

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

**Bail App. No.7/2026**

CrIM No. 68/2026

Reserved on: 25.09.2026

Pronounced on: 01.10.2026.

Uploaded on: 01.10.2026

Operative part or full judgment: Full

**Tanveer Hussain Dar**

S/O Mohammad Afzal Dar

R/O Khumani Chowk,

Bemina, Srinagar.

...Petitioner(s)

Through: Adv. Danish Majid Dar with  
Adv. Ahra Syed.

**Vs.**

**1. Union Territory of Jammu & Kashmir**

through Station House Officer,  
Police Station,  
Bemina, Srinagar.

**2. Shabir Ahmad Rather**

S/O Ali Mohammad Rather

R/O Khumani Chowk,

Bemina, Srinagar.

...Respondent(s)

Through: Sr.AAG Mohsin Qadri with  
AC Nadiya Abdullah for R-1.

Adv. Asifa Padroo, Legal Aid Panel Counsel  
with Adv. Tabinda Yousuf, for R-2.

**CORAM: HON'BLE MR. JUSTICE M. A. CHOWDHARY, JUDGE**

**JUDGMENT**

1. The applicant has invoked the jurisdiction of this Court under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (for short, "BNSS"), seeking his enlargement

on bail in a case **FIR No.54/2022** registered with Police Station Bemina, Srinagar, for offences under Sections 363, 376 and 109 IPC read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, “POCSO Act”), pending trial before the Fast Track Court of POCSO Cases, Srinagar. The applicant has also called in question the order dated **23.12.2025** passed by the learned trial Court whereby his application for bail came to be rejected.

**2.** Learned counsel appearing for the applicant, while arguing the case and seeking the applicant’s enlargement on bail, urges that the applicant has remained in custody for more than four years and that such prolonged incarceration, without conclusion of trial, has seriously impaired his right to a fair and expeditious trial guaranteed under Article 21 of the Constitution of India; that the statements of the main witnesses under Section 161 of the Code of Criminal Procedure have neither been properly recorded nor placed before the Court and that the statement under Section 164 CrPC was recorded at the earliest point of time, whereas the medical examination/statement under Section 164-A CrPC was undertaken much later; that the subsequent version of the prosecutrix contains material improvements and variations; that the material collected during investigation *prima facie* indicates that the applicant and the prosecutrix were acquainted with each

other and were involved in an adolescent relationship; that the medical evidence indicates that the prosecutrix had been dating the applicant for about three years and was found sexually active; that the applicant is entitled to bail particularly when viewed in conjunction with the long period of incarceration, absence of FSL/expert opinion and the fact that the trial has not concluded.

**3.** Learned counsel appearing for the respondents, ex-adversos, opposed the present application and contended that the statement of the prosecutrix under Section 164 CrPC was recorded at the earliest opportunity and, therefore, the absence of a statement under Section 161 CrPC cannot, by itself, be treated as a circumstance favourable to the applicant; that the statement of the doctor makes it clear that the prosecutrix was of tender age and, consequently, any alleged consent on her part has no relevance in law; placing reliance upon Sections 29 and 30 of the POCSO Act learned counsel for the respondents contended that the statutory presumptions operate against the applicant; that the allegations relate to a child and involve offences of grave nature; that the POCSO offences have a serious impact upon Society and the Court is required to keep in view the object of the legislation, the vulnerability of children and the societal consequences of sexual offences against them; that the gravity and severity of the alleged offences, as also the

possibility of prejudice being caused to the prosecution case, furnish sufficient grounds for declining bail.

4. Learned counsel appearing for respondent No.2/ complainant, would oppose the prayer for bail and vehemently argued that no legally recognizable consent can be attributed to a child and that the statutory presumption afforded by the POCSO Act, cannot be diluted by describing the relationship as a “love affair”.

5. Heard learned counsel for the parties, perused the material available on record and considered the matter.

6. At the outset, it needs to be emphasised that the allegations are undoubtedly serious. The POCSO Act constitutes a special statutory framework intended to protect children from sexual assault, sexual harassment and exploitation. The Supreme Court in ***Nipun Saxena v. Union of India, (2019) 2 SCC 703***, has emphasised the heightened need for protection of child victims of sexual abuse. The societal interest in protecting children from sexual offences, therefore, cannot be overlooked. At the same time, seriousness of the accusation, by itself, cannot be the sole determinative factor in deciding a bail application. The Court is required to balance the nature and gravity of the accusation with the constitutional requirement that an under-trial should not be subjected to incarceration for an unduly long period when the trial itself is not proceeding towards conclusion.

7. The settled principle is that pre-trial detention is not intended to operate as punishment. In ***State of Rajasthan v. Balchand*, (1977) 4 SCC 308**, the Supreme Court explained the basic principle that bail is ordinarily to be preferred over incarceration, subject to circumstances such as likelihood of absconding, interference with the administration of justice, intimidation of witnesses or repetition of offence. The same constitutional concern has subsequently been reiterated by the Supreme Court in ***Union of India v. K.A. Najeeb*, (2021) 3 SCC 713**, wherein it was recognised that prolonged incarceration and the absence of a reasonable possibility of conclusion of trial may justify release on bail notwithstanding the gravity of the offence. In the present case, one of the significant circumstances which weighs with this Court is the period of incarceration. The applicant has remained in custody for more than four years. The prosecution has not been able to demonstrate that the trial is likely to conclude within a reasonably proximate period. Right to a speedy trial is an integral facet of Article 21 of the Constitution of India. The fact that the allegation is serious cannot furnish a justification for keeping an accused incarcerated indefinitely as an under-trial. The Supreme Court has repeatedly recognised that an accused cannot be subjected to unending detention merely because the accusation is grave.

8. The respondents have placed reliance upon Sections 29 and 30 of the POCSO Act. There can be no quarrel with the proposition that these statutory presumptions have to be borne in mind by a Court dealing with a prosecution under the POCSO Act. Section 29 raises a presumption in respect of specified offences under the POCSO Act once the statutory foundation is established, whereas Section 30 raises a presumption regarding culpable mental state. However, neither of these provisions create an absolute statutory prohibition against grant of bail. A recent judgment dated 18.08.2026 of this Court in ***Mohammad Ashraf Sheikh v. UT of J&K & Anr., (Bail App. No.84/2026)***, while considering a POCSO bail application, recognised that the presumption under Section 29 is rebuttable and that there is no statutory bar to grant bail in a POCSO case; each case has to be examined on its own facts and circumstances. Thus, the existence of Sections 29 and 30 does not dispense with the necessity of undertaking the ordinary judicial exercise required for determining whether continued incarceration of the applicant is warranted.

9. This Court must be conscious of the limitation upon its jurisdiction. A bail Court is not expected to conduct a mini-trial or to finally determine the credibility of the prosecutrix, admissibility or probative value of disputed evidence, or the ultimate guilt or innocence of the accused.

The Supreme Court in ***The State of Uttar Pradesh v. Anurudh & Anr., 2026 INSC 47***, has recently reiterated that the jurisdiction exercised at the stage of bail is confined to a '*prima facie*' assessment and that the Court cannot embark upon a mini-trial or undertake roving enquiries into disputed questions of fact. Consequently, the rival contentions regarding improvements in the statements, the precise circumstances in which the relationship developed, the evidentiary value of the medical statement, and the absence or otherwise of corroborative scientific evidence will ultimately have to be examined by the learned trial Court on the basis of evidence led before it.

**10.** The contention of learned counsel for the applicant that the prosecutrix and the applicant were involved in a relationship also requires to be considered with some circumspection. There can be no dispute that where the victim was below eighteen years of age, her consent has no legal validity for the purpose of determining criminal culpability under the POCSO Act. The Supreme Court has specifically observed that sexual intercourse with a person below eighteen years, irrespective of consent, attracts the statutory consequences prescribed by law. The Court also emphasised that courts are bound to apply the statutory framework and cannot treat such an offence as lawful merely because the parties describe their relationship as

romantic. Therefore, this Court is not accepting the submission that the prosecutrix's alleged consent constitutes a defense to the prosecution. At the same time, the factual circumstance that the parties were acquainted with each other, if borne out from the material collected during investigation, cannot simply be erased from consideration while examining the question of custody pending trial. It may have a limited bearing upon the assessment of the surrounding circumstances for the purpose of bail, without conferring any legal validity upon the alleged consent of the minor and without prejudging the merits of the prosecution. In ***Shahnawaz Amin Shah v. UT of J&K & Anr., Bail App. No.42/2026***, decided on **05.06.2026**, this Court, while reiterating that the consent of a minor has no legal sanctity, considered the factual circumstances of an alleged relationship between young persons, while determining the question of bail. The said principle has to be understood in its proper perspective; factual circumstances surrounding the relationship may be considered for the limited purpose of bail; they cannot be elevated into a legally valid consent or treated as a defense to the charge under the POCSO Act.

**11.** The medical expert statement referred to by the parties, including the opinion that the prosecutrix was sexually active and the reference to her having been in a relationship with the applicant, also cannot, at this stage,

be treated as determinative of the prosecution case. Sexual activity by itself does not conclusively establish the circumstances in which the alleged sexual act occurred, nor does it determine the legal question of consent under the POCSO Act. Likewise, the absence of an FSL report or other expert opinion, if indeed the prosecution has not placed such material on record, is a circumstance which may be noticed at the stage of bail. It would, however, be inappropriate for this Court to draw a final conclusion regarding the effect of such absence upon the prosecution case.

**12.** The submission regarding non-recording or non-placement of statements under Section 161 CrPC also cannot be examined in isolation. The prosecution has stated that the statement of the prosecutrix under Section 164 CrPC was recorded at the earliest opportunity. Whether the manner in which the investigation was conducted has resulted in any contradiction, omission or prejudice is essentially a matter for the trial Court to determine upon appreciation of the complete record. The fact that the statement under Section 164 CrPC was recorded earlier may explain the prosecution's stand, but it does not, at the same time, justify indefinite incarceration of the applicant when the trial itself has remained pending for more than four years. The Court is also mindful of the submission that offences against children have a

deleterious effect upon Society. There is no doubt that sexual offences against children constitute a serious social concern and that the POCSO Act was enacted to provide special protection to children. The object of the legislation must be given full effect. However, the societal interest and the liberty of the accused are not mutually exclusive considerations. The proper course is to ensure that the trial proceeds expeditiously and that appropriate conditions are imposed to protect the prosecutrix and the prosecution evidence, rather than to convert pre-trial incarceration into punishment.

**13.** While considering bail, the Court is required to take into account, *inter alia*, the nature and gravity of the accusation, the severity of the punishment, the *prima facie* material, the possibility of the accused fleeing from justice, the likelihood of tampering with evidence or influencing witnesses, the possibility of repetition of the offence, the stage of investigation/trial and the larger interest of society. In the present case, the applicant has already remained incarcerated for more than four years. The prosecution has not placed before this Court any specific material demonstrating that, if released on stringent conditions, the applicant is likely to abscond, threaten or influence the prosecutrix or other witnesses, tamper with evidence, or repeat the alleged offence. More importantly, this Court is not called upon at this stage to decide

whether the applicant is guilty or innocent. The observations made herein are confined to determine whether his continued incarceration, pending trial, is justified on the facts presently available. The Supreme Court has repeatedly cautioned that bail proceedings should not be converted into a detailed examination of evidence. The Court is required to form only a *prima facie* view and leave the final determination to the trial Court.

**14.** On an overall consideration of the matter, this Court finds that the following circumstances, taken cumulatively, tilt the balance in favour of enlargement of the applicant on bail. However, considering the nature of the allegations and the fact that the case involves a child victim, the applicant cannot be released without stringent safeguards. The conditions must ensure his presence before the trial Court and prevent any possibility of contact with, intimidation of, or influence upon the prosecutrix or other prosecution witnesses.

**15.** For the foregoing reasons, the present bail application is **allowed**. The applicant shall be released on bail in FIR No.54/2022 registered at Police Station Bemina, Srinagar, subject to his furnishing a personal bond in the amount of Rs.50,000/- with two sureties of the like amount to the satisfaction of the learned trial Court/Presiding Officer, subject to the following conditions:

- (i) The applicant shall appear before the Trial Court, on each and every date of hearing, unless his personal appearance is specifically exempted;
- (ii) The applicant shall not leave the territorial limits of the Union Territory of Jammu and Kashmir without prior permission of the learned trial Court;
- (iii) The applicant shall not, directly or indirectly, contact, communicate with, approach, threaten, induce or attempt to influence the prosecutrix, her family members or any other prosecution witness;
- (iv) The applicant shall not tamper with the prosecution evidence in any manner whatsoever;
- (v) The applicant shall not commit any offence similar to the offence of which he is accused;
- (vi) In the event the applicant violates any of the conditions imposed herein, it shall be open to the prosecution to seek cancellation of bail in accordance with law.

**16.** Bail Application is accordingly **disposed of** along-with pending application(s). However, it is clarified that the observations made herein are purely prima facie in nature and are confined to the adjudication of the present bail application. Nothing contained in this order shall be construed as an expression of opinion on the merits of the

prosecution case. The learned trial Court shall decide the case independently on the basis of the evidence led before it, uninfluenced by any observation made in this order. In case of contraventions of any of the bail conditions, the prosecution shall be at liberty to seek cancellation of the bail granted by this court, on laying a motion before the Trial Court.

**17.** Copy of this order shall be forwarded to the trial court, for information and compliance.

**(M. A. CHOWDHARY)**  
**JUDGE**

Srinagar  
01.10.2026.  
Muzammil. Q

*Whether the order is reportable:*      Yes / No