

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Bail App No. 367/2022

Reserved on :24.04.2023

Pronounced on: 29.05.2023

Rahul Kumar aged 21 years s/o Madan Lal,
R/O Simbal Morh, Tehsil Miran Sahib District
Jammu (presently lodged in District Jail
Ambphalla Jammu).

.... Petitioner(s)

Through :- Sh. Sunil Sethi, Sr. Advocate with
Sh. Ankesh Chandel, Advocate.

V/s

1. Union Territory of Jammu & Kashmir
through SHO Police Station Miran Sahib
Jammu;
2. Superintendent District Jail Ambphalla
Jammu;
3. Kawalpreet Singh S/O Jaswbir Singh R/O
Simbal Morh Tehsil Miran Sahib Jammu
[impleaded as respondent No.3 in terms of
order of this court dated 09-12-2022 passed
in CrL(M) 2024/2022].

...Respondent(s)

Through :- Sh. Pawan Dev Singh, Dy. AG for R-1&2,
Sh. Anil Gupta, Advocate for R-3.

Coram: HON'BLE MR. JUSTICE MOHAN LAL, JUDGE

O R D E R

29. 05. 2023

1. Petitioner has sought regular bail in terms of Section 439 of Code of Criminal Procedure (hereinafter referred as the 'Code') in case FIR No. 25/2022 dated 30-03-2022 registered with police station Miran Sahib Jammu for commission of offences punishable u/ss 377/506 IPC r/w Sections 4/5(m) of POCSO Act on the grounds, that petitioner is citizen of India and permanent resident of UT of Jammu & Kashmir, therefore, entitled to the protection of his fundamental rights guaranteed under the Constitution of India including right to freedom and liberty. It is averred, that petitioner is a young boy of 21 years of age, belongs to respectable family and after passing 12th standard in the year 2020 was about to join college for pursuing higher studies, but has been involved in false and frivolous FIR which later on culminated into production of challan which is pending trial in the court of Special Judge POCSO Cases Jammu and petitioner from the date of his arrest on 30-03-2022 is languishing in District Jail Ambphalla Jammu despite the fact that he has not committed any offence. It is moreso averred, that the trial court while rejecting his bail application vide order dated 12-10-2022 has not considered

crucial aspect of the matter that except allegations there is no documentary proof or otherwise which even remotely suggest the involvement of petitioner in the commission of offences attributed to him as the trial court has not even considered the medical report forming part of the charge sheet which clearly negates the stand of victim that unnatural offence has been committed against him. It is averred, that the Ld. Trial Court has not even taken into consideration the law laid down by Hon'ble Supreme Court in cases viz; State of Rajasthan vs. Balchand [(1977) 4 SCC 308] & Sanjay Chandra Vs. CBI [2012 (1) SCC 94] which lay down that the basic rule perhaps tersely is that "bail is rule" and "jail is an exception"; moreso, petitioner shall not jump over the bail and undertakes to abide by all such terms and conditions as are found just and proper while admitting him to bail.

2. Respondents by filing objections/status report have opposed the bail on the grounds, that petitioner cannot claim bail as a matter of right as he is involved in cognizable and heinous unnatural offence u/s 377/506 IPC r/w offences under Sections 4/5(m) POCSO Act and there is every likelihood of his fleeing from the course of justice. It is contended, that release of accused on bail would have adverse effect on the fair trial of the case as the liberty of the petitioner is subservient to the interest of public at large.
3. Ld. Counsel for petitioner while reiterating the grounds urged in the memo of bail application, has sought the enlargement of petitioner on bail by canvassing arguments, that the FIR in question is motivated, petitioner has been involved in false and frivolous FIR, for the last more than 1 year petitioner is languishing in District Jail Ambphalla Jammu, bail is rule and refusal is an exception, personal liberty is of paramount importance and petitioner is presumed to be innocent till guilt is proved against him. It is argued, that keeping of accused in incarceration for an indefinite period would amount to infliction of pre-trial punishment which is against basic principle of criminal jurisprudence, petitioner has deep roots in the society and does not possess the golden wings to flee from justice, moreso, the medical report negates the involvement of petitioner for commission of unnatural offence attributed to him. To support his arguments, Ld. Counsel has relied upon the judgments reported in, (i) **(1977) 4 SCC 308** [State of Rajasthan vs. Balchand, (ii) **2012 (1) SCC 94** [Sanjay Chandra Vs. CBI] & (iii) **2006 Legal Eagle (SC) 120** [Yerumalla Latchaiah Versus State of Andhra Pradesh].

4. Ld. GA, per-contra, while opposing the bail has vehemently articulated arguments, that the victim of crime is a child of 11 years of age and at the relevant time of occurrence on 30-03-2022 had gone to the house of accused for getting milk, but the accused committed unnatural offence with the said child/victim, therefore, petitioner/accused indicted for commission of offences u/s 377 IPC r/w Sections 3/4/5 (m) of POCSO Act. It is argued, that the gravity and seriousness of offence is of such a nature that the petitioner on conviction shall be punished for imprisonment for not less than 20 years but which may extend for imprisonment for life, there is every likelihood that if petitioner is released on bail he may abscond and prejudice the case of prosecution, moreso, the statement of victim of the crime is yet to be recorded before the trial court, even the medical evidence cannot be appreciated as the doctor who conducted the medical of the victim is yet to be examined and at this stage it cannot be comprehended/concluded that there is no case against the accused. Prayer has been made for rejection of bail.
5. Heard Ld. Counsel for petitioner/accused, & Ld. GA and counsel for victim/private respondent No.3. I have pursued the contents of bail application, objections/status report filed by official respondents, bestowed my thoughtful consideration to material aspects involved in the case and have also gone through the relevant law on the subject matter meticulously.
6. Before deciding the case in hand, I would like to enumerate the factors which should be taken in consideration while granting or refusing bail in a non-bailable case. Hon'ble Supreme Court of India in a case law titled State of U.P vs Amarmani Tripathy, reported in 2005 (8) SCC 21, vide paragraph-18 has culled out certain factors to be taken in consideration while deciding bail application in non-bailable offences as under:-
- "It is well settled that the matters to be considered in an application for the bail are:-
- (i) whether there is any prima-facie or reasonable ground to believe that the accused has committed the offence;
 - (ii) nature and gravity of charge;
 - (iii) severity of the punishment in the event of conviction;
 - (iv) danger of the accused absconding or fleeing if released on bail;
 - (v) character, behavior, means, position and standing of the accused;
 - (vi) likelihood of the offence being repeated;
 - (vii) reasonable apprehension of the witnesses being tampered with; and
 - (viii) danger, of-course the justice being thwarted by grant of bail.
- Indeed, these guidelines are not exhaustive, nonetheless, these have to be considered while passing an order in a bail application in a non-bailable

offence. The aforementioned factors for grant or refusal of bail in non-bailable offences are discussed in the case in hand, under the following headings.

(I) **Prima-facie or reasonable ground to believe that the accused has Committed the offence:-**

It is profitable to reiterate here, that law was set into motion by lodging FIR No. 25/2022 dated 30-03-2022 registered with Police Station Miran Sahib Jammu for the commission of offences punishable u/ss 377/506 IPC r/w Sections 4/5(m) of POCSO Act to the effect, that on 30-03-2022 victim of crime a child of 11 years of age had gone to the house of accused for getting milk, but the accused committed unnatural offence with the said child/victim. Therefore, there is a prima-facie or reasonable ground to believe that the petitioner/accused has committed the offence of rape upon the victim.

(II) **Nature and gravity of charge:-**

The nature and gravity of charge is very serious, as the petitioner/accused committed unnatural offence upon the victim. The lustful designs of the petitioner/accused crossed all borders of indecency as he committed penetrative sexual assault upon minor victim unmindful of the shattering mental trauma the later suffered, which not only caused physical injuries upon the possession of victim, but more indelibly left a scar on his dignity, honour and reputation in the society. Enlargement of the petitioner/accused on bail in the case in hand at this stage when the trial is yet incomplete and even the statement of victim child is yet to be recorded, is sure to shake the confidence of the people at large whose interests are involved in the case. Instant case is a case of huge public importance.

In AIR 2007 S.C 451(Rajesh Ranjan Yadav @ Pappu Yadav Vs. C.B.I through its Director), Hon'ble Apex Court, while comparing the general interest of society with individual liberty of a person enshrined in Article 21 of the Constitution of India, in head note of the case law, held as under:-

"While it is true that Article 21 of the constitution of India is of great importance because it enshrined the fundamental right to individual liberty, but at the same time a balance has to be struck between the right to individual liberty and interest of society. No right can be absolute and reasonable restrictions can be placed on them. While it is true that one of the considerations in deciding, whether to grant bail to an accused or not is, whether he has been in Jail for a long time, the court has also to take into consideration other facts and circumstance, such as the interest of the society. Thus, grant of bail depends on facts and circumstances of each

case and it cannot be said there is any absolute rule that because a long period of imprisonment has expired bail must necessarily be granted."

Unnatural offence is the most hated crime in the society which leaves a scar upon the most cherished personality of the victim. In the case in hand, the crime alleged against the petitioner/accused has a deleterious effect on the civilized society. Gravity of crime is to be necessarily assessed from the nature of crime. A crime may be grave, but the nature of the crime may not be so grave. Similarly, a crime may not be so grave but the nature of the crime may be very grave. It is unambiguously reiterated here, that since unnatural offence leaves a permanent scar on the most cherished possession of a victim and serious psychological impact on his family, the victim as in the case in hand, would not therefore, have concocted story of unnatural offence against the petitioner/accused to falsely implicate him by putting his honour and reputation on stake in the society. Ordinarily, the offence of unnatural offence is grave by its nature.

(III) Severity of Punishment and danger of accused absconding/fleeing if released on bail:-

The maximum punishment provided for the offence of penetrative sexual assault u/s 3/4/5(m) of POCSO Act indicted against petitioner/accused when the victim child is below 12 years of age is not be less than 20 years, but may extend to the life imprisonment. Where the punishment provided for an offence is severe in nature, there is every danger of the accused absconding or fleeing from justice if released on bail. More severe the punishment is, more are the chances of the accused to abscond during to the trial or flee from justice if released on bail. There is every danger that the petitioner/accused will abscond or flee during trial if enlarged on bail.

(IV) Character, behavior, means and position of the accused:-

Petitioner/accused does not enjoy special status in the society as compared to the victim as both of them are residents of Miran Sahib District Jammu and none of them enjoy special status in the society. As per the allegations against petitioner/accused, on 30-03-2022 victim child aged 11 years had gone to the house of accused for getting milk, but the accused committed unnatural offence with the said child/victim. No self-respecting person as the victim child in the case in hand would normally concoct a story of unnatural offence committed against him just to falsely implicate a person. Petitioner/accused therefore does not enjoy any special status in the society so as to succeed in his case for grant of bail.

(V) Likelihood of the offence being repeated:-

In view of the aforesaid discussion, it is clearly gatherable, that there is prima-facie or reasonable ground to believe that the petitioner/accused has committed the offence indicted against him. Punishment provided for unnatural offence and penetrative sexual assault u/s 3/4/5(m) of POCSO Act is not less than 20 years but may extend upto life imprisonment. If petitioner/accused is enlarged at this stage of the trial as even the evidence of the victim child has not been recorded, the accused would get embolden/encouraged and may repeat the offence.

(VI) Reasonable apprehension of the witnesses being tempered with:-

It is profitable to reiterate here, that Challan against petitioner/accused is pending trial before the Court of Ld. Special Judge POCSO Cases Jammu. Charges have been framed wherein petitioner/accused who has pleaded not guilty and preferred trial. The statement of victim child is yet to be recorded before the trial court. The doctor who has conducted the medical examination of the victim child is yet to be examined and therefore the medical evidence without the examination of the said doctor cannot be appreciated at this stage and it cannot be comprehended/concluded that there is no case against the accused. If petitioner/accused is enlarged at the stage of trial, there is every likelihood or reasonable apprehension that he may influence/win over/threaten the victim of the crime and material witnesses, therefore, temper the prosecution evidence.

(VII) Danger, of the course of justice being thwarted by grant of bail:-

In view of the aforesaid discussion, it can be safely held, that a balance has to be struck between the "right to individual liberty" and "interest of the society" and no right can be absolute and reasonable restriction can be placed on it. The grant of bail depends upon facts and circumstances of each case, and it cannot be said, that there is absolute rule that because a long period of imprisonment has expired, bail must necessarily be granted. It is profitable to reiterate here, that petitioner/accused has been arrested on 30-03-2022 and at present is lying in Judicial Custody in District Jail Ambphalla Jammu for the last more than 1 year. In view of the ratio of judgment rendered in AIR 2007 S.C 451 (Rajesh Ranjan Yadav @ Pappu Yadav v.s CBI through its Director), Hon'ble Supreme Court has held, "that the interest of society outweighs the individual interest of a person and the longer period of imprisonment cannot be a ground for grant of bail". There

is every danger of the course of justice being thwarted, if the petitioner/accused is enlarged on bail at the stage of trial. The case laws relied upon by Ld. Counsel for petitioner/accused reported in (i) (1977) 4 SCC 308 [State of Rajasthan vs. Balchand & (ii) 2012 (1) SCC 94 [Sanjay Chandra Vs. CBI] do not laid down an invariable rule of law that bail has to be mandatorily granted in every non-bailable offence without seeing the gravity of offence. In 2006 Legal Eagle (SC) 120 [Yerumalla Latchaiah Versus State of Andhra Pradesh] further relied by Ld. Counsel for petitioner/accused, Hon'ble Supreme Court of India acquitted the accused for commission of rape punishable u/s 376 IPC taking into consideration also the medical evidence after the medical expert Dr. K. Sucheritha (PW-7) was examined in the trial court who found that no injury on private part of the victim/prosecutrix, hymen was intact and there was no sign of rape at all. Ratio of the judgment (Supra) is squarely distinguishable from the facts of the case in hand, wherein, the victim child against whom unnatural offence is alleged to have been committed, the Doctor who conducted the medical examination of the victim is yet to be examined by the trial court.

7. Courts cannot loose sight of the fact that crime of violence against minor children are on increase and therefore the perpetrators of the crime must be dealt with iron hands. A dastardly, diabolic and fiendish manner in which the crime has been committed by the petitioner/accused upon the victim child, sends the shivers down to the spines of everybody who is concerned with the administration of justice and maintenance of rule of law. Leniency in matters involving unnatural offences is not only undesirable, but also against public interest. Such types of offences are to be dealt with severity and with iron hands. Showing leniency in such matters would be really a case of misplaced sympathy. The act of petitioner/accused is not only shocking, but outrageous in contours. The granting of bail to the petitioner/accused at this stage would lead to the danger of the course of justice being thwarted. I hold that this is a fittest case where, "**Jail**" and not "**Bail**", is the appropriate remedy at this stage. The basic law of bail can be found in 1962 SC 253 (Capitan Jagjit Singh's case) and then in the most-talked about the case reported in 1978 SC 429 (Gudikanti Narasimula and others, Appellants v. Public Prosecutor, High Court of Andhra Pradesh, Respondent) on the basis of which a sacred citation usually echoes in all the courts of country, viz; "Bail or Jail", has also been mis-understood and mis-

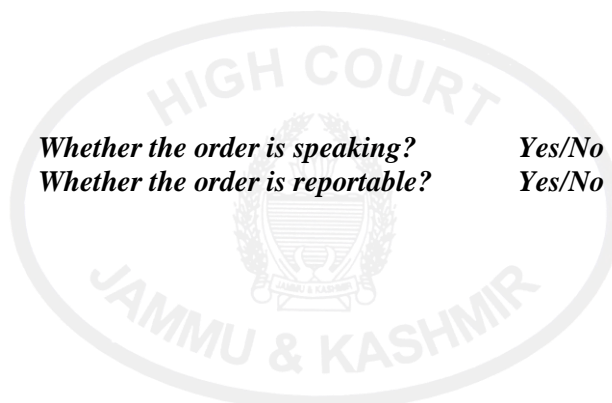
applied on various occasions. These Judgments, do not lay down an invariable law that it is always the "BAIL" that should be awarded by the court hearing a bail petition in a non-bailable case. I am afraid, if that were the intention of legislature, then there ought not to be two categories of offences, viz; "bailable" and "non-bailable".

8. On these considerations and in view of the aforesaid discussion, I am of the considered opinion, that this is the fittest case, where bail ought not be granted and petitioner/accused at this stage too has failed to carve out a strong case for bail in his favour. The bail application being utterly misconceived under law, is disallowed, rejected and dismissed. As the speedy trial is the fundamental right of an accused enshrined in Article 21 of the Constitution of India, the Trial Court is directed to conclude the trial as expeditiously as possible.

9. Disposed off accordingly.

(Mohan Lal)
Judge

Srinagar:
29.05.2022
Issaq



<i>Whether the order is speaking?</i>	<i>Yes/No</i>
<i>Whether the order is reportable?</i>	<i>Yes/No</i>