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

(THROUGH VIRTUAL MODE)

Reserved on: 30.04.2024
Pronounced on: 06.05.2024

Bail App No.60/2024

WASEEM AKRAM & ANR ... PETITIONER(S)

Through: - Mr. P. C. Patnaik, Advocate, with
Mr. Hemant Mishra & Mr. Abid Khan, Advocates
(Petitioners present in person before Registrar Judicial, Jammu)

Vs.

UT OF J&K AND ANR …RESPONDENT(S)

Through: - Mr. Pawan Dev Singh, Dy. AG-for R1.
Ms. Deepika Pushkar Nath, Adv. With
Ms. Zarin Ali & Mr. Gazi Muzamil, Advocates-for R2.

CORAM:HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1) The petitioners having surrendered before this Court seek bail in FIR No.351/2021 dated 28th October, 2021 under Sections 354/342, 498, 498-A, 504/506 IPC registered at Police Station Bahu Fort, Jammu, as also in offence under Section 376, 376-D of IPC added subsequently to the FIR on the basis of statement of respondent No.2 recorded under Section 164 of Cr. P. C.

2) Before adverting to the grounds urged for seeking bail, it is necessary to state few facts relevant to the disposal of this bail application.

3) Genesis of the entire dispute lies in matrimonial discord between the complainant and her husband Razak Hussain who got married on 23.10.2020 as per Muslim rites and rituals. The accused Bilal Hussain is father-in-law and accused Suraya Bibi is mother-in-law of respondent No.2. The other two accused in the FIR, namely, Waseem Akram and Sahil Chowdhary, who are petitioners in this bail application, are real brother and cousin of Razak Hussain respectively. As is evident from reading of the FIR registered by the police on the basis of a written complaint filed by respondent No.2 before Inspector General of Police, Jammu, the husband of respondent No.2, her father-in-law, mother-in-law and brother-in-law had been torturing, abusing and harassing her from the very next day of her marriage for not bringing enough dowry. The written complaint which was filed before Inspector General of Police, Jammu, on the basis whereof the FIR was registered against the petitioners herein and three others, the respondent No.2, apart from making the allegations of abuse, harassment and torture at the hands of her in-laws, also made a complaint against the petitioners that one day she had gone to kitchen to eat something, the petitioners tried to touch her body in an inappropriate manner. The respondent No.2, who was undergoing depression, ran back to her room and bolted herself from inside. Apart from this, there is no allegation of any sexual assault or rape made by respondent No.2 in her complaint. There is, however, an allegation made against father-in-law and mother-in-law, who, as per complaint of the respondent No.2, took her to a Tantrik in Village Badhori where

she was stripped naked by the Tantrik with their help. The unknown Tantrik touched her private parts and applied some oil there. The respondent No.2 in her complaint also refers to an incident of 8th September, 2021. She states that the accused persons including the petitioners herein took her to a God-man in a shrine by the name of Klier Sharief in Uttarakhand. She complains of being abused and beaten by her husband and mother-in-law. She also alleges that she heard the petitioner No.1 telling other accused that they should kill her and throw her here and there will be no witness to the crime. It is here respondent No.2 claims that she somehow managed to reach the roof of the building and after having bolted herself inside, she called her father as well as one Showkat Ali who was responsible for arranging her marriage with Razak Hussain. On the request of father of respondent No.2 and said Showkat Ali, the accused No.1 and 2 brought respondent No.2 back home safely. This is the written version of the complainant about the incident given to the IGP. On the basis of this complaint, FIR No.351/2021 was registered at Police Station, Bahu Fort, Jammu on 28th October, 2021, under Section 354, 342, 498, 498A, 504 and 506 IPC against the petitioners and three others i.e. husband, father-in-law and mother-in-law of the respondent No.2.

4) An anticipatory bail application was filed by all the accused including the petitioners before the Court of Additional District & Sessions Judge, Jammu, which came up for consideration on 5th November, 2021, The Court, while furnishing copy of the application

to APP and calling for the police report, also admitted all the accused including the petitioners to interim anticipatory bail. In the meanwhile, on 3rd November, 2021, respondent No.2 gets her statement recorded before the Magistrate under Section 164 of Cr. P. C in which she, for the first time, alleged the incident of rape and gang rape by the petitioners herein and on the basis of her aforesaid statement, Sections 376 and 376-D of IPC were added against the petitioner.

5) On 10th November, 2021, the aforesaid bail application was withdrawn with liberty to file the fresh. Accordingly, all the accused persons including the petitioners herein filed a fresh anticipatory bail application before this Court which was registered as BA No.359/2021. This Court vide order dated 12th November, 2021, granted interim protection from arrest to all the accused including the petitioners. Subsequently, respondent No.2 also came to be impleaded as party in the bail application. The interim protection granted by this Court was extended till 29th September, 2023. The bail application was disposed of on 29th September, 2023 and the bail in anticipation of arrest in the subject FIR was granted to all the accused except the petitioners herein.

6) Feeling aggrieved and dissatisfied with the order of this Court rejecting anticipatory bail plea of the petitioners, the petitioners approached the Hon'ble Supreme Court by way of SLP(Crl) No.14073 of 2023 titled "Waseem Akram & anr. Vs. Union Territory

of Jammu and Kashmir". The SLP came up for consideration before the Hon'ble Supreme Court on 3rd November, 2023 when the Hon'ble Supreme Court, while issuing notice to the learned Standing Counsel for the Union Territory of Jammu and Kashmir and respondent No.2 herein, also provided, by way of interim order, that the petitioners shall not be arrested subject to the condition that they shall continue to cooperate with the investigation. The SLP was taken up for final consideration by the Hon'ble Supreme Court on 11th January, 2024. The Hon'ble Supreme Court, after hearing both the sides, dismissed the SLP but granted four weeks time to the petitioners to surrender before the jurisdictional court as and when the bail application is filed, with a further direction to the jurisdictional court to consider the bail application, if any filed by the petitioners on its own merit without being influenced by the order held in the impugned order or by the Hon'ble Supreme Court. There was a further direction given to the jurisdictional court to decide the bail application, if any filed by the petitioners, within a period of two weeks. The petitioners were directed to cooperate with the investigation. Four weeks time granted by the Hon'ble Supreme Court for surrendering was extended by four weeks more by the Hon'ble Supreme Court vide its order dated 9th February, 2024, passed on an application filed by the petitioners i.e. M.A. No.271 of 2024. This is how the petitioners filed regular bail application under Section 439 of Cr. P. C before the Court of learned Sessions Judge (Special Judge, Fast-track Court POCSO Cases), Jammu [hereinafter referred to as "*the jurisdictional court*"] on 9th

March, 2024, which was disposed of on 22nd March, 2024. The jurisdictional court declined to grant regular bail to the petitioners and the petitioners are, therefore, before this Court by way of instant application filed under Section 439 of Cr. P. C for grant of regular bail. The petitioners have surrendered before this Court.

7) The bail is sought by the petitioners on the ground that the allegations made in the complaint registered on 28th October, 2021 are totally false and frivolous. The dispute between the respondent No.2 and her husband is purely and simply a matrimonial dispute and the respondent No.2 has made reckless allegations only with a view to settle score with her husband and his relatives. Not only the petitioners, the father-in-law, mother-in-law and husband have been roped in by the respondent No.2. It is submitted that the first available version of the incident narrated by none other than respondent No.2 in her written complaint made before the IGP, Jammu, does not, directly or indirectly, disclose commission of offence under Section 376/376-D of IPC against the petitioners. It is only on 03.11.2021, the respondent No.2, with a view to improvise the case registered against the petitioners, got her statement recorded under Section 164 of Cr. P. C. It is for the first time the respondent No.2 made allegations of rape against the petitioners, that too on two occasions and at two different locations. There is no explanation tendered by respondent No.2 in her statement under Section 164 of Cr. P. C as to why she had not made a mention of these incidents of sexual assault and rape, if any

committed by the petitioners. In a nutshell, the plea of the petitioners is that there is no material on record to persuade this Court to believe that the petitioners have committed the offence under Section 376/376-D IPC.

8) Learned counsel for the petitioners brought to my notice a certified copy of the statement of respondent No.2 recorded in a petition filed under Domestic Violence Act, appended as Annexure-I with CrlM No.588/2024, wherein respondent No.2 has now even gone to the extent of alleging rape by her father-in-law. It is, thus, submitted that the story projected by respondent No.2 to wreak vengeance against her in-laws for her failed marriage is far from truth and is a sheer outcome of imagination and concoction.

9) The bail application is opposed by the Union Territory as well as respondent No.2. The status report filed by the SHO, P/S Bahu Fort, indicating the steps taken by him in the investigation, was passed on by Mr. Pawan Dev Singh, learned Dy. AG, in the open Court which was taken on record. The respondent No.2 has, however, filed detailed objections opposing the bail plea of the petitioners.

10) Mr. Pawan Dev Singh, learned Dy. AG appearing for the UT, submits that the charge against the petitioners is very heinous and, therefore, they do not deserve the concession of bail. He submits that the jurisdictional court has already applied its mind to the facts and circumstances of the case and has rightly declined to grant bail to the petitioners. He submits that the petitioners have even failed to

surrender before the jurisdictional court as was directed by the Hon'ble Supreme Court and, therefore, are guilty of acting in violation of the orders of the Hon'ble Supreme Court.

11) Ms. Deepika Puskhar Nath, learned counsel appearing for respondent No.2, opposes the bail application on the similar grounds. She submits that having regard to the gravity of charge against the petitioners and the nature of investigation required to be carried out, it is necessary to subject the petitioners to custodial interrogation. She submits that the petitioners have not only violated the orders of the Supreme Court by not surrendering before the jurisdictional court for seeking regular bail but they have also failed to cooperate with the police and, therefore, have rendered themselves disentitled to the concession of bail. She argues that the FIR is not an encyclopedia of the entire happening and, therefore, the prosecutrix or the first informant is well within his/her rights to explain and elaborate what is contained in the FIR. She submits that the plea of contradiction between FIR and the statement of respondent No.2 recorded under Section 164 of Cr. P. C cannot be taken to mean that the charge against the petitioners is frivolous and unsustainable.

12) Both sides have relied upon various judgments to buttress their submissions.

13) Having heard learned counsel for the parties and perused the material on record, I am of the considered opinion that having regard to the peculiar facts and circumstances obtaining in the case, the

petitioners do deserve the concession of bail. It is true that similar bail plea filed by the petitioners before the jurisdictional court stands rejected. From reading of the order passed by jurisdictional court, it clearly transpires that the jurisdictional court has rejected the application of the petitioners on two counts, one that the allegations of gang rape leveled by the respondent No.2 against the petitioners are too grave and serious to admit the petitioners to bail and that the petitioners have not surrendered before the court in compliance with the directions of the Supreme Court and, therefore, do not deserve to be enlarged on bail. The petitioners have seriously contested the observation of the jurisdictional court that the petitioners did not surrender before the court for grant of bail. This Court would have no difficulty in accepting what is contained in the order of the jurisdictional court. However, having regard to the fact that the bail application filed by the petitioners under Section 439 Cr. P. C was entertained on 9th March, 2024 goes a long way to show that the petitioners were present in the court on the said date, as is claimed by them on affidavit. Needless to say that application under Section 439 Cr. P. C for grant of anticipatory bail could not have been entertained by the jurisdictional court without the petitioners first having surrendered before the court. It, therefore, seems that the bail application remained pending before the jurisdictional court for some time. The status report from the learned APP was sent for and the matter was heard at length by the jurisdictional court and thereafter reserved for orders. It is at the time of writing of the judgment, the

court observed that the petitioners had not surrendered before the court. If that was the correct position, there was no necessity for the jurisdictional court to go into the merits of the case and decide the application accordingly on merits. The court could have simply dismissed the bail application on the ground that regular bail application would not be maintainable unless the petitioners were either in custody of the police or surrendered before the court. In these circumstances, I am left with no option but to believe statement of the petitioners that they were all along present in the jurisdictional court during the course of hearing of the bail application. Immediately upon rejection of their bail application by the jurisdictional court, the petitioners applied for regular bail to this Court and remained present on each date of hearing. From the police report filed before the Court opposing the bail application of the petitioners, I could not find any material which would indicate that there was non-cooperation with the police on the part of the petitioners. Having said that, I am inclined to consider the bail application of the petitioners purely on merits.

14) Before I delve deep into the matter and weigh the rival contentions, I deem it appropriate to briefly recapitulate the parameters laid down by the Courts governing the grant of bail, particularly in heinous offences.

15) In ***Prasantha Kumar Sarkar vs. Ashish Chatterjee and another,*** **(2010) 14 SCC 496,** the Hon'ble Supreme Court, after surveying entire case law on bails, held thus:

> *"*9….However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:
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> (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
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> (ii) nature and gravity of the accusation;
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> (iii) severity of the punishment in the event of conviction;
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> (iv) danger of the accused absconding or fleeing, if released on bail;
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> (v) character, behaviour, means, position and standing of the accused;
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> (vi) likelihood of the offence being repeated;
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> (vii) reasonable apprehension of the witnesses being influenced; and
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> (viii) danger, of course, of justice being thwarted by grant of bail.

16) Before I proceed further, I deem it appropriate to refer to the observations made by the Hon'ble Supreme Court in Para (17) of the judgment in **Ash Mohammad vs. Shiv Raj Singh alias Lalla Babu and another, (2012) 9 SCC 446,** which reads thus:

> *"17.* We are absolutely conscious that liberty of a person should not be lightly dealt with, for deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes it causes a sense of vacuum. Needless to emphasize, the sacrosanctity of liberty is paramount in a civilized society. However, in a democratic body polity which is wedded to Rule of Law an individual is expected to grow within the social restrictions sanctioned by law.

> 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 others' rights. It is a well accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialized. The life of an individual living in a society governed by Rule of Law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his individual as well as social interest. That is why Edmond Burke while discussing about liberty opined, "it is regulated freedom."

17) Close on the heels is judgment of the Hon'ble Supreme Court in **Satinder Kumar Antil vs. Central Bureau of Investigation & anr, 2022 LiveLaw (SC) 577,** wherein the law relating to bails has once again been elaborately discussed and appropriate guidelines governing the discretion in the matter of bails has been laid down. It is once again emphasized by the Hon'ble Supreme Court that it is trite principle of law that bail is the rule and jail is the exception. Paras 11 and 12 of the judgment deal with this aspect and are, therefore, set out below:

> "11. The principle that bail is the rule and jail is the exception has been well recognised through the repetitive pronouncements of this Court. This again is on the touchstone of Article 21 of the Constitution of India. This court in Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1, held that:
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> > "19. In Gurbaksh Singh Sibbia v. State of Punjab [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465], the purpose of granting bail is set out with great

felicity as follows: (SCC pp. 586-88 , paras 27-30)

“27. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in Nagendra Nath Chakravarti, In re [Nagendra Nath Chakravarti, In re, 1923 SCC OnLine Cal 318 : AIR 1924 Cal 476 : 1924 Cri LJ 732] , AIR pp. 479-80 that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the “Meerut Conspiracy cases” observations are to be found regarding the right to bail which deserve a special mention. In K.N. Joglekar v. Emperor [K.N. Joglekar v. Emperor, 1931 SCC OnLine All 60 : AIR 1931 All 504 : 1932 Cri LJ 94] it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the Court that there was no hard-and-fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In Emperor v. H.L. Hutchinson [Emperor v. H.L. Hutchinson, 1931 SCC OnLine All 14 : AIR 1931 All 356 : 1931 Cri LJ 1271] , AIR p. 358 it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the

cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

28. Coming nearer home, it was observed by Krishna Iyer, J., in Gudikanti Narasimhulu v. State [Gudikanti Narasimhulu v. State, (1978) 1 SCC 240 : 1978 SCC (Cri) 115] that: (SCC p. 242, para 1)

'1. … the issue [of bail] is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process. … After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right.'

29. In Gurcharan Singh v. State (UT of Delhi) [Gurcharan Singh v. State (UT of Delhi), (1978) 1 SCC 118 : 1978 SCC (Cri) 41] it was observed by Goswami, J., who spoke for the Court, that: (SCC p. 129, para 29)

'29. … There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.'

30. In AMERICAN JURISPRUDENCE (2 nd, Vol. 8, p. 806, para 39), it is stated: 'Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the

jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would effect 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 or as necessarily justifying the grant or refusal of bail."

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24. Article 21 is the Ark of the Covenant so far as the Fundamental Rights Chapter of the Constitution is concerned. It deals with nothing less sacrosanct than the rights of life and personal liberty of the citizens of India and other persons. It is the only article in the Fundamental Rights Chapter (along with Article 20) that cannot be suspended even in an emergency [see Article 359(1) of the Constitution]. At present, Article 21 is the repository of a vast number of substantive and procedural rights post Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] ."

12. Further this Court in Sanjay Chandra v. CBI (2012) 1 SCC 40, has observed that:

"21. 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 preventative. Deprivation of liberty must be considered a punishment, unless it is 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 begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. 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 unconvicted 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.
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> 23. Apart from the question of prevention being the object of 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 unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

18) Equally important is a cardinal principle of criminal jurisprudence that an accused shall be presumed innocent till proven guilty and this aspect is important to be born in mind by the Court while considering the bail application filed by a person accused of an offence. The discussion in **Satinder Kumar Antil's** case (supra) made in paras 13 to 18 highlights this aspect of criminal jurisprudence and are, therefore, set out below:

> "…13. Innocence of a person accused of an offense is presumed through a legal fiction, placing the onus on the prosecution to prove the guilt before the Court. Thus, it is for that agency to satisfy the Court that the arrest made was warranted and enlargement on bail is to be denied.
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> 14. Presumption of innocence has been acknowledged throughout the world. Article 14 (2) of the International Covenant on Civil and Political Rights, 1966 and Article 11 of the Universal Declaration of Human Rights acknowledge the presumption of innocence, as a cardinal principle of law, until the individual is proven guilty.

15. Both in Australia and Canada, a prima facie right to a reasonable bail is recognized based on the gravity of offence. In the United States, it is a common practice for bail to be a cash deposit. In the United Kingdom, bail is more likely to consist of a set of restrictions.

16. The Supreme Court of Canada in Corey Lee James Myers v. Her Majesty the Queen, 2019 SCC 18, has held that bail has to be considered on acceptable legal parameters. It thus confers adequate discretion on the Court to consider the enlargement on bail of which unreasonable delay is one of the grounds. Her Majesty the Queen v. Kevin Antic and Ors., 2017 SCC 27:

> "The right not to be denied reasonable bail without just cause is an essential element of an enlightened criminal justice system. It entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal trial process and safeguards the liberty of accused persons. This right has two aspects: a person charged with an offence has the right not to be denied bail without just cause and the right to reasonable bail. Under the first aspect, a provision may not deny bail without "just cause" there is just cause to deny bail only if the denial occurs in a narrow set of circumstances, and the denial is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to that system. The second aspect, the right to reasonable bail, relates to the terms of bail, including the quantum of any monetary component and other restrictions that are imposed on the accused for the release period. It protects accused persons from conditions and forms of release that are unreasonable.
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> While a bail hearing is an expedited procedure, the bail provisions are federal law and must be applied consistently and fairly in all provinces and territories. A central part of the Canadian law of bail consists of the ladder principle and the authorized forms of release, which are found in s. 515(1) to (3) of the Criminal Code. Save for exceptions, an unconditional release on an undertaking is the default position when granting release. Alternative forms of release

> are to be imposed in accordance with the ladder principle, which must be adhered to strictly: release is favoured at the earliest reasonable opportunity and on the least onerous grounds. If the Crown proposes an alternate form of release, it must show why this form is necessary for a more restrictive form of release to be imposed. Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a judge to order a more restrictive form without justifying the decision to reject the less onerous forms. A recognizance with sureties is one of the most onerous forms of release, and should not be imposed unless all the less onerous forms have been considered and rejected as inappropriate. It is not necessary to impose cash bail on accused persons if they or their sureties have reasonably recoverable assets and are able to pledge those assets to the satisfaction of the court. A recognizance is functionally equivalent to cash bail and has the same coercive effect. Cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable. When cash bail is ordered, the amount must not be set so high that it effectively amounts to a detention order, which means that the amount should be no higher than necessary to satisfy the concern that would otherwise warrant detention and proportionate to the means of the accused and the circumstances of the case. The judge is under a positive obligation to inquire into the ability of the accused to pay. Terms of release under s.515(4) should only be imposed to the extent that they are necessary to address concerns related to the statutory criteria for detention and to ensure that the accused is released. They must not be imposed to change an accused person's behaviour or to punish an accused person. Where a bail review is requested, courts must follow the bail review process set out in R. v. St-Cloud, 2015 SCC 27, [2015] 2 S.C.R. 328."

17. We may only state that notwithstanding the special provisions in many of the countries world-over

> governing the consideration for enlargement on bail, courts have always interpreted them on the accepted principle of presumption of innocence and held in favour of the accused.
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> 18. The position in India is no different. It has been the consistent stand of the courts, including this Court, that presumption of innocence, being a facet of Article 21, shall inure to the benefit of the accused. Resultantly burden is placed on the prosecution to prove the charges to the court of law. The weightage of the evidence has to be assessed on the principle of beyond reasonable doubt.

19) It is, thus, trite that while the Court is obliged to bear in mind the parameters for grant of bail reiterated in **Prasantha Kumar Sarkar's** case (supra) and various other judgments that followed it, it is equally important to keep in mind that bail is the rule and jail is the exception is still regarded as essential element ingrained in our criminal justice system. No less important is the presumption of innocence which is regarded as one of the bedrocks of free society and is globally recognized as golden principle of criminal jurisprudence of all civilized nations. We in India find support of this principle flowing directly from Article 21 of the Constitution of India.

20) When the matter on hand is considered in the light of settled legal principles governing bails, it is seen that the material on record falls short of persuading this Court to conclude that there is any *prima facie* or reasonable ground to believe that the petitioners have committed the offence of rape or gang rape. As is evident from the narration of facts given hereinabove, the first version of the incident is available on record in the shape of a written complaint made by none other than respondent No.2 (the prosecutrix). She is, admittedly, a

postgraduate in Arts and is well versed with English language. She being the alleged victim of offence is the best person to know about the occurrence and the manner in which it has happened. Her written complaint made to IGP, Jammu, does not indicate anywhere, directly or indirectly, that she was ever subjected to any sexual assault or rape by the petitioners. From reading of the entire complaint, one would find only an allegation made by respondent No.2 that on one day she was going to kitchen for meals, there was an attempt made by the petitioners to touch her inappropriately. She ran away and locked herself in a room. She does not allege any rape or attempt to rape by the petitioners. She further narrates about her visit along with her mother-in-law, father-in-law, husband and the petitioners to a shrine in Uttarakhand. She has clearly indicated in her complaint that she was subjected to beating by her husband and mother-in-law at Uttarakhand. She also complains of having overheard the petitioner No.1 saying that they should kill respondent No.2 in Uttarakhand. There is no allegation of any rape or attempt to rape made by the petitioners or anybody else in Uttarakhand. It is on the basis of this complaint, the police acted and registered subject FIR. All the accused in the aforesaid FIR other than the petitioners have already been let off on anticipatory bail by this Court. The anticipatory bail application filed by the petitioners earlier was dismissed by this Court on the ground that in view of later statement of respondent No.2 recorded under Section 164 Cr. P. C serious allegation of gang rape had been made. The Hon'ble Supreme Court also did not entertain the SLP against

the rejection of anticipatory bail by the High Court but provided that the petitioners would be free to file a regular bail application before the jurisdictional court after surrendering before it. The Hon'ble Supreme Court also granted eight weeks time to the petitioner to surrender, four weeks initially and thereafter it was extended by another four weeks.

21) I have also gone through the statement of respondent No.2 recorded under Section 164 of Cr. P. C, which was produced before me by the Investigating Officer in the sealed cover. From reading of the statement, it clearly comes out that the respondent No.2 has leveled fresh allegations against the petitioners of having committed rape upon her twice, once in Jammu and thereafter in Uttarakhand without explaining as to why she did not refer to these incidents in her written complaint made before IGP, Jammu, which ultimately became the basis of registration of FIR No.351/2021 at Police Station, Bahu Fort. Interestingly, the respondent No.2 does not even give the exact date, time and place of these incidents. Indisputably, the incident of respondent No.2 having been taken to a Tantrik in village Bhadori implicates a Tantrik and other two accused i.e. father-in-law and mother-in-law of respondent No.2. There is no allegation against the petitioners of any abetment or incitement to the commission of offence by unknown Tantrik. It has come in the police report that the respondent No.2 has not been able to given any clue to reach the Tantrik who allegedly committed offence against her.

22) There is no dispute with regard to the proposition that FIR is not an encyclopedia which must disclose all facts and details relating to the offence reported and an informant may lodge a report about the commission of an offence though he/she may not know the name of victim or his assailant. The first informant need not necessarily be an eye witness so as to be able to disclose in great details all aspects of the offence committed. This is stated and reiterated by the Hon'ble Supreme Court in umpteen judgments. However, the distinction needs to be drawn where the first informant is himself or herself a victim. It is equally significant to bear in mind the distinction between elaboration and improvisation. While elaboration of what is stated in the FIR by the first informant at the time of recording his or her statement is permissible, the same is not true of improvisation which has the result of creating a new offence against the person accused in the FIR. The Hon'ble Supreme Court in the case of **Superintendent of Police, CBI vs. Tapan Kumar Singh, AIR 2003 SC 4140,** has considered this aspect elaborately as under:

> "It is well settled that a First Information Report is not an encyclopedia, which must disclose all facts and details relating to the offence reported. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eye witness so as to be able to disclose in great details all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a

> cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed. If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation. At this stage it is also not necessary for him to satisfy himself about the truthfulness of the information. It is only after a complete investigation that he may be able to report on the truthfulness or otherwise of the information. Similarly, even if the information does not furnish all the details, he must find out those details in the course of investigation and collect all the necessary evidence. The information given disclosing the commission of a cognizable offence only sets in motion the investigative machinery, with a view to collect all necessary evidence, and thereafter to take action in accordance with law. The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the concerned police officer is empowered under Section 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named, and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses the commission of a cognizable offence. Even if the information does not give full details regarding these matters, the investigating officer is not absolved of his duty to investigate the case and discover the true facts, if he can.

23) I am well aware that while considering the bail application this Court cannot hold a mini trial to find out as to whether the evidence of record is sufficient to warrant conviction of the accused. The least that

is permissible to be enquired into is appraisal of the evidence and material on record for the limited purpose of ascertaining as to whether there is any *prima facie* or reasonable ground to believe that the accused had committed the offence. As discussed hereinabove, the given facts and circumstances of the case and the material on record do not indicate that there is any *prima facie* or reasonable ground to believe that the petitioners have committed the offence of gang rape. The manner in which the respondent No.2 has improvised at every stage brings the prosecution case of gang rape against the petitioners in the realm of suspicion. The allegations projected by the respondent No.2 for the first time in her statement recorded under Section 164 of the Code of Criminal Procedure do not inspire much confidence of the Court. It is inexplicable as to why there is not even a whisper about the two incidents of gang rape in her written complaint submitted to the IGP, Jammu, on the basis whereof the FIR was registered. I could understand that there was reference without any details made to the incidents in her complaint filed by respondent No.2 as also in the FIR that was lodged by the police on the basis thereof and respondent No.2 only elaborated and gave details of the incidents in her statement under Section 164 of Cr. P. C. Had this been the case, it would have been perfectly alright and acceptable in law. In her statement made before the Court in a petition under Domestic Violence Act, the respondent No.2 has gone ahead and has even alleged a rape by her father-in-law, which fact she has neither stated in her complaint made to IGP, Jammu, nor has deposed during her statement under Section

164 of Cr. P. C. There is, thus, clear tendency seen in the respondent No.2 to improvise and make fresh allegations involving her in-laws in the heinous offences in a bid to settle score for her disturbed marital life. That apart, the police has not brought to my notice any material to show that the petitioners are influential persons who, if released on bail, will influence the investigation. The petitioners have placed on record several documents to indicate that they had been cooperating with the police. The Investigating Officer, who produced the record before me, has not alleged any such non-cooperation on the part of the petitioners.

24) Viewed thus and having regard to the facts and circumstances of the case, this Court is of the considered view that denial of bail to the petitioners who have surrendered before this Court would not serve the ends of justice. The application is, therefore, allowed and the petitioners are admitted to bail subject to the following conditions:

I. That they shall furnish personal bond in the amount of Rs.50,000/ and two sureties of the like amount each to the satisfaction of Registrar Judicial Jammu;

II. That they shall cooperate with the investigation and shall appear before the Investigating Officer, as and when required;

III. That they shall not influence the prosecution witnesses or the course of investigation in any manner;

IV. That they shall not leave the territorial limits of Union Territory of J&K without prior permission of this Court;

25) It is made clear that the observations made hereinabove shall remain confined to the disposal of the instant application only and shall not be construed as expression of an opinion on the merits of the case. The Investigating Officer shall proceed to investigate the matter to unearth the truth by following the due process of law.

26) The bail application shall stand **disposed** of.

(SANJEEV KUMAR)
JUDGE

Srinagar,
06.05.2024
"Bhat Altaf - Secy""

Whether the order is reportable: **Yes**