

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

**Bail App No. 67/2025**

Reserved on- 25.08.2025

Pronounced on- 08.09.2025

**Jagay Kumar**

.....Applicant(s)

Through: Mr. Gagan Basotra, Sr. Advocate with  
Ms. Navdeep Kour, Advocate.

Vs

**UT of J&K & Ors.**

..... Respondent(s)

Through: Mr. Sumeet Bhatia, GA for R-1 & 2.

**CORAM: HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE.**

**JUDGMENT**

**01.** The applicant, under trail for the past 02 years, in consequence of trial for offences under Sections 376/452/323/506 of Bharatiya Nyaya Sanhita, 2023 (for short “the BNS”), being aggrieved of order dated 02.05.2024, passed by learned Additional Sessions Judge, Udhampur [“the trial court”], vide which, his bail plea came to be declined, has approached this Court for liberty, predominantly on the ground of false implication and prolonged incarceration.

**02.** The plea has been opposed by the respondent-UT primarily on the ground of gravity of the charge.

**03.** As factual narration of the case would unfurl, on 06.08.2023, one Joginder Kumar lodged a written complaint with Police Station, Udhampur, alleging *inter alia* that on 26.07.2023, the accused-applicant forcibly entered his house, caught hold of his pregnant wife (hereinafter

referred to as “the prosecutrix”), and raped her, due to which she sustained grievous injuries and remained hospitalized at Govt. S.M.G.S Hospital, Jammu. The incident could not be reported in time due to the poor health of his wife and because accused had threatened his wife with dire consequences. On the receipt of this report, FIR No. 417/2023, under Sections 376/452/323/506 IPC came to be registered against the applicant.

**04.** It surfaced during investigation that prosecutrix, at the time of occurrence was pregnant, therefore, offence under Section 376(2)(h) IPC came to be added and offence under Section 323 was dropped, as not proved.

**05.** The investigation revealed that about 15 days prior to the admission of the prosecutrix in S.M.G.S. Hospital, Jammu, i.e., on 26.07.2023, the applicant-accused forced his entry into her house and raped her in a bathroom, while she was washing clothes. He threatened the prosecutrix with dire consequences, if she reveals the incident to her husband or children.

**06.** The investigation culminated in the final report against the applicant for offences under Sections 376(2) (h)/452/506 IPC, while potency test of the applicant and CDR/tower location from the concerned Nodal Officer, regarding his presence at the scene of occurrence, were awaited.

**07.** The applicant came to be charged by the trial court on 16.11.2023, to which he claimed trial. The prosecution so far has examined 05 witnesses including the complainant, the prosecutrix and the Medical Officer, out of 09 witnesses cited in the charge-sheet.

**08.** The bail plea of the applicant, came to be declined by the trial court primarily on the ground of seriousness of the charge and the severity of the punishment prescribed therefor.

**09.** Aggrieved of the denial of bail by the trial court, the applicant has approached this Court *inter alia* on the grounds that testimonies of the complainant, the prosecutrix and independent prosecution witnesses are contradictory on material aspects and do not support the prosecution case. The delay of 11 days in lodgment of the FIR and procrastinated trial of about 02 years have been urged as additional grounds for enlargement.

**10.** It is contention of the applicant that, as per the medical report and statement of the Medical Officer, it was a case of ruptured ectopic pregnancy, where fertilization of the egg had implanted in the fallopian tube, due to which she was operated upon in S.M.G.S. Hospital and her fallopian tube had to be removed. Thus, according to the applicant, no offence of rape is made out.

**11.** The plea has been opposed, on the other side by the respondent-UT, on the ground of gravity of the charge and the severity of punishment. It is also contended that material prosecution witnesses with respect to the CDRs and potency test of the applicant, are yet to be examined.

12. Having heard learned counsels for the parties, I have gone through the trial court record and statements of the prosecution witnesses so far examined in the trial court.

13. Learned counsels for the parties, in arguments have reiterated their respective stands.

14. The discretionary jurisdiction of a Court in granting or refusing bail is regulated by settled principles of law and the facts and circumstances obtaining a case. The underlying considerations for the exercise of discretion include the seriousness of the charge, potential impact on the investigation/trial, propensity of the accused to jump over bail, abscond and re-offend, the nature of accusations, the severity of punishment which conviction may entail and obligation of the Court to balance the rights of the accused with the need to maintain public confidence in the justice delivery system.

15. A perusal of the trial court record reveals that applicant came to be charged by the trial court on 16.11.2023. There are total 09 witnesses cited in the charge-sheet and the prosecution so far has managed to examine 05 witnesses, including the complainant, the prosecutrix/victim and the Medical Officer.

16. A critical examination of the evidence, recorded during the trial, is not permissible while considering a bail plea, to ensure that there is no prejudging of the matter. A brief examination of the testimonial potency of the prosecution evidence, however, can be undertaken by the Court to

determine the existence or otherwise of a *prima facie* case. In cases involving capital punishment or lifer, bail can only be granted if the Court has reasons to believe that accused has not committed the offence and that material on record verily points out the absence of grounds to believe that applicant is involved in the commission of the offence for which he stands charged.

17. A perusal of the charge-sheet and statement of the complainant would indicate that the complainant and PW Neelam Devi are hearsay witnesses as they came to know about the incident from the prosecutrix only. In the circumstances, the entire prosecution case hinges upon the testimonial potency of the prosecutrix and the Medical Officer.

18. The prosecutrix has stated that she was operated upon, 15 to 20 days prior to 26.07.2023. While she was washing clothes in the bathroom, she received a telephonic call of the applicant-accused as to who among her family members were present in the house. She told the applicant that there was none else. The accused disconnected the phone and after sometime he forcibly entered her house and while she was washing clothes in the bathroom, he raped her. The prosecutrix goes on to allege that she was pregnant and dissuaded the accused from doing so, but accused turned a deaf ear and continued for about 30 minutes and threatened her with dire consequences if incident was revealed to anybody. On the same day she started bleeding and on 26.07.2023, when bleeding did not stop, she disclosed the incident to her sister-in-law, who

shifted her to District Hospital, Udhampur, where she disclosed the occurrence to the Doctor. In cross-examination, the prosecutrix has stated that dimension of the bathroom where accused ravished her was 3 ft x 4 ft, where a bucket was lying and Indian-style commode was fitted. The prosecutrix also stated in cross-examination that she was not aware about the meaning of rape.

**19.** PW Dr. Paru Sharma examined the prosecutrix on 06.08.2023. She has stated that, on examination, the Urine Pregnancy Test (UPT) of the patient was positive and she was diagnosed as ruptured ectopic with previous 2 Lscs, and was referred to S.M.G.S. Hospital, Jammu because no facility of DNA testing was available at GMC Udhampur. The prosecutrix/victim underwent laparotomy for ruptured tubal ectopic at S.M.G.S. Hospital, Jammu. The Medical Officer goes on to state that Last Menstruation Period (LMP) of the patient was 17.06.2023. In cross-examination, she has stated that LMP of the patient/victim was 17.06.2023. LMP cycle is of 25 to 30 days, which means that her next menstrual period was due on 17.07.2023. The Medical Officer clarified in cross-examination that, during the intervening period of two menstrual cycles, it cannot be ascertained whether prosecutrix was pregnant or not, and pregnancy can be revealed only after an overdue period of approximately one week.

**20.** The aforesaid evidence of the prosecutrix and the Medical Officer, recorded during the trial, is self-explanatory. Less said the better.

However, based on the evidence, presented so far, by the prosecution, there exists a reasonable doubt about the complicity of the applicant. Be it also noted that the prosecution till date has failed to produce the report of potency test of the applicant and CDRs from the concerned nodal officer regarding presence of the applicant, at the scene of occurrence, at the relevant time. The evidence on record, if it persists, may not establish a strong *prima facie* case against petitioner.

21. Provisions of CrPC, now BNSS, confer discretionary jurisdiction on courts to grant bail to an accused pending trial and since this power is discretionary, it must be exercised with circumspection by balancing the valuable right of liberty of an individual with the interest of the society. The seriousness of the charge, no doubt is one of the relevant considerations while considering the bail pleas but that is not the only test or factor, because if it is reckoned as the sole test, it may amount to imbalancing the constitutional rights and recalibration of the scales of justice.

22. It is a fundamental postulate of criminal jurisprudence that accused is presumed to be innocent until his guilt is proved. Since material witnesses of the prosecution, including the prosecutrix, the medical officer, the complainant, and his close relatives stand examined and applicant is behind the bars for more than 02 years now and trial for the examination of formal witnesses is likely to consume some time, further incarceration of the applicant shall not serve any purpose. There is

nothing to suggest that, if released on bail, the applicant is likely to abscond to evade trial, nor is there any material to show that, in the event of bail, he is likely to tamper with the prosecution evidence, as the remaining prosecution witnesses are formal only. Hence, the present application is allowed and applicant is directed to be released on bail subject, however, to the following conditions that:-

- i) he shall furnish a surety bond in the amount of Rs. 1.00 lac to the satisfaction of the trial Court and a bond of personal recognizance of the like amount, to the satisfaction of Superintendent of the concerned jail;
- ii) he shall regularly appear before the trial court without fail;
- iii) he shall not jump over bail and directly or indirectly make an attempt to coerce or influence the prosecution witnesses or tamper with the prosecution evidence; and
- iv) he shall not leave the territorial jurisdiction of the trial court, without prior permission.

23. Before parting, however, it is made clear that nothing said in this order shall be construed as an expression of opinion on the merits of the case and learned trial court shall be at liberty to assess the evidence in entirety uninfluenced by any observation made in the order.

**(Rajesh Sekhri)**  
**Judge**

**Jammu**  
08.09.2025  
Abinash

*Whether the judgment is speaking? Yes*  
*Whether the judgment is reportable? Yes*