the petitioner amounts to an attempt to commit rape.

12) Believing the statement of the victim, as it is, *prima facie* the act of the petitioner may amount to making preparation for committing rape but cannot be said to be an attempt to commit rape. Therefore, *prima facie*, Section 511 IPC may not be attracted. It could, at best, be a case of indecent assault punishable under Section 354 IPC. This brings me to another question; “whether the offence under Section 8 of POCSO Act is *prima facie* made out against the petitioner?”

13) Section 7 of the POCSO Act defines sexual assault whereas Section 8 prescribes punishment for such sexual assault. For facility of reference Sections 7 and 8 of POCSO Act are reproduced hereunder:-

“7. Sexual assault.”---Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

“8. Punishment for sexual assault.”--- Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which

may extend to five years, and shall also be liable to fine.”

14) Going by the statement of the victim, which is the only primarily evidence in the case, it is abundantly clear that the act of the petitioner taking off the trousers of the girl and also taking off his own trousers was an act with sexual intent, which involved physical contact without penetration and, therefore, would amount to committing sexual assault punishable under Section 8 with a term, which shall not be less than three years but which may extend to five years and also be liable to fine. Therefore, I am of the *prima facie* view that not only the petitioner is accused of committing indecent assault but also seems to have committed sexual assault defines under Section 7 of the POCSO Act.

15) Keeping in view the totality of circumstances and the discussion made herein above, the petitioner, who is in custody since 16.12.2020 and that the investigation in the matter has since been completed and the challan presented in the Court of law, I am of the view that indulgence of this Court is called for. After all an accused is presumed to be innocent until proven guilty. We also cannot forget that bail is a rule and its denial an exception. The purpose of arrest has been well served. The petitioner is, thus, held entitled to grant of bail subject to the petitioner's furnishing personal bond in the amount of Rs.50,000/- and two sureties of the like amount to the satisfaction of the trial Court. The grant of bail shall be further subject to following conditions: -

- i) That the petitioner shall not directly or indirectly influence or pressurize the prosecution witnesses.
- ii) That the petitioner shall not come in contact with the victim, her family or other relatives with a view to influence the trial.
- iii) The petitioner shall not leave the jurisdiction of the trial Court without prior permission.
- iv) The petitioner shall regularly appear before the trial Court on each and every date of hearing.

16) Before parting, it may be clarified that the discussion made above and the prima facie findings returned herein above, were only for the purposes of disposal of this bail application and nothing said herein above shall prejudice the trial in any manner and the trial shall be conducted by the trial Court uninfluenced by any of the observations made in this order.

The bail application stands disposed of in the above terms.

(Sanjeev Kumar)
Judge

Srinagar
12.07.2021
“Vinod, PS”

Whether the order is speaking: **Yes**
Whether the order is reportable: **Yes**