

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

Reserved on: 29.05.2024
Pronounced on: 07.06.2024

Crl. R No.07/2023
c/w
Crl. R No.16/2023
Bail App No.17/2024

MOHAMMAD SULTAN RESHI
SHABNAM MUSHTAQ & ORS
ZAHID AHMAD LONE & ORS. ... PETITIONER(S)

Through: -Mr. Munir Ahmad Bhat, Adv. (in Crl. R. No.07/2023)
Mr. Musavir Mir, Adv. (in Crl. R. No.16/2023 & Bail App No.17/2024)

Vs.

UT OF J&K & OTHERS ...RESPONDENT(S)

Through:-Mr. Satinder Singh Kala, AAG, with
Ms. Rahella Khan, Assisting Counsel.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) By this common judgment, the afore-titled two criminal revision petitions, one filed by petitioner Mohammad Sultan Reshi (**Crl. R No.07/2023**), other filed by petitioners Shabnum Mushtaq, Gulshana Begum and Ishfaq Ahmad (**Crl. R No.16/2023**), and bail application (**Bail App No.17/2024**) filed by petitioners Zahid Ahmad

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Lone, Mushtaq Ahmad Lone and Irshad Ahmad Dar, are proposed to be disposed of. All these petitions arise out of a case emanating from FIR No.130/2022 for offences under Section 363, 109, 376, 511, 366-A, 354-B, 506 IPC and Section 8, 12 of POCSO Act registered with Police Station,

2) As per the prosecution case, father of the victim lodged a report with police on 16.05.2022 alleging therein that his minor daughter has been kidnapped by petitioners Zahid Ahmad Lone and others including his father, brothers, mother and sisters. On the basis of this report, FIR No.130/2022 for offences under Section 363/109 of IPC was registered. During the course of investigation, the victim was recovered but when she was taken for conducting her medical examination, she refused to subject herself to medical examination. According to the prosecution, the victim was produced before the Child Welfare Committee and the members of the said Committee persuaded the victim to undergo medical examination, whereafter she was subjected to medical examination. It

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was revealed that no penetrative sexual assault had taken place with the victim.

3) The statement of the victim under Section 164 of the Cr.P.C was recorded before the Magistrate. In her statement she deposed that on 16th May, 2022, while she was waiting to board a bus at the bus stop for going to the house of her uncle, two unknown persons came over there on a motorcycle. They sprinkled some chemical upon her, whereafter she was made to board an Alto vehicle in which petitioner Zahid Ahmad Lone was already seated. Even prior to this incident, the aforesaid person was teasing and threatening her. She was taken in the vehicle to some unknown location. When she regained her senses, she found herself in a secluded house. In the said house, besides petitioner Zahid Ahmad Lone, petitioner Irshad Ahmad Dar was also present. The petitioners Zahid Ahmad Lone and Irshad Ahmad were telling each other that they would make the victim nude and make video recording of the same in order to demand a ransom from the father of

the victim. She further stated that petitioner Zahid Ahmad Lone intended to commit rape upon her and while she was unconscious, the aforementioned two persons undressed her. She also stated that she does not know as to how many times, the aforementioned petitioners committed rape upon her but after regaining her senses, the two accused tried to commit rape upon her which she resisted and did not allow it to happen. However, her clothes were torn apart by them. During whole of this episode, petitioner Zahid Ahmad Lone was in contact with his sister, petitioner Shabnam Mushtaq and his father Mushtaq Ahmad on telephone and they were imparting instructions to the said petitioner. The sister of petitioner Zahid Ahmad Lone was asking him to kill the victim. She further stated that brother of petitioner Zahid Ahmad Lone, namely, Ishfaq Ahmad also came on spot and he tried to strangulate her. She was taken in a vehicle, which perhaps belonged to maternal uncle of petitioner Zahid Ahmad Lone, Ghulam Hassan Lone, the uncle of petitioner Zahid Ahmad Lone, was also present in the said

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vehicle. They threatened to kill her only brother in case she deposed against them. According to the victim, these persons were talking to each other in the vehicle that the victim needs to be killed by administering an injection to her. Thereafter the victim was taken to the house of Ghulam Hassan Lone and due to the pressure of police, said Ghulam Hassan Lone called her maternal uncle and she was handed over to him.

4) After recording the statement of the victim, accused/persons petitioners Zahid Ahmad Lone, Mushtaq Ahmad Lone, Ghulam Hassan Lone, Irshad Ahmad Dar, and Mohammad Sultan Reshi were arrested on 22.05.2022 whereas accused Ishfaq Ahmad Lone, Gulshan Begum and Shabnam Mushtaq could not be arrested as they had absconded. The Investigating Agency found that offences under Section 363, 109, 376, 366-A, 506, 511, 354-B IPC and Section 8 and 12 of POCSO Act are found proved against the above-named accused and, accordingly, the challan was laid before the trial court.

5) Heard and considered.

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6) The instant criminal revision has been filed by petitioner Mohammad Sultan Reshi. It has been contended by the petitioner that there is no material on record in the challan laid against him before the learned trial court as would even remotely suggest his involvement in the alleged occurrence. Therefore, there was no occasion for the learned trial court to frame charges against him in terms of the impugned order dated 31.12.2022.

7) As per the provisions contained in Section 31 of the POCSO Act, the provisions of the Code of Criminal Procedure apply to the proceedings before a Special Court and for the purposes of the said provision, a Special Court has to be deemed as a Court of Sessions. Therefore, the procedure prescribed for trial before a Court of Session is to be followed by a Special Court under POCSO Act. Thus, the question of charge and discharge of accused in the

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present case has to be governed by the provisions contained in Section 227 and 228 of the Cr. P. C.

8) Section 227 of the Cr. P. C provides that if, upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the accused and the prosecution, the Sessions Judge considers that there is no sufficient ground for proceeding against the accused, he has to be discharged. Similarly, Section 228 of the Cr. P. C provides that, if upon consideration of the record of the case and hearing the accused and the prosecution, the Sessions Judge is of the opinion that there is ground for presuming that the accused has committed the offence, a charge has to be framed against him.

9) The object of the aforesaid provisions is to ensure that an accused is not tried in respect of a frivolous and vexatious charge and unless there is some material for proceeding against him, he should not be put to trial. In

order to ascertain whether or not there is sufficient ground for proceeding against the accused, a Sessions Judge has only to sift the material available on record and if such material, *prima facie*, discloses that there are suspicious circumstances against the accused, a charge has to be framed against him. However, if the material on record, even if fully accepted, shows that there is no sufficient ground for proceeding with the trial against the accused, he has to be discharged.

10) With the aforesaid legal position in mind, let us now advert to the facts and the material on record. Petitioner Mohammad Sultan Reshi happens to be the maternal uncle of the main accused, namely, Zahid Ahmad Lone. As already stated, the victim during her statement under Section 164 of Cr. P. C has only made a reference to the vehicle of maternal uncle of accused Zahid Ahmad Lone. She has stated that after the occurrence, she was made to board another vehicle which, according to her, perhaps belonged to maternal uncle of Zahid Ahmad Lone. She has

not even named petitioner Mohammad Sultan Reshi in her statement. Even if it is assumed that the maternal uncle, to which the victim has referred, is the petitioner herein, still then merely because after the occurrence she has been made to board a vehicle belonging to petitioner Mohammad Sultan, who was not even present on spot, it cannot be stated that he had any involvement in the alleged occurrence.

11) The statements of other prosecution witnesses recorded under Section 161 of Cr. P. C including the statement of father the victim, would also reveal that they have not stated anything with reference to involvement of petitioner Mohammad Sultan Reshi. Therefore, there is absolutely no material on record of the challan to even, *prima facie*, show the involvement of petitioner Mohammad Sultan Reshi in the alleged crime.

12) The learned trial court while framing charges against petitioner Mohammad Sultan Reshi has not distinguished

his case from the cases of other accused and has mechanically proceeded to frame charges against him as well. The impugned order passed by the trial court to the extent of framing charge against petitioner Mohammad Sultan Reshi has resulted in material illegality which deserves to be revised by this Court in exercise of its revisional jurisdiction. The impugned order is, therefore, not sustainable in law and deserves to be set aside to the aforesaid extent.

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13) Petitioners Shabnam Mushtaq, Gulshan Begum and Ishfaq Ahmad Lone have challenged order dated 31.12.2022 passed by the learned Sessions Judge, Kupwara, whereby charges have been framed against the accused.

14) A perusal of the impugned order passed by the trial court reveals that charges for offences under Section 363, 109, 376, 511, 366-A, 354-B, 506 IPC and Section 8, 12 of POCSO Act have been framed against all the accused except

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the petitioners herein, who were absconding and, as such, were not present before the Court at the time of framing of the charges. A perusal of the trial court record reveals that the petitioners in CrI. R. No.16/2023 have not even participated in the proceedings before the trial court as yet. In these circumstances, the challenge launched by the aforesaid three petitioners to charges framed against the other accused is without any locus standi. The charges against these petitioners are yet to be framed by the learned trial court and they are yet to participate in the proceedings before the said court.

15) In the face of aforesaid position, the petitioners have no locus standi to challenge impugned order dated 31.12.2022. Therefore, the criminal revision petition No.16/2023 deserves to be dismissed leaving it open to the petitioners to surrender before the learned trial court and urge all those grounds that have been urged by them before this Court before the trial court at the time of consideration of question of charge/discharge.

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16) Petitioners Zahid Ahmad Lone, Mushtaq Ahmad Lone and Irshad Ahmad Dar have invoked jurisdiction of this Court under Section 439 of the Cr. P. C for grant of bail in their favour in FIR No.130/2022 for offences under Section 363, 109, 376, 511, 366-A, 354-B, 506 of IPC and Section 8, 12 of POCSO Act registered with Police Station, Handwara.

17) In the application it has been submitted that the petitioners have been arrested on 22nd May, 2022 and during pendency of the case before the trial court, co-accused Ghulam Hassan Lone and Mohammad Sultan Reshi have already been enlarged on bail. It has been further submitted that the petitioners have been unnecessarily implicated in the case and that the victim, who was aged more than 17 years at the relevant time, was having a love affair with petitioner Zahid Ahmad Lone. It has been submitted that the victim was beaten up by her parents, as a result of which she voluntarily left her home

and joined the company of petitioner Zahid Ahmad Lone. It has been further submitted that the story projected by the victim in her statement under Section 164 of Cr. P. C is absolutely false and frivolous. It has been further submitted that the petitioners had approached the learned trial court for grant of bail but their bail application was rejected in terms of order dated 27.06.2023 passed by the trial court.

18) According to the petitioners, the trial of the case has substantially progressed and the statement of the victim has already been recorded before the trial court, as such, they deserve to be enlarged on bail.

19) The bail application has been resisted by the respondents on the ground that the petitioners are involved in a heinous crime. It has been submitted that if the petitioners are released on bail, it will have a deleterious effect on the minds of the general public which will have serious ramifications upon the larger public interest.

20) So far as principles for grant of bail are concerned, the Supreme Court and various High Courts of the Country have laid down guidelines regarding the same. In the case of **Deepak Yadav vs. State of Uttar Pradesh**, (2022) 8 SCC 559, the Supreme Court noted the considerations for a Court while granting bail to an accused and enumerated the same in the following manner:

1. *Whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;*
2. *Nature and gravity of the accusation;*
3. *Severity of punishment in the event of conviction;*
4. *Danger of the accused absconding or fleeing, if released on bail;*
5. *Character, behaviour, means, position and standing of the accused in the society;*
6. *Likelihood of the offence being repeated;*
7. *Reasonable apprehension of the witnesses being influence;*
8. *Danger of course of justice being thwarted by grant of bail;*

21) In the instant case, since the petitioners have also been booked for offences under POCSO Act, as such, while considering the bail application, we have to keep in mind

the provisions contained in the said Act, particularly those contained in Section 29 of the said Act. As per the provisions contained in Section 29, in a case where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 or 9 of the Act, a presumption arises that such person has committed the said offence.

22) Since the petitioners are facing trial for charges under Section 8 and 12 of the POCSO Act, as such, the provisions contained in Section 29 of the Act are not attracted to the present case. Therefore, presumption of culpability which arises in case of offences defined under Sections 3, 5, 7 and 9 of the POCSO Act in terms of Section 29 of the said Act would not get attracted to the present case. The same has to be, therefore, dealt with keeping in mind general principles for grant of bail, on the basis that presumption of innocence is attached to the petitioners. However, while considering the question of grant of bail to an accused in the matters relating to sexual offences, especially under

POCSO Act, the following considerations are also to be taken into account:

- (1) Age of the victim;
- (2) Age difference between the victim and the accused;
- (3) Ferociousness of the offence;
- (4) Relationship between the victim and the accused;
- (5) Vicinity of residence of the accused and the victim and if they are in proximity and then if the accused is willing to reside elsewhere till the pendency of the trial;

23) With the aforesaid legal position in mind, let us now advert to the facts of the present case. The victim in her statement has alleged that she was kidnaped by petitioner Zahid Ahmad Lone and taken to a secluded house where petitioner Irshad Ahmad Dar was also present. She has alleged that both Zahid Ahmad Lone and Irshad Ahmad Dar attempted to commit rape upon her. The allegation against accused Mushtaq Ahmad Lone is that he was in touch with his son i.e. petitioner Zahid Ahmad Lone on telephone, meaning thereby he was not even present on spot. Therefore, to the extent of petitioner Mushtaq Ahmad Lone, even if the prosecution case is assumed to be correct, *prima*

facie, it can be stated that he is not involved in the alleged crime.

24) That takes us to the roles of petitioner No.1 and petitioner No.3. Learned counsel for the petitioners has argued that there was a love affair between petitioner No.1, Zahid Ahmad Lone and the victim. The age of petitioner No.1 is stated to be 20 years and the age of the victim as per her date of birth certificate, which is available on the record of the challan, as on the date of alleged incident was about 17 years. Thus, there is a difference of only three years in the age of the victim and the age of the main accused, both of whom are at the threshold of their youth.

25) Learned counsel for the petitioners has also contended that there is evidence on record in the shape of statement of the victim recorded during trial of the case that she was in constant touch with petitioner Zahid Ahmad Lone even prior to the occurrence, meaning thereby that there was an affair between the two. On this basis, it has

been urged that it is not a case of kidnapping but it is a case where the victim girl has left her house out of her own volition to join the company of petitioner No.1. According to the learned counsel, the victim is a well-educated girl and even if she is minor, she has attained the age of discretion. Therefore, it cannot be stated that she was forcibly taken away by the petitioners.

26) Without commenting upon the merits of the contentions raised by the learned counsel for the petitioners 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 learned counsel for the petitioners. Thus, *prima facie*, the petitioners have succeeded in making out a case for grant of bail in their favour even on merits.

27) Apart from the above, a perusal of the trial court record reveals that statement of the victim as well as the statements of other prosecution witnesses excepting the statement of the Investigating Officer, have been recorded

before the trial court. Thus, if the petitioners are 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 petitioners are habitual offenders and in case they are admitted to bail, they are likely to repeat similar offences. Thus, on this ground also, a case for grant of bail is made out in favour of the petitioners.

28) Accordingly, all the petitions are decided and disposed of in the following manner:

- (I) **Crl. R No.7/2023** is allowed and the impugned order dated 31.12.2022 passed by learned Sessions Judge, Kupwara, to the extent of framing charge against petitioner Mohammad Sultan Reshi, is set aside and he is discharged of the offences alleged against him. His bail and surety bonds shall stand discharged.

(II) **Crl. R No.16/2023** is dismissed with liberty to the petitioners therein to surrender before the trial court and participate in the proceedings, with a further liberty to urge all the available grounds before the trial court at the time of consideration of question of charge/discharge.

(III) **Bail App No.17/2024** is allowed and the petitioners therein are admitted to bail subject to the following conditions:

- i. *That they shall furnish personal bonds in the amount of Rs.50,000/ each with one surety each of the like amount to the satisfaction of the learned trial court;*
- ii. *That they shall appear before the trial court on each and every date of hearing;*
- iii. *That they shall not leave the territorial limits of the Union Territory of J&K without prior permission of the learned trial court;*
- iv. *That they shall not tamper with the prosecution witnesses.*

(Sanjay Dhar)
Judge

Srinagar,
07.06.2024
"Bhat Altaf-Secy"

Whether the order is reportable: Yes/No

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