

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

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Bail App No. 289/2025
CrlM No. 2033/2025

Tsewang Thinles

.....Petitioner(s)

Through: Mr. Amit Gupta, Sr. Advocate with
Mr. K.D S Kotwal, Advocate
Mr. Tasaduq Hussain, Advocate
Mr. Ajaz Hussain, Advocte
Mr. Rahul Singh, Advocate

Vs

UT of J&K & Anr.

..... Respondent(s)

Through: Mr. Eishaan Dadhichi, CGSC for R-1
Mr. Nissar H Ladakhi, adv for R-2

Coram: HON'BLE MR. JUSTICE MOHD. YOUSUF WANI, JUDGE

ORDER

15.12.2025

1. Through the medium of the instant successive bail petition filed under Section 439 of the Code of Criminal Procedure, 1973 (repealed but applicable to the case in hand and hereinafter referred to as the *Code* for short), corresponding to Section 483 of the ***Bharatiya Nagarik Suraksha Sanhita, 2023*** (hereinafter referred to as ***BNSS*** for short), bail on behalf of the petitioner/accused in FIR No. 5/2019 dated 01.07.2019, registered at Police Station Women's, Leh, has been sought, inter alia, on the grounds that he is a law-abiding citizen of India and, therefore, entitled to seek enforcement of his constitutional and other legal rights. That he is innocent and has been falsely implicated in case FIR in question. That he earlier approached the court of Learned Principal Sessions Judge, Leh (hereinafter referred to as the **trial Court** for short), seeking bail in the case FIR in

question, which was denied to him. That the petitioner has been in custody in the case FIR since September, 2024. That the final report/charge-sheet bearing No. 22 of 2025 of Police Station Womens, Leh has already been filed before the learned trial court. That the statement of the prosecutrix/respondent No. 2 was recorded during the course of investigation on 02.07.2019 in terms of the provisions of Section 164-A of the Code. That at the time of lodging of the complaint (FIR), the prosecutrix mentioned her age as 17 years, as on date of the alleged incident, on account of which fact the offence under the Jammu and Kashmir Protection of Children from Sexual Offences Act (POCSO for short) came to be added in the FIR. That the learned trial court vide its order dated 12.12.2024 passed on an application filed on behalf of the petitioner/accused regarding determination of the age of the prosecutrix declared her as a “Child” in terms of the POCSO Act. That aggrieved by the said order of the learned trial court dated 12.12.2024, the petitioner/accused assailed the same before this court through a petition bearing No. CRM(M) 39/2025. That the petitioner alongside the said petition, also preferred an application for his bail bearing No. 15/2025. That this Court vide its order dated 24.04.2025 passed in common for both the said petitions set aside the order dated 12.12.2024 of the learned trial court, that had declared the prosecutrix as a “child” and remanded the matter to the learned trial court with the direction to conduct an enquiry afresh in the light of the observations made by this court in its order with liberty to the learned trial court to record any further evidence for arriving at a proper conclusion with regard to the age of the victim. That the

clubbed bail petition, was, however, dismissed by this court with the liberty to petitioner to approach the learned trial court after the statement of the victim is recorded by the said court. That the learned trial court vide its order dated 06.06.2025 disposed of the application of the petitioner afresh filed in terms of section 94 of the Juvenile Justice (care and protection of children) Act (hereinafter referred to as JJ Act for short) and declared the prosecutrix as “major” by observing that her date of birth is 05.02.2000. That pursuant to the order dated 06.06.2025 of the learned trial court the offences U/s 9(1) r/w 10 of POCSO Act came to be dropped in the case FIR and the charge sheet was transferred to the court of learned CJM, Leh for disposal under law. That the learned CJM after initiating the trial in the case came to record the statement of the prosecutrix as prosecution witness on 03.07.2025. That the learned CJM, Leh upon recording the statement of the prosecutrix at the trial came to the conclusion that the commission of offence punishable under section 376 of Ranbir Penal Code (RPC for short) stands *prima facie* established against the petitioner pursuant to which, he committed the case for trial to the learned trial court vide its order dated 21.07.2025. That the learned trial court upon receiving the charge sheet pursuant to the commitment of the same in terms of provisions of section 205-D of erstwhile J&K Code of Criminal Procedure, framed charge against the petitioner/accused u/s 376 RPC and directed the prosecution to lead its evidence upon the petitioner’s pleading, “Not guilty” to the charge. That the statement of the prosecutrix as a prosecution witness came again recorded at the trial on 29.09.2025 and the successive

bail application of the petitioner came to be rejected by the learned trial court vide its order dated 15.01.2025.

That the continued detention of the petitioner/accused is violative of his fundamental right to liberty and, besides, amounts to a pre-trial conviction. That the learned trial court ought to have in the ends of justice considered the bail in favour of the petitioner after recording of the statement of prosecutrix at the trial as this court vide order dated 24.04.2025 had directed the learned trial court to consider the bail of the petitioner after recording the statement of the prosecutrix at the trial.

That since the prosecutrix and some other witnesses stand now recorded at the trial as such, there is no question of hamper and tamper of the prosecution evidence.

That the prosecutrix has subsequently made improvements in her statement at the trial to implicate the petitioner in a heinous offence.

That the improvements made by the prosecutrix in her version at the subsequent stages of the criminal proceedings are outcome of exaggerations and manipulations.

That at the initial stage when the offences under POCSO Act were there in the case and charge was also framed by the learned trial court, the alleged prosecutrix who had also engaged a counsel on her behalf did not raise any plea regarding the commission of offence u/s 376 RPC in the case, which clearly demonstrates that the allegation of rape was conceived only after the failure of the prosecution to sustain the charge under POCSO Act against the petitioner.

That a comparative reading of the earlier and later statements of the prosecutrix made during investigation and at the trial reveals material contradictions and inconsistencies demonstrating that her later version is the clear improvement over her previous statement which go to the root of the prosecution case rendering the same inherently doubtful and entitles the petitioner/accused to bail. That there is no medical or scientific evidence in the case in support of the charges against the petitioner regarding his commission of the offence of rape. That since trial of the case is already going on as such there is no need of the petitioner in custody. That the petitioner is a permanent resident of the area possessing clean antecedents and undertakes to comply with the terms and conditions that may be imposed by this court while admitting him to bail. That there is no apprehension of the petitioners misusing the concession of bail by tampering with the remaining prosecution evidence or absconding at the trial. That the statement of the prosecutrix does not inspire confidence. That even if for the arguments sake, it is supposed that the alleged incident has taken place, the prosecutrix nowhere in her depositions disclosed that there was absence of consent.

2. The respondent No.1/UT resisted the bail application on the grounds that petitioner/accused stands involved in the commission of a heinous and grave offence punishable u/s 376 RPC which is non bailable and serious in nature striking at the very core of societal morality. That petitioner cannot claim bail as a matter of right and his application deserves dismissal outrightly. That the petitioner is supposed to have committed the heinous act while misusing his position and by taking undue advantage

of the helplessness of the prosecutrix who had approached him for help. That the statement of the prosecutrix which stands recorded at the trial fully incriminates the petitioner and substantiates the charge framed against him. That the trial of the case is at its initial stage as most of the prosecution witnesses are yet to be examined. That having regard to the petitioners being highly influential, there exists a reasonable and well founded apprehension that if enlarged on bail, the petitioner-accused may influence or intimidate the prosecution witnesses thereby obstructing fair course of justice. That the offences against women have become a serious social menace across the country. That the parliament of India has introduced stringent amendments in the aftermath of Delhi gang rape case to safeguard the dignity and security of a woman and to ensure that perpetrators of such offences are dealt with heavy hand. That the legislative intent behind such stringent provisions would be defeated if persons accused of such heinous crimes are granted bail at an early stage. That the mere fact that the petitioner has been in detention would not, by itself, entitle him to the concession of bail.

That the case of the petitioner attracts the bar under the provisions of section 497 of the Code corresponding to Section 480 BNSS as the offence under section 376 RPC carries a punishment of the imprisonment for life.

That there is no denying the fact that liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be

balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law. In an orderly society an individual is expected to live with dignity having respect for law and also giving due respect to other's rights. The individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society.

3. I have heard the learned counsel for both the parties including the counsel for the respondent No.2/prosecutrix.
4. The learned counsel for the petitioner/accused while reiterating the stand already taken in the bail petition contended that petitioner has been falsely and frivolously implicated in the case FIR when he is innocent and has not committed the alleged offence. That filing of the complaint by the prosecutrix in respect of alleged incident having occurred some four months ago apparently looks to be motivated and a creature of afterthought. The learned counsel contended that the prosecutrix has reported an alleged incident of March 2019 to the police concerned on 1st July 2019 without giving any satisfactory and plausible explanation for delayed report of the said incident to the police. That petitioner was during early phase of the trial granted interim bail by the learned trial court in April 2024 and he did not violate any bail conditions. That during his interim bail period he remained punctual at the trial and there is no compliant of his violation of any bail conditions by any attempt to tamper with the prosecution evidence. He contended that petitioner is a

respectable person of the locality and a man of substance who is not likely to flee from the justice.

The learned counsel submitted that the petitioner has been continuously facing detention in the case since 12.12.2024 when his interim bail came to be withdrawn by the learned trial court only on the observation of the court regarding the prosecutrix being a child. That the said observation of the learned trial court was subsequently set aside by this Court, and pursuant to the directions issued by this Court, the learned trial court conducted a fresh inquiry for ascertainment of the age of the prosecutrix and declared her to be a major, which resulted in dropping of the offence under the POCSO Act.

The learned senior Advocate further contended that even if for arguments sake the petitioner is supposed to have indulged in the act complained of, yet in the facts and circumstances of the case having regard to the alleged continuing acts, commission of the alleged offence punishable u/s 376 RPC cannot be imagined.

The learned counsel further contended that subsequent to the passing of the order dated 24.04.2025 by this Court, the learned trial court was approached on behalf of the petitioner twice on 22.08.25 & 29.09.25, for grant of bail in his favour. That the earlier bail application was rejected on 03.09.25 by the learned trial court on the mere ground that since the statement of the victim is yet to be recorded at the trial as such the bail cannot be granted in view of the order of this court dated 24.04.2025. That the subsequent bail application was again rejected by the learned trial court on the ground of the heinous nature of the crime having serious social

implications, and also on the ground that the offence charged against the petitioner carries punishment of imprisonment for life. He further contended that it is a settled legal position that an accused person is presumed to be innocent till proved guilty at the trial and as such the denial of bail will tantamount to his pre-trial conviction. He submitted that bail is the rule and its denial an exception especially in cases which do not carry the sentence of death or imprisonment for life in alternative. He submitted that the embargo under the provisions of Section 437 of the code corresponding to Section 480 BNSS, does not apply to offences where punishment for imprisonment of life is disjunctive of death sentence. He contended that the petitioner has been behind the bars since last one year and his family has been badly suffering on account of his continued detention.

The learned counsel submitted that petitioner shall undertake to abide by any conditions that may be imposed by this court while admitting him to bail. That the petitioner shall not make any attempt to tamper with the remaining prosecution evidence. He further contended that since the prosecutrix being the star prosecution witness has been recorded among some other witnesses as such there is no need for keeping the petitioner in custody.

The learned Senior Advocate submitted that, in the facts and circumstances of the case, having regard to the delay of four months in reporting the alleged incident to the police, coupled with the contradictory and inconsistent versions of the prosecutrix at different stages of the case,

there appear to be no reasonable grounds to infer the involvement of the petitioner/accused in the alleged crime.

The learned counsel for the petitioner further submitted that if anything can be supposed to have happened, the same in the facts and circumstances of the case appears to be consented. He submitted that the prosecutrix has not alleged a solitary act but continuing acts, and in her statement before the Court, she, inter alia, admitted that she went to Delhi along with her mother and the air tickets were arranged by the accused. That the prosecutrix/respondent No.2 being a matured girl of the age of majority even if scared of petitioner owing to his influential position could have simply avoided him after knowing his intention which was not done till the matter was reported to the police after a gap of four months

5. Per contra the learned counsel for the respondent No.1/UT of Ladakh contended that the petitioner/accused does not deserve the concession of bail as being involved in the commission of a heinous offence which carries an imprisonment of life. That the offence charged against the petitioner is highly anti-social in nature and the act has shaken the conscience of the society. That the petitioner is highly influential, and there is every apprehension that he may intimidate the prosecution witnesses or win over the same. That the petitioner has committed the heinous act while holding a reputed position in the society as the President of Ladakh Buddhist Association, Leh. That, being at the helm of affairs of such a respectable organization, the accused was expected to act as a role model for the youth by imparting values of morality, education, and discipline in society. That,

instead of fulfilling such responsibilities, he indulged in a shameful and reprehensible act of outraging the modesty of a poor girl.

The learned UT counsel further contended that the trial of the case is at its initial stage and the statements of most of the prosecution witnesses are yet to be recorded. That, the release of the petitioner shall flash a bad signal to the society by encouraging the criminal-minded persons. The learned counsel contended that it is well-settled position of law that the presumption of innocence in criminal cases until proof of the guilt at the conclusion of the trial will not be disturbed by mere rejection of bail for securing the fair trial.

The learned State counsel further contended that successive bail applications are not maintainable unless there is a substantial change in the circumstances .

The learned counsel while placing reliance on the judgment cited as “*Kalyan Chandra Sarkar v. Rajesh Ranjan (2005) 2 SCC 52*,” contended that it is a settled legal position that change of circumstances would be considered only on the ground when there is a change in the fact situation or in law on the basis of which the earlier finding become obsolete which is not the ground raised in the instant case.

The learned counsel for respondent No.2/prosecutrix very vehemently opposed the bail application on the grounds that petitioner has sexually exploited the victim who had approached him for his help. That the petitioner while taking the undue advantage of the helplessness and weak position of the prosecutrix subjected her to sexual exploitation so much so that she under fear, threat and coercion hesitated to report the

matter to the police at an earliest. He contended that the petitioner, who was holding a respectable position in society and was about 50 years of age, had degraded himself to such an extent as to misuse his position vis-à-vis the victim. He contended that the act committed by the petitioner is highly anti-social and, owing to this fact, the petitioner does not deserve the concession of bail. He contended that the act committed by the petitioner has shocked the conscience of the society. That the accused is an influential person and is likely to intimidate or threaten the prosecution witnesses with a view to dissuade them from disclosing the true facts at the trial. He further contended that petitioner is likely to misuse the concession of bail if granted in his favour by absconding at the trial. The learned counsel further contended that the petitioner has criminal antecedents as he is involved in a number of such offences. That the petitioner-accused stands charged for the commission of the offence punishable under section 376 RPC and the prosecutrix has clearly established his guilt during her statement at the trial.

6. Before proceeding ahead it is felt appropriate to give a brief synopsis of the prosecution case relevant for the disposal of the instant matter.

On 01.07.2019, respondent No. 2/prosecutrix lodged a written report with the P/S Womens, Leh, alleging that the petitioner had sexually assaulted her in March 2019. She stated that she was 17 years old and that her mother, a divorcee, was suffering from an ailment. Due to her poverty, she was unable to take her mother outside Ladakh for treatment. On the suggestion of her friends mother, she approached the petitioner, who was the President of the Ladakh Buddhist Association (LBA), and

narrated her miseries to him. The petitioner, while initially showing sympathy, began to take undue advantage of his position and made sexual advances toward her at various places. On the first occasion, the petitioner touched her inappropriately in his office, which she did not like. That thereafter, he came to her house in the absence of her mother and touched her private body parts. Thereafter, the petitioner, in his office, laid her down on the sofa and jumped upon her, whereafter he sexually assaulted her. That since the petitioner was holding a high position in the society as such she felt scared and hesitated to make any complaint against him.

That on the basis of the said report, FIR 5/2019 came to be registered with the said police station under section 354, 354-A RPC and 9(1) /10 of POCSO Act and investigation was started. That the statement of the prosecutrix came to be recorded during investigation before a magistrate in terms of the provisions of section 164-A of the Code. That the prosecutrix in her said statement also gave clear details about incident of sexual assault committed upon her by the petitioner. That during the investigation of the case, the commission of offences under Sections 354 and 354-A of the RPC and Sections 9/10 of the POCSO Act came to be prima facie established against the petitioner on the basis of the evidence on record. That the petitioner absconded during investigation of the case and the investigating officer upon being convinced that there are no immediate prospect of his arrest, chose to file the final report/charge sheet in the case FIR before the learned trial court in the absence of the accused while making prayer before the court for initiation of proceedings in terms of section 512 J&K Cr.P.C

corresponding to section 335 of BNSS in the case for preservation of the prosecution evidence. That the learned trial court, upon recording the statements of the Investigating Officer and the Tamili Constable, was satisfied that the petitioner was absconding and that there was no immediate prospect of his arrest in the case; accordingly, the proceedings under Section 512 of the J&K Cr.P.C. came to be initiated in the case. That subsequently, the petitioner approached this Hon'ble Court and obtained interim protection with a direction to approach the learned trial court seeking recalling of the general warrant of arrest issued against him, which he accordingly did. The learned trial court after recalling of the general warrant of arrest against the petitioner/accused admitted him to interim bail which came to be extended till 12.12.2024. Charge against the petitioner/accused came to be framed in the case u/ss 354, 354-A RPC and 9(1)/10 POCSO Act. Subsequently the petitioner made an application before the learned trial court for determination of the age of the prosecutrix in terms of the provisions of Section 94 of the JJ Act. The learned trial court disposed of the said application by holding that the prosecutrix was a child as on date of the occurrence and the interim concession of bail also came to be withdrawn. The order of the learned trial court dated 12.12.2024 came to be assailed before this Court. This Court, vide its order dated 24.04.2025 passed in common for both the petitions, i.e., Petition No. 39/2025 as well as the accompanying bail application No. 15/2025, set aside the order dated 12.12.2024 passed by the learned trial court declaring the prosecutrix as a child and remanded the matter to the learned trial court for a *de novo* enquiry in light of the

observations made by this Court in the said order. That the trial court was given liberty to record any other evidence for arriving at a proper conclusion with regard to the age of victim. That however, the bail petition No. 15 of 2025 came to be dismissed with liberty to petitioner to approach the learned trial court after the statement of the victim is recorded by the said court.

The learned trial court after conducting a fresh enquiry as per directions of this court passed an order dated 06.06.2025 declaring the prosecutrix/respondent no.2 as major with her date of birth as 05.02.2000. The learned trial court vide order dated 14.06.2025 alters the charge already framed by dropping the penal sections under POCSO Act and transfers the case for disposal under law to the learned CJM, Leh.

The learned Chief Judicial Magistrate, Leh commenced the trial in the case and recorded the statement of respondent No. 2/prosecutrix on 03.07.2025. On the basis of the evidence of the prosecutrix, the learned CJM, Leh was satisfied regarding the commission of offence punishable under Section 376 RPC by the petitioner/accused. Accordingly, the case came to be committed to the Court of the learned Sessions Judge for trial vide order dated 21.07.2025 passed by the learned CJM, Leh. The accused came to be formally charged for the commission of the offence u/s 376 RPC by the learned trial court vide order dated 03.09.2025.

An application for grant of bail had been moved on behalf of the petitioner before the learned trial court came also to be dismissed by the learned court vide the same order i.e 03.09.2025. Subsequently, the statement of the respondent No.2/prosecutrix comes to be recorded at the

trial of the case on 29.09.25. A fresh application that came to be filed on behalf of the petitioner on 29.09.2025, came to be again dismissed by the learned trial court vide order dated 15.10.2025. The statement of the PW-3 Ms. Dikshat Dolma also stands recorded at the trial on 16.10.25.

Aggrieved of the order of rejection of bail dated 15.10.25 by the learned trial court, the petitioner has approached this court with the instant successive bail petition.

7. I have perused the instant bail petition, and the objections filed by the respondent No.1/UT. The scanned copy of the trial court record has also been perused.
8. I have also given my thoughtful consideration to the rival arguments advanced on both sides, including the learned counsel for the complainant.
9. Keeping in view the aforementioned perusal and consideration, this court without touching the merits of the case is of the opinion in the facts and circumstances of the case that it may meet ends of justice in case the petitioner/accused is admitted to bail in the case subject to some reasonable terms and conditions.
10. Admittedly, in case of non-bailable offences which do not carry a sentence of death or imprisonment for life in alternative, bail is a rule and its denial an exception especially in cases where firstly the custodial questioning of an accused is not imperative for the logical and scientific conclusion of the investigation and secondly where there is nothing on record to show that the accused, if admitted to bail, will misuse the concession by tampering with the prosecution evidence, by non-

cooperation and association with the investigating agency and also by absconding at the trial.

11. Apart from the statutory bar, if any, two paramount considerations viz. likelihood of accused fleeing from justice and tampering with the prosecution evidence relate to the ensuring of a fair trial of the case in a court of law. It is essential that due and proper appreciation and weightage should be bestowed on these factors apart from others. The grant of bail or the denial of the same falls within the purview of the judicial discretion meant to be exercised on sound legal principles upon the logical interpretation and application of the same in the given facts and circumstances of the case. The necessary arrests subject to the law of bails as provided under the Code, BNSS and the provisions of different special Legislations are permissible under the Constitution of our Country by way of a reasonable exception to the fundamental right to liberty guaranteed under Article 21 of the Constitution and the mandate of the provisions of Article 22 of the Constitution is meant to be followed upon making any such necessary arrests.

12. In State of Rajasthan Jaipur Vs. Balchand AIR 1977 S.C. 2447. The Hon^{ble} Apex Court has held, "basic rule may perhaps be tersely put as bail not jail, except where there are circumstances of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating the witnesses and the like, by the petitioner who seeks enlargement on bail from the court.

13. It is also well settled that the bar imposed under section 480 of BNSS on the exercise of the discretion in the matters of bail subject to proviso

contained in the section, is confined to the offences carrying a sentence of death or imprisonment for life in alternative and the offences carrying a sentence of imprisonment for life disjunctive of death sentence are exempted from the embargo.

14. No single rule or a golden litmus test is applicable for consideration of a bail application and instead some material principles/guidelines are needed to be kept in mind by the Courts and the Magistrates for consideration of a bail application especially including:-

- i. The judicial discretion must be exercised with the utmost care and circumspection;
- ii. That the Court must duly consider the nature and the circumstances of the case;
- iii. Reasonable apprehension of the witnesses being tampered;
- iv. Investigation being hampered or v. The judicial process being impeded or subverted. vi. The liberty of an individual must be balanced against the larger interests of the society and the State. vii. The court must weigh in the judicial scales, pros and cons varying from case to case.
- viii. Grant of bail quo an offence punishable with death or imprisonment for life is an exception and not the rule; ix. The court at this stage is not conducting a preliminary trial but only seeking whether there is a case to go for trial;
- x. The nature of the charge is the vital factor, the nature of evidence is also pertinent, the punishment to which the party may be liable also bears upon the matter and the likelihood of the applicant interfering with the witnesses or otherwise polluting the course or justice, has also a bearing on the matter.
- xi. The facts and circumstances of the case play a predominant role.

15. The *Hon^{ble} Apex Court in Gur Bakash Singh Sibbia Vs. State*

of Punjab AIR 1980 S.C. 1632, referred to the following extract from the American Jurisprudence having bearing on the subject of bail, "where the grant of bail lies within discretion of the court, granting or denial is regulated to a large extent, by the facts and circumstances of each particular case. Since the object of detention order/imprisonment of the accused is to secure his appearance and submission to jurisdiction and the judgment of the court, the preliminary enquiry is whether a recognizance or bond would yield that end. It is thus clear that the question whether to grant bail or not, depends for its answer upon a Variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity for justifying the grant or refusal of bail.

16. It has been laid down by the *Hon^{ble} Supreme Court in SanjayChandra vs. Central Bureau of Investigation AIR 20012 SC830* at Para 14 of its Judgment as under:-

14) In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventive. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment beings after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship.

From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, necessity is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be

deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un- convicted person for the purpose of giving him a taste of imprisonment as a lesson."

17. The Hon'ble Supreme Court in *Dataram Singh vs State of UP and Anr. 2018 3 SCC 22*, has held that even if grant or refusal of bail is entirely the discretion of a Judge, such discretion must be exercised in a judicious manner and in a humane way observing as follows:

"2. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstance of a case.

3. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge-sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure 1973."

18. In *Pankaj Jain vs Union of India and Anr. 2018 5 SCC 743* the Hon'ble Supreme Court has held that the grant of bail has to be exercised compassionately. Heinousness of crime by itself cannot be the ground to out rightly deny the benefit of bail if there are other overwhelming circumstances justifying grant of bail. The Hon'ble Apex Court in its Judgments cited as *Siddharam Satlingappa Mhetre Vs. State of Maharastra AIR 2011 SC 312* and *Sushila Aggarwal and Ors. Vs. State*

(NCT of Delhi) and Anr 2020 SC online 98, has interpreted law even on the subject of anticipatory bail with a very wide outlook and while interpreting concept of liberty guaranteed under Article 21 of the Constitution of our Country in a flexible and broader sense.

19. This Court is conscious of the legal position that offence under Section 376 IPC charged against the petitioner/accused carries a sentence of life imprisonment owing to which fact attraction or otherwise of the bar under Section 480 of BNSS, corresponding to Section 437 of the Code is to be addressed to. As hereinbefore mentioned, the bar imposed under Section 480 of BNSS is not confined to the cases where the imprisonment for life is provided as an alternative punishment disjunctive of death penalty. I deem it proper to reproduce the relevant extracts of the pronouncements of the Hon'ble Apex Court and also of this Court to the clarification of the issue:-

“Gurcharan Singh & Ors. V/s State (Delhi Administration) AIR 1978 SC179.

"If a police officer arrests a person on a reasonable suspicion of commission of an offence punishable with death or imprisonment for life and forwards him to a Magistrate, the Magistrate at that stage will have no reasons to hold that there are no reasonable grounds for believing that he has not been guilty of such an offence. At that stage, unless the Magistrate is able to act under the proviso to section 437 (1), bail appears to be out of the question. The only limited inquiry may then relate to the materials for the suspicion. The position will naturally change as investigation progresses and more facts and circumstances come to light section 439 (1) on the other hand, confers special powers on the High Court or the court of Sessions in respect of bail. Unlike under section 437 (1) there is no ban imposed under section 439 (1) against granting of bail by the High court or the Court of Sessions to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the court of Sessions will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even the Court of Sessions will have to exercise its judicial discretion in considering the question of granting of bail under section 439 (1) The overriding considerations in granting bail which are common both in the case of section 437 (1) and section 439 (1) are the

nature and gravity of the circumstances in which the offence is committed, the position and the status of the accused with reference to the victim and the witnesses, the likelihood of the accused fleeing from justice of repeating the offence of jeopardizing his own life being faced with a grim prospect of possible conviction in the case, of tampering with witnesses, the history of the case as well as of its investigation and other relevant grounds which in view of so many variable factors, cannot be exhaustively set out. The two paramount considerations viz likelihood of the accused fleeing from justice and his tampering with prosecution evidence relate to ensuring a fair trial of the case in a court of justice. It is essential that due and proper weight should be bestowed on these two factors apart from others."

Jawahar Barwa vs. State of J&K, 1973 JKL 74.

"Cases are conceivable in which a person is accused of an offence punishable with imprisonment for life or in the alternative with imprisonment for a lesser term. To quote some instances take for example the offences under section 371, 372 and 376 IPC all of which are punishable with imprisonment for life or imprisonment of either description for ten years and fine. The question arises, as in fact it was raised by Mr. Beg, appearing for the petitioner, whether the restriction imposed in section 497 (1) Cr.P.C. providing that no bail should be granted where there are reasonable grounds for believing that the accused is guilty of an offence punishable with imprisonment for life, applies equally to such cases. The object of the law in providing an alternate punishment seems to be to leave room for the court to impose a lesser punishment than imprisonment for life where, in its opinion, there are some extenuating circumstances which lessen the gravity of the offence. As a corollary it must follow that the restriction imposed by section 497 (1) is not intended to cover a case involving an offence punishable with imprisonment for life and in the alternative imprisonment for a lesser term if there are extenuating circumstances which lessen the gravity of the offence. Even so the court may decline to enlarge the accused on bail in such case as in other cases involving non-bailable offences where larger interests of the state or of the public so demand or because there is reasonable possibility of the accused absconding or tampering with the witnesses or for similar other consideration....."

Assadullah Khan and ors v.s State, SLJ 1980 J&K 31

"The very fact that an offence u/s 376 RPC was punishable "with imprisonment for life or ten years" amply makes out the distinction between the categories of cases of this class and those which fall within the category where punishment provided is death or life imprisonment. It could not be correct to equate offences punishable with imprisonment for life or 10 years in their gravity and seriousness and in matter of bail with those as are punishable either with death or imprisonment for life. The bar for setting out on bail was complete in respect of offences which are punishable either with death or imprisonment for life. That bar in law could not be extended to any other offence."

Mohinder Singh v.s State, KLJ 1987 237

"Therefore the rule of caution for granting bail is in respect of any non-bailable offences which carry punishment of either death or life. The proviso, therefore, classifies the offences on the basis of punishment as there are huge number of offences which are non-bailable some of them defined heinous. First category comes murder u/s 302 RPC while under section 371, 372, 376, 377 RPC etc. Comes later. Thus latter portion of

clause (1) section 497 Cr.P.C excludes the offences which carry sentences for life or 10 years which we are concerned here. The gravity of the charge under Murder is definitely grave. Therefore, punishment provided iis death or life with no other alternative, the forceful portion of the clause 1st of section 497 Cr.P.c. is, therefore, to be read in isolation while the first portion of the clause (1) of section 497 Cr.P.C. which gives a clear command as in section 498 Cr.p.c. for granting the bail. But even u/s 498 Cr.P.C. the latter portion of the 1st proviso has its play and it should be deemed a ride while granting bail u/s 489 Cr.P.C. in non-bailable offences carrying death penalty or life imprisonment. Therefore, there is clear distinction between offences which carry punishment of death or life and offense which carry life and 10 years. This demarcation is very much embedded in clause (1) of section 497 Cr.P.C. In this view of the matter. I am not at all in agreement with the counsel for the complainant that the life imprisonment provided as punishment u/s 377 RPC should be regarded with equal force with offences which carries the punishment of death penalty or life. In my opinion the offences u/s 371,372, 376 and 377 RPC and other carrying similar punishment are out of the clutches of last clause of (1) of section 497 Cr.P.C. The bail in this case is, therefore, to be considered on its own merit without applying the rider indicated in clause (1) of section 497 Cr.P.C."

Satyan, Petitioner Vs State, Respondent Cr.L.J. 1981 1313

"The Magistrate is not justified in holding that he has no power to grant bail to a person accused on the sole ground that the offence is punishable with imprisonment for life. The prohibition against granting bail is confined to cases where the sentence is either death or alternatively imprisonment for life. The expression "offence punishable with death or imprisonment for life" in section 437 (1) does not extend to offences punishable with imprisonment for life only (1926 27 Cr.L.J. 401 (Rang) and 1926 27 Cr.LJ 1063 (Nag) Re1.

The legislature has made a liberal approach in the matter of granting bail and has shown its disapproval in the matter of keeping an accused person in custody in cases where he is ordinarily entitled to bail. The purpose of keeping a person in custody is to ensure his appearance in court at the time of trial and that he is also made available for the purpose of execution of the sentence. The purpose is not penal in character"

20. The offence under Section 376 IPC charged against the petitioner/accused carries a rigorous imprisonment of not less than 10 years, but which may extend to imprisonment for life and with fine.
21. So in view of the punishments provided for the offence of rape under Section 376 IPC the bar created under Section 480 of BNSS is not attracted.

22. Admittedly, the offence charged against the petitioner/accused is heinous in nature and highly anti-social. A murderer destroys the physical body of a victim, but a rapist destroys the very soul of the victim. Society looks with great apathy and hatred an unchaste girl and it is immaterial whether she becomes so by a voluntary act or under force or compulsion.
23. The petitioner/accused has been in custody in the case since 12.12.24 i.e for more than a year. He is supposed to have been badly suffering on account of his continued detention in the case. The trial of the case is going on and the statement of the respondent No.2/prosecutrix stands already recorded. There is no apprehension of the petitioner's influencing the prosecutrix so as to dissuade her from making factual account of the occurrence at the trial. PW-3 has also been examined at the trial. There is nothing on record to show that petitioner shall mis-use the concession of bail, if granted, in his favour by absconding at the trial or by tampering with the remaining prosecution evidence. The offence u/s 376 RPC does not attract the bar u/s 437 of the Code, corresponding to section 480 BNSS as the maximum punishment of life imprisonment provided for the offence charged against the petitioner is disjunctive of death sentence. The apprehensions if any of the prosecution could be met by imposing appropriate bail conditions.
24. For the foregoing discussion, the application is allowed and the petitioner/accused is admitted to bail in case FIR No. 5/2019 under Section 376 RPC of Police Station Womens, Leh, subject to his

furnishing surety & personal bonds in the sum of ₹1,00,000/- each (the surety bond of ₹1,00,000/- to be furnished by two persons from amongst the near relatives of the petitioner, each of whom shall be liable to the extent of ₹50,000/-), to the satisfaction of the learned Registrar Judicial of this Court and the Superintendent of the Jail concerned, respectively, for assuring his compliance of the following conditions:

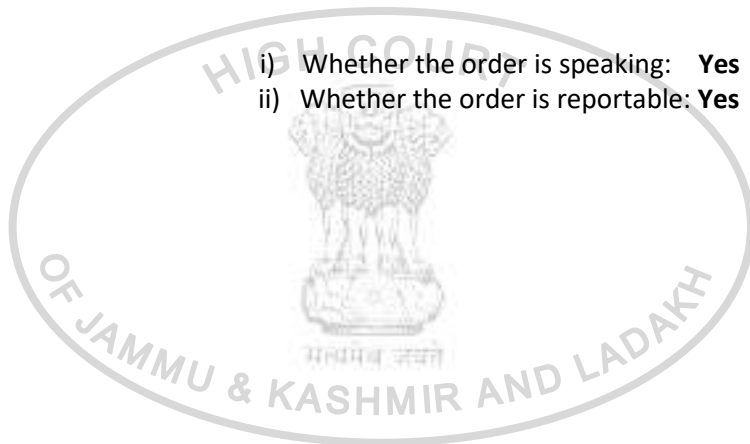
- i) The petitioner/accused shall remain punctual at the trial of the case.
- ii) The petitioner/accused shall not leave the territory of India without prior permission of the learned trial court.
- iii) The petitioner/accused shall not repeat the commission of any crime.
- iv) The petitioner/accused shall not, directly or indirectly, make any inducement, threat, or promise to any of the unexamined prosecution witnesses so as to dissuade them from making true account of the case before the trial court.
- v) The petitioner/accused shall not, in any manner whatsoever, confront the prosecutrix or subject her, directly or indirectly, to any form of criminal intimidation.

25. The learned trial court shall be fully competent to proceed against the petitioner/accused in terms of the provisions of Sections 491 and 492 of the BNSS, in the event of violation of any of the aforesaid bail conditions.

26. It is very needful to clarify that nothing stated in this order shall be construed as any prejudging of or interference with the merits of the case, which shall, be the subject matter of the trial.
27. The learned trial court shall proceed with the trial of the case strictly in accordance with law and shall not be influenced by any references made in this order to the arguments advanced by the learned counsel for the parties, which are limited only to the consideration and disposal of the present bail application.
28. Disposed of.

(Mohd. Yousuf Wani)
Judge

Jammu
15.12.2025
Ayaz



- i) Whether the order is speaking: **Yes**
ii) Whether the order is reportable: **Yes**