

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

Bail App. No. 171/2025 c/w

Bail App. No. 155/2025

***Mushtaq Ahmad Kumar and
Aamir Gulzar Kumar.***

...Petitioner/Appellant(s)

Through: *Mr. M. Ashraf Malik, Advocate with
Mr. Salfi Izhar, Advocate .*

Vs.

UNION TERRITORY AND OTHERES.

...Respondent(s)

Through: *Mr. Illyas Nazir Laway, GA (R-1).
Mr. G. N. Sofi, Advocate (R-2).*

CORAM:

HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE

ORDER

13.10.2025

(ORAL)

1. The instant bail applications are being taken up for consideration and disposal together having regard to the identity of the issues involved.
2. The case set up by the prosecution is that on 3rd August, 2024, respondent 2 herein called the petitioner namely Aamir Gulzar Kumar and requested him to borrow her some money, needed by her immediately as her parents were not at home and that she is alone, the said Aamir Gulzar with one more person came on his Motor cycle outside the residence of the respondent 2 herein for giving her money and that when she came out of her home to collect the money, she was caught hold of and gagged by both the persons and by force put on bike and taken to Naibasti Anantnag where she was kept in a room and raped during the night. It is further the case of the prosecution that later-on on 08.08.2024, the father of the respondent 2 lodged a complaint before Police Station, Ashmuqam against the said persons for commission of rape upon respondent 2 whereupon an FIR was registered and investigation taken up and upon completion of the

investigation the charge sheet was filed on 21st October, 2024, before the court of Principal Sessions Judge, Anantnag, wherein the said accused persons were found to have committed the offences under Section 137(2), 64, 352 (2), 49 BNS, 17, 3/4 POCSO Act, 2012.

3. It is significant to mention here that before filing of the instant applications before this Court, the accused/petitioners had earlier filed two bail applications for grant of bail after laying of the charge sheet before the trial court on 21st April, 2025 which applications however, came to be dismissed by the trial court on 19.06.2025, whereafter the present applications have been filed by the petitioners herein.
4. The petitioners have sought the concession of bail in the instant applications on multiple grounds urged in the applications.
5. Objections to the applications have been filed by the official respondents as well as by the respondent 2 herein, opposing the same.
6. In the objections filed by the official respondents, the instant applications are being opposed *inter-alia* on the premise that the respondent 2 herein on the date of occurrence, i.e, 3rd August, 2024 was minor, aged 16 years and upon registration of FIR at the instance of the complainant being the father of the respondent 2 herein, and after completion of investigation thereof, offences under Section 137 and 4/3 of the POCSO Act 2012 were found to have been committed by the accused petitioners herein. It is further stated in the objections that since the accused/petitioners herein have committed grave and heinous offences, as such, are not entitled to the concession of bail, moreso in view of the provisions of Section 29 and 30 of the Act of 2012 wherein there is presumption that the accused has committed the crime unless contrary is proved read with Section 30 of the said Act which provides that presumption of culpable mental state of committing the crime. It is also stated in the objections that in the event of grant of bail to the

accused/petitioners herein, there is every likelihood that the accused/petitioners herein will jump over the bail and tamper with the prosecution evidence.

Heard counsel for the parties and perused the record.

7. Mr. M. Ahshraf Malik, appearing counsel for the petitioners while making his submissions in line with the case set up in the instant bail applications would vehemently argue that the material witnesses cited by the prosecution stands examined by the trial court and that therein the statements of the said witnesses there are serious material contradictions qua the age of the respondent 2 herein who in fact was not a minor on the date of occurrence and as such does not inspire confidence. It is further contended by Mr. Malik that even the FIR stands registered belatedly by the complainant with the Police Station, almost after a period of five days from the date of occurrence and that, as such, owing to the said facts the accused/petitioners become entitled to the concession of bail having essentially discharged the presumption provided under Section 29 of the Act.
8. On the contrary Mr. Illyas Laway, GA, appearing counsel for the official respondent while controverting the submissions of Mr. Malik would insist that there has been unshakable, credible and cogent evidence on record, signifying that the accused/petitioners have committed a grave and heinous offence and that the plea of age raised by the counsel for the petitioners being major cannot be determined during the consideration of the bail applications, but only upon the ultimate trial of the case. It is further contended by Mr. Laway that the respondent 2 has in her statement before the trial court recorded under Section 164 Cr. P.C, revealed the whole ordeal she has been through while suffering the offence of rape at the hands of the accused/petitioners. Mr Laway would further submit that despite the said credible clinching evidence brought by the prosecution before the trial court

against the accused/petitioners, the accused personas seemingly have succeeded in winning over the respondent 2 herein who has conceded to the instant bail applications.

9. Mr. G. N. Sofi appearing counsel for the respondent 2 herein admits the submissions of Mr. Laway that the respondent 2 herein is not opposing the bail applications.
10. Before proceeding to advert to the applications in hand, it would be appropriate to refer to the position of law enunciated by the Apex Court in the issues of bails and matters allied thereto.

The Apex Court in case titled as ***“Neeru Yadav Vs. State of Uttar Pradesh and Another”***, reported in **2014 (16) SCC 508**, has laid down at para 9 and 10 asunder:-

*“9. In this context, a fruitful reference be made to the pronouncement in **Ram Govind Upadhyay v. Sudarshan Singh**, wherein this Court has observed that grant of bail though discretionary in nature, yet such exercise cannot be arbitrary, capricious and injudicious, for the heinous nature of the crime warrants more caution and there is greater chance of rejection of bail, though, however dependant on the factual matrix of the matter. In the said decision, reference was made to **Prahlad Singh Bhati v. NCT, Delhi** and the Court opined thus:*

‘(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.’

10. *In Chaman Lal V. State of U.P.*, the Court has laid down certain factors, namely, the nature of accusation, severity of punishment in case of conviction and the character of supporting evidence, reasonable apprehension of tampering with the witness or apprehension of threat to the complainant, and prima facie satisfaction of the Court in support of the charge which are to be kept in mind.”

Further the Apex Court in case titled as “**Anil Kumar Yadav v. S (NCT of Delhi) and Another**”, reported in **2018 (12) 129**”, has held as under:-

“17. While granting bail, the relevant considerations are :- (i) nature of seriousness of the offence; (ii) character of the evidence and circumstances which are peculiar to the accused; and (iii) likelihood of the accused fleeing from justice; (iv) the impact that his release may make on the prosecution witnesses, its impact on the society; and (v) likelihood of his tampering. No doubt, this list is not exhaustive. There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court.

“18. While considering the basic requirements for grant of bail, in *State of U.P. through CBI v. Amarmani Tripathi*, (2005) 8 SCC 21, this Court has held as under:-

“18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the 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, behaviour, 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, of justice being thwarted by grant of bail [see *Prahlad Singh Bhati v. NCT, Delhi* (2001) 4 SCC 280 and *Gurcharan Singh v. State (Delhi Admn.)* (1978) 1 SCC 118]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in *Kalyan Chandra Sarkar v. Rajesh Ranjan* (2004) 7 SCC 528: (SCC pp. 535-36, para 11).

“11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the

case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

- (a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.*
- (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.*
- (c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh (2002) 3 SCC 598 and Puran v. Rambilas (2001) 6 SCC 338.)”*

11. Besides above reference to Section 29 and 30 of the Act of 2012 also would be appropriate,

“Sections 29 and 30 of the POCSO Act are "reverse onus" provisions that shift the burden of proof to the accused. Section 29 establishes a presumption that the accused has committed an offense under specific sections (3, 5, 7, and 9) unless the contrary is proven, but this presumption can only be applied after the prosecution proves foundational facts, such as the victim's age and the commission of the crime. Section 30 creates a presumption that the accused has a "culpable mental state" (intention, knowledge, etc.) unless the accused can prove they did not have such a state”.

12. Keeping in mind the aforesaid position of law and reverting back to the case in hand, the first aforesaid plea of the counsel for the petitioners, qua the material contradictions in the statements of the witnesses recorded by the trial court in general and that of the victim in particular qua the age of the respondent 2, it is significant to mention here that the said matter of age of the respondent 2 herein can neither be decided and adverted thereto nor any view thereof can be expressed while considering the instant bail applications, in that, the said issue can be appropriately be determined on the conclusion of the trial of the case by the trial court on the basis of the ultimate evidence that may be led by the prosecution as well as by the defence. The plea of contradictions pointed out by the counsel for the

petitioners in the statements of the witnesses or that the same does not inspire confidence falls into insignificance at this stage.

13. Insofar as the aforesaid next plea of the counsel for the petitioner qua the delayed registration of the FIR is concerned, it needs to be taken note of here that the offence of rape alleged to have been committed by petitioners is a serious offence allegedly committed upon a minor and having regard to the and the Indian society, ordinarily even a major women would not report commission of such an offence of rape, in that, such a women will be fully aware of the repercussions flowing therefrom, in case an offence of rape is disclosed by her in society and also that if subsequently the allegations are found to be false by a competent court, such a women would be looked down upon with contempt throughout her life. The situation would be much serious in the case of an unmarried girl or else a minor girl child as an unmarried girl or a minor girl child would also face immense issues and difficulties in finding a suitable groom on account of an incident of rape and, therefore, having regard to the said societal compulsions a women or a girl child would be extremely reluctant to report the matter of commission of offence of rape and would be even hesitant in admitting that such an offence is committed or had taken place as same would as well affect the chastity of such women/girl child.

Therefore, having regard to the aforesaid position it would have been indeed difficult for the complainant- father of the respondent 2 herein to have even reported the offence of rape committed upon respondent 2 promptly to the police for registration of an FIR. Thus under these circumstances, the petitioners herein cannot be allowed at this stage to derive any benefit of the delayed registration of the FIR for the purposes of seeking concession of bail.

14. Besides, insofar as the provisions of Sections of 29 and 30 of the Act of 2012 are concerned, law is settled that when a person is prosecuted for committing or abetting or attempting to commit an offence under certain provisions of the Act of 2012 including the offence under Section 4, the presumption arises that such person has committed the said offence, so is the position *viz-viz* the provision of Section 30 of the Act which raises a presumption of culpable mental state, meaning thereby that once a person is prosecuted under certain offence under the Act of 2012, the normal presumption of innocence attached to an accused does not come into play while considering bail application of such an accused.

However, it goes without saying that there is otherwise no statutory bar to the grant of bail in case where an accused is prosecuted under the Act of 2012, in that, each case has to be decided on its own merits and circumstances by applying the well recognized principles for grant of bail, as set out by the judicial precedence from time to time.

15. Therefore, in view of the aforesaid facts and circumstances obtaining in the matter, the petitioners herein are not found at this stage entitled to the concession of bail, even though the respondent 2 herein has expressed no objection to the grant of bail to the petitioners herein. Here a reference to the one of the excerpts of the judgment of ***Neeru Yadav*** supra would be relevant which for the sake of brevity is in extenso extracted and reproduced hereunder:-

.....A democratic body polity which is wedded to the rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. Society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the society. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the sem of social stream. It is impermissible. Therefore, an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage,

the court has duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law."

16. Viewed thus, for aforesaid reasons, the applications are ***dismissed***.

17. However, it is made clear that this Court did not express any opinion hereinabove either qua the grant of innocence of the accused petitioners which would be ultimately decided on merits by the trial court upon conclusion of trial. Thus any observation made hereinabove in this regard shall be deemed to have been made for the purposes of the disposal of the instant bail applications and same shall have no bearing upon the merits of the case.

(JAVED IQBAL WANI)
JUDGE

SRINAGAR
13.10.2025
"Ab.Rashid"

<i>Whether the order speaking:</i>	<i>Yes/No.</i>
<i>Whether approved for reporting:-</i>	<i>Yes/No.</i>