

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

Bail App. No. 159/2023

Reserved On: 22nd of December, 2023
Pronounced On: 29th of December, 2023.

Aqib Ahmad Baba
S/O Late Abdul Rashid
R/O Dangerpora, Wathora
Through his mother, namely,
Dilshada W/O Abdul Rashid Baba
R/O Dangerpora, Wathora

... Petitioner

Through: -
Ms Masooda Jan, Advocate.

V/S

- 1. Union Territory of J&K through**
Station House Officer, Police Station,
Chadoora, District Budgam.
- 2. Mushtaq Ahmad Sheikh (Father of Victim)**
S/O Assadullah Sheikh
R/O Dangerpora, Wathora,
District Budgam.

... Respondents

Through: -
Mr Faheem Nisar Shah, GA for R-1; and
Mr Umar Mir, Advocate for R-2.

CORAM:

HON'BLE MR JUSTICE M. A. CHOWDHARY, JUDGE

(JUDGMENT)

01. This Order shall dispose of the instant Bail Application moved for grant of bail by the Petitioner, who has been denied bail by the Court of learned Principal Sessions Judge, Budgam, vide his Order dated 17th of November, 2023 in a Bail Application No. 218/M titled '**Aqib Ahmad Baba v. UT of J&K**'.

02. In the Application, it has been asserted that a case came to be registered vide FIR No. 175/2018 of Police Station, Chadoora, on 23rd of November, 2018, on a complaint of the father of a boy (name withheld), who was alleged to have been sexually harassed by the Petitioner, when he had visited the shop of the Petitioner. It is alleged that the aforesaid case had been registered against the Petitioner on account of some personal vengeance due to neighborhood fight; that the investigation into the FIR concluded into a charge sheet, which was laid before the Court of learned Judicial Magistrate, Chadoora and the Petitioner, as accused, was granted bail by the afore-stated Court vide Order dated 4th of December, 2018, after seeking Objections to the Bail Application and also in view of an Affidavit filed by the Complainant; that the Petitioner, as accused, had been facing trial for the last five years, however, the Prosecution failed to examine any witness in support of their case and then moved an application under Section 227 of the Code of Criminal Procedure, for alteration/ addition of charge and, despite the said Application having been opposed by the Petitioner, the same was allowed by the trial Court on 14th of June, 2023, whereafter, the Prosecution, again, moved an application to the trial Court with a plea of arresting the accused; that the Petitioner, who was on bail earlier, moved a subsequent Bail Application which was rejected by the Court below on 17th of November, 2023.

03. The Petitioner has assailed the aforesaid impugned Order passed by the Court below, *inter alia*, on the grounds that the Court has passed the impugned Order ignoring the fact that the Petitioner was facing trial for a long period of five years, having been bailed out without mentioning the satisfaction about the conduct of the Petitioner; that the Court below, while rejecting the Application, had mentioned that the statements of Doctor and Investigating Officer are to be recorded first, which is not the criteria for granting bail and, therefore, it shows that the learned Court below has not gone through the certificate of the Doctor, wherein it has been mentioned that no internal or external injuries were found on examination of the victim and that was the reason the

Complainant had filed an Affidavit himself, asking for enlarging the accused on bail; that the personal liberty of the Petitioner cannot be curtailed on any frivolous ground which has been mentioned by the Court below, while rejecting the bail application. It has been finally prayed that the instant Application be accepted and the Petitioner be admitted to bail.

04. Pursuant to notice having been issued, the Respondents have filed Objections.

05. The Respondent No.1, in its Objections, has pleaded that initially a case had been registered against the Petitioner for the commission of offences punishable under Sections 377 and 511 of the erstwhile Ranbir Penal Code (RPC), whereafter, on an application moved by the Prosecution, the case was ordered to be further investigated and the concerned Police Station laid the charge sheet for the commission of offences punishable under Sections 377 and 511 RPC as also 3/4 Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018 (for short 'the POCSV Act') and the case was presented before the Sessions Court at Budgam on 21st of August, 2023, where the charge was framed against the Petitioner on 30th of August, 2023 and the proceedings are at the stage of recording Prosecution evidence, with just two witnesses having been examined thus far. It is pleaded that the Petitioner, in case of grant of bail, may jump over the concessions of bail and may also tamper with the Prosecution evidence, thereby vitiating the whole trial. Finally, it has been urged that the Bail Application be rejected.

06. In his Objections, the Respondent No.2, who is the father of the victim and the Complainant in the case, has asserted that the Petitioner had committed serious and heinous offences against a child, who was of the age of just nine years at the time of commission of the offences, therefore, the Bail Application is required to be rejected. It has been further pleaded that merely because of the fact that the Petitioner had been admitted to bail, before filing of the charge sheet in terms of the POCSV Act, he has no vested right to be granted bail at this stage as well.

07. Learned Counsel for the Petitioner, while reiterating the assertions made in the Application, has vehemently argued that the Petitioner, in this case, had been facing trial since the year 2018, when a case was registered against him and the charge sheet for the commission of offences punishable under Sections 377 and 511 RPC was filed in the Court at Chadoora and that, after a period of five years, the Prosecution awoke from a deep slumber and asked for alteration/ addition of charge to the trial Court, which, in turn, ordered further investigation of the case and a fresh charge sheet for the commission of offences punishable under Sections 377 and 511 RPC as also 3/4 POCSO Act was filed before the learned Sessions Court at Budgam. He has further argued that the Petitioner, who had earlier been admitted to bail in the case during his trial before the Court at Chadoora, ought to have been admitted to bail by the Sessions Court as well, inasmuch as, he had not jumped over any of the conditions of the bail, to which he had been admitted earlier. The learned Counsel has further argued that since there was neither any apprehension of tampering of the evidence nor jumping over of the bail on part of the Petitioner, therefore, the Sessions Court at Budgam, while denying the bail to the Petitioner, has misdirected itself to reject the Bail Application moved by the Petitioner. In this backdrop, it has been prayed that this Bail Application be allowed, the Petitioner be admitted to bail and ordered to be released from custody.

08. Learned Counsel for the Respondents, on the other hand, in unison, argued that since the Petitioner was accused of having sexually assaulted a child of nine years, therefore, he is not entitled to be admitted to bail, inasmuch as, there is a presumption of commission of offences in terms of Section 29 of the POCSV Act. The learned Counsel, thus, prayed that the instant Bail Application be dismissed.

09. Heard learned Counsel for the parties, perused the record and considered the matter.

10. On a perusal of the Order dated 17th of November, 2023 passed by the learned Principal Sessions Judge, Budgam, it appears that the Court

was swayed away by the nature of the offences allegedly committed against a child, aged about nine years, by the Petitioner. Besides, the learned Court below has also observed that the offences attributed against the Petitioner, being heinous and serious in nature, are, in fact, committed against the State and Society, as such, the Petitioner does not deserve any concession for grant of bail, as it would send a wrong signal to the Society at large.

11. Since, the Petitioner had already been admitted to bail in the same case registered against him way back in the year 2018 and he was admitted to bail on the basis of the charge sheet, wherein he was charged of having attempted to commit unnatural offence with the victim, particularly in the face of the Affidavit filed by the Complainant, who happens to be the father of the victim child. It appears that after five years, the Prosecution laid a motion before the trial Court for alteration of charge and further investigation of the matter, which resulted into filing of a revised charge sheet before the Sessions Court at Budgam for the commission of offences punishable under Sections 377 and 511 RPC as also 3/4 POCSO Act.

12. Though, the offences, alleged to have been committed by the Petitioner, are against a child and appear to be grave in nature, however, in view of the subsequent developments having taken place in the case with regard to investigation of the case, filing of the charge sheet, filing of Affidavit by the complainant in support of the Application for grant of bail, further investigation and laying of subsequent charge sheet and the pendency of the case against the Petitioner for the last more than five years, the Petitioner, in the considered opinion of this Court, is entitled to be admitted to bail.

13. For the foregoing reasons and observations made hereinabove, the instant Application is **allowed** and the Petitioner is admitted to bail, subject to the following conditions:

- i. That the Petitioner shall furnish bail bonds to the tune of Rs.50,000/- to the satisfaction of the Trial Court, with personal bond of the like amount, before the Superintendent, Central Jail, Srinagar;

- ii. That the Petitioner shall attend the hearing of the case on each and every date;
- iii. That the Petitioner will not leave the territorial jurisdiction of this Court, without permission of the trial Court;
- iv. That the Petitioner will not tamper with the Prosecution evidence, in any manner, whatsoever; and
- v. Contravention of any of the afore-stated conditions/ terms of the bail, shall entail its cancelation, on laying of motion, in this behalf, before the trial Court.

14. Bail Application is, thus, **disposed** of on the above terms. It is, however, made clear that any observation made or finding returned in this Order, for purpose of disposal of this Bail Application, shall not have any bearing with regard to the merits of the case pending before the trial Court and that the same shall be taken to its logical conclusion as per law, expeditiously.

(M. A. CHOWDHARY)
JUDGE

SRINAGAR

December 29th, 2023

"TAHIR"

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| i. | Whether the Judgment is speaking? | Yes. |
| ii. | Whether the Judgment is reporting? | Yes. |