Supple-46
Dt. 03.10.24

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

Bail App. No. 150/2024
CrlM. No. 1075/2024

Reserved on: 05.08.2024
Pronounced on: 03.10.2024

Pawan Kumar …Petitioner(s)/Appellant(s)

Through: Mr. Sunil Sethi, Sr. Advocate with
Mr. Shubam Sharma, Advocate

Vs.

UT of Jammu and Kashmir and Another. ...Respondent(s)

Through: Mr. Sumit Bhatia, GA for R-1
Mr. Nikhil Padha, Advocate for R-2

CORAM:

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

JUDGMENT

01. The instant bail application has been filed under the provisions of Section 483 of Bharatiya Nagraik Suraksha Sanhita, 2023, [hereinafter referred to as 'BNSS, for short], corresponding to Section 438 of the repealed Code of Criminal Procedure, 1973, [hereinafter referred to as ' Code' for short], for grant of bail in favour of the petitioner/accused in case FIR No. 116/2022 of Police Station, Katra, the investigation wherein has already culminated into the filing of final police report/challan filed before the court of learned Principal Sessions Judge, Reasi [hereinafter referred to as 'the Trial Court'] in terms of the provisions of Section 193 of the BNSS, corresponding to Section 173 of the Code under sections 376, 506 IPC and 3/4 of Protection of Children from Sexual Offences Act 2012, [herein referred to as ' POCSO Act']

pursuant to the dismissal of his earlier bail application by the Trial Court.

02. The bail has been sought on the grounds that petitioner/accused has been falsely and frivolously involved in the case FIR No. 116/2022 of Police Station, Katra, registered under Sections, 376,506 IPC and 3/4 of POSCO Act, which has culminated in the filing of final report/challan pending before the learned Trial Court. That an earlier bail application filed for and on behalf of the petitioner/accused before the learned Trial Court on 14th February, 2024, came to be dismissed by the learned Trial Court vide Order dated 8th June, 2024 as being non-maintainable on the ground that this Court in a criminal petition filed under Section 482 of the Code, corresponding to Section 528 of the BNSS, stayed the process of taking cognizance on the final report/challan while allowing the presentation of the same vide Order dated 8th May, 2024. That aggrieved by the Order dated 8th June, 2024, passed by the learned Trial Court while dismissing the bail application, the petitioner/accused approached this Court with a bail application bearing No. 133/2024 and this Court, vide Order, dated 21st June, 2024, set-aside the Order dated 8th June, 2024, of the learned Trial Court, directing for adjudication of the bail application on merits. That the learned Trial Court pursuant to the Order dated 21st June, 2024, of this Court heard the bail application afresh and disposed of the same on merits while dismissing the same vide Order dated 10th July, 2024, which necessitated the filing of instant bail application. That the

medical evidence, FSL opinion and more especially, the DNA Analysis Report have ruled out the involvement of the petitioner/accused in the commission of alleged crime. That basically a couple, namely, "X" [husband] and "Y" [wife] residents of Panjar District Udhampur along with their minor children came to Katra in the year 2011 in search of their employment as labourers/private workers on account of their extreme poverty. That the mother of the petitioner/accused gave them shelter and in lieu of the same, Mrs. "Y" used to attend the house hold works of the mother of the accused when "X" used to go for begging at Railway Track, out of which amount the major portion was used to be taken by the mother of the accused. That "Y" while giving birth to her 5th child in the year 2015 expired and later on her husband "X" also died in the year 2018. That the children of the deceased couple consisting of four daughters and one son continued to live with mother of the accused even after the death of their parents as none of their relatives came forward to own them. That in February, 2021, two daughters of the deceased couple including the prosecutrix ran away from Katra on the pretext of seeing their land at their parental village Panjar, Udhampur, as they came to be informed by some villagers that their parental uncles are going to sell out their share in the land also. That while going to their native village Panjar, Udhampur, they met their step maternal grandfather and thereafter both the girls stayed at his residence for 15 to 20 days. That as per the version of one of girls, i.e., sister of the prosecutrix, she narrowly escaped an

attempt of sexual assault of her said maternal step grandfather on which night she ran away from his home and slept on the road side and reached Katra next morning. That the other girl i.e., complaint/victim preferred to stay at her step maternal grandfather's house despite, the insistence by her sister for coming back to Katra. That the respondent no. 2/victim continued to live at maternal grandfather's house till February, 2022, where she reportedly gave birth to a baby girl who is now about more than one month old. That the parental uncle's son of the respondent no. 2/victim, upon hearing about the matter approached the concerned police station in Panjar, Udhampur for taking action against the maternal grandfather of the prosecutrix for committing forcible repeated rape upon her, making her pregnant and even managing her delivery in a Jungle (Forest). That the step maternal grandfather of the respondent no. 2/prosecutrix, by use of his influence succeeded in shifting the blame upon the petitioner/accused. That on 23rd April, 2022, the said person brought the respondent no. 2 to Police Station, Katra, under his influence and succeeded in lodging a complaint written in Urdu before the SHO, Police Station, Katra, involving the petitioner/accused in commission of the crime. That it was alleged in the said complaint lodged by the respondent no. 2 at the behest of her said step maternal grandfather that the petitioner/accused allured her and forcibly committed rape on her, whereafter he threatened her of dire consequences in case she made a revelation of the same, who lastly took the prosecutrix to her step maternal grandfather's

place at Panjar, where, after one month, she gave birth to a baby girl. That the respondent no. 1, i.e., SHO, Police Station, Katra, without looking to the genuineness of the highly motivated complaint prepared and filed by said step maternal grandfather of the victim through her, registered the FIR No. 116/2022 against the petitioner/accused for commission of offences under Sections 376,506 IPC and 3/4 of POSCO Act. That the registration of the FIR against the petitioner/accused is also backed by the persons who have committed the murder of the brother of the petitioner/accused and were acquitted by the Trial Court, but regarding which acquittal, the mother of the petitioner/accused has filed a criminal revision which is pending before this Court alongside the acquittal appeal filed by the Union Territory of Jammu and Kashmir. That the registration of the FIR against the petitioner, was assailed by him through the medium of a criminal petition filed under Section 482 of the Code bearing No. CRM(M) No. 368/2022 titled *Pawan Kumar vs. UT of Jammu and Kashmir and Anr.*, in which, this Court in the first instance directed that while proceeding with the investigation of the case, the respondent no. 1 shall await the orders of this Court for filing charge sheet, if any, contemplated. That this Court subsequently vide Order dated 8th May, 2024, passed on the said petition directed the prosecution to file the challan before the Trial Court, but barred the taking of cognizance in the criminal case till further orders of this Court. That it is the case of the prosecution as mentioned in the challan that the DNA Analysis has ruled out the

petitioner/accused as being the biological father of the child who was born from the respondent no. 2 out of the alleged offence of rape. That the learned Trial Court, while rejecting the bail vide Order dated 10th July, 2024 has committed an error as the Court has failed to appreciate that the allegations against the petitioner/accused as per the prosecution are full of inherent contradictions and based on no overwhelming evidence. That the learned Trial Court has overlooked the very important aspect i.e., DNA Analysis Report while rejecting the bail application. That the petitioner/accused in his petition earlier filed before this Court under Section 482 of the Code has averred that he has been falsely implicated in the case as he had no physical contact with the alleged prosecutrix. That the petitioner/accused voluntarily opted for his DNA profiling for allowing the State to ascertain his involvement. That the incarceration of the petitioner in the case despite his non-involvement as per the DNA Report is unjustified under law. That the learned Trial Court has rejected the bail application of the petitioner only on the basis of statement of respondent no. 2 recorded during investigation under Section 164 of the Code, which, *inter alia*, is to the effect that petitioner raped her for three to four years and when she revealed the matter to her mother, she did not pay any heed to the same and instead turned her out from her residence, which version could not be believed as being without any clear dates and being belated. That had the respondent no. 2 been subjected to the rape by the petitioner continuously for years, then she ought to have raised

an alarm earlier. That the respondent no. 2 was residing for more than one and a half year at Panjar in her step maternal grandfather's house, who, in fact, subjected her to repeated rape and made her pregnant where after he by use of his influence and by exerting undue influence on the respondent no. 2 succeeded in filing a false complaint before the SHO, Katra, for registration of FIR. That the petitioner will not jump over the concession of the bail and shall abide any conditions that may be imposed by the Court. That the Hon'ble Supreme Court of India in a criminal appeal No. 537/2020 titled *Jayanat Chatterjee vs. The State of West Bengal* enlarged the appellant/accused to bail on the ground that DNA Report did not show him as the biological father of the child born.

03. The respondent no. 1 i.e., Union Territory of Jammu and Kashmir through SHO, Police Station Katra Reasi resisted the bail petition on the grounds, *inter alia*; that the petitioner/accused is involved in commission of offences punishable under Sections 376,506 IPC and 3/4 of POSCO Act arising out of case FIR No. 116/2022 registered with Police Station, Katra Reasi; that the statements of the witnesses especially that of the respondent no. 2/prosecutrix recorded under Sections 161 and 164-A of the Code, the medical examination of the respondent no. 2 and her age determination have corroborated the commission of offences by the petitioner/accused during investigation of the case and the final report/challan stands also filed before the competent court which is pending trial; that the DNA profiling of the new born

baby who has subsequently died due to dehydration at SMGS Hospital, Jammu, respondent no. 2/prosecutrix and also of the petitioner/accused has been done and that the learned Trial Court has rightly dismissed the earlier bail application of the petitioner on merits as the offences committed by the petitioner are heinous and antisocial.

04. The bail petition has been resisted on behalf of the respondent no. 2 i.e., prosecutirix on the grounds that the petitioner/accused does not deserve the concession of bail as he has committed serious, non-bailable and antisocial offences in relation to a minor orphan girl by taking advantage of her orphanage and helplessness. That the nature of the crime committed by the petitioner/accused is of utmost seriousness. The petitioner/accused not only forcibly raped the victim resulting in her pregnancy and the birth of a baby at the age of 14 years, but coerced her with a false promise of marriage to ensure her silence. That both the petitioner and his mother further threatened to kill the victim in case she discloses the crime. That fearing her life, the respondent no. 2 was compelled to flee to her maternal grandfather's residence where she gave birth in isolation in March, 2022. That the release of the petitioner/accused on bail is likely to pose a significant threat to the safety and wellbeing of the victim who has already suffered immense trauma. That the accused in order to flee from the clutches of law absconded since 23rd February, 2022 and was only apprehended on 11th February, 2024. That in view of the severity of the charges and potential consequences on the

victim's health and wellbeing, there is high likelihood that the petitioner may attempt to evade the judicial process and cause harm to the victim if granted bail. That mention of the maternal grandfather of the victim as an offender is an attempt on the part of the petitioner to create confusion and to shift the blame. That the statement of the victim clearly reveals that the offences have been committed by the petitioner and not by the said person. That the police concerned during investigation of the case did not find any evidence regarding involvement of the Balak Ram. That the re-examination of the DNA samples is necessary to ensure the accuracy and reliability of the findings. That the initial DNA test results may have been influenced by factors, such as, sample contamination or procedural errors. Furthermore, the doctors, who conducted the original DNA test, be examined as witnesses during the trial to ensure that there was no tampering whatsoever. That the petitioner's continuous attempt to question the DNA Analysis Report is an effort to divert attention from the core issue of sexual assault, which the victim's statement clearly establishes. That granting of bail in this case would set a dangerous precedent, particularly, as the crime involves heinous acts against a minor. Such an act is not only a grave violation of victim's rights but also an affront to societal morals and the rule of law. That the allegations in the FIR and the criminal challan against the petitioner cannot be dismissed as false, frivolous, or baseless solely on the basis of delay in reporting. The delay in reporting such traumatic events is not unusual and should not be used to

undermine the seriousness of the allegations. The victim, who was a mere child and an orphan, of 14-15 years old at the time of the alleged incidents, is likely to have experienced significant psychological trauma, fear and coercion, which could have impeded her ability to report the crime immediately. The fact that the victim did not raise an alarm immediately or that the accused is not the biological father the child does not negate the occurrence of the crime or the credibility of the victim's account. The respondent no. 2 has given the detailed para-wise response to the bail application also.

05. Learned counsel for the respondent no. 2/prosecutrix in support of the memo of his objections has placed reliance on the Authoritative Judgments cited as ***Rahul Kumar vs. Union Territory of Jammu and Kashmir through SHO Police Station Miran Sahib Jammu and Ors, reported in (2023) SCC Online J&K 323, State of Bihar vs. Bajballav Parasad, reported in (2017) 2 SCC 178 and Y vs. State of Rajasthan and Anr, reported in (2022) 9 SCC 269.*** It has been laid down in the relied upon cases that seriousness of the crime committed by the accused, the age of the prosecutrix and the statutory presumptions under Sections 29 and 30 of the POCSO Act are needed to be considered while dealing with the bail application of an accused involved in serious offences of sexual assault in relation to a minor victim. It has also been laid down in the relied upon cases that the court cannot conduct a mini trial while considering a bail application as the same is likely to prejudice the merits of the main case.

06. I have heard learned counsel for the parties, who almost reiterated their respective stands taken in the bail application and the objections respectively.

07. I have perused the instant bail application and objections filed in rebuttal by the respondents. Considered the rival submissions.

08. The final report/challan in terms of the provisions of Section 193 of BNSS is reported to have been already filed before the Trial Court, in which, the taking of cognizance stands barred pending further orders by this Court as per its order dated 8th May, 2024, passed on a petition filed under Section 482 of the Code by the petitioner/accused.

09. The petitioner/accused, as per the police report/challan, a copy whereof is enclosed with the instant bail application, is alleged to have committed the offences punishable under Sections 376,506 IPC and 3/4 of POSCO Act arising out of case FIR No. 116/2022 of Police Station Katra, Reasi.

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 yeild 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 ***Sanjay Chandra vs. Central Bureau of Investigation AIR 20012 SC 830*** 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* ***<u>punishment beings after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty</u>.*** *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 offences under Sections 376 IPC and 4 of POCSO Act charged against the petitioner/accused carry 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 reason s 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 is 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 JKLR 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. This Court is also conscious of the fact that provisions of Sections 29 of the POCSO Act presume commission, abetment or attempt of offences defined under Sections 3,5,7 and 9 of the said Act, in any prosecution against an accused for commission, abetment and attempt of said offences. The provisions of Section 30 of the POCSO Act, also presume existence of the culpable mental state of the accused in any prosecution for any offence under the said Act, which requires a culpable mental state on the part of the accused. However, the accused's right in defense to prove that he had no such mental state with respect to the act charged as an offence is being protected under the provisions of the aforementioned Section 30 of the POCSO Act.

21. It is also true that as per the Section 31 of the POCSO Act, the provisions of the Code including the provisions as to bail and bonds

are applicable in the proceedings before a Special Court under the POCSO Act.

22. The presumptions under Sections 29 and 30 of the POCSO Act are not absolute but are rebuttable presumptions. Such provisions of the Act are to be considered at the conclusion of the trial and they do not operate as a bar for grant of bail if there are other conditions and circumstances which even before recording the evidence during the trial make out a *prima facie* case for not relying upon and considering such presumptions. Such presumptions are in the form of an additional advantage to the prosecution and do not absolve the prosecution from proving the foundational facts of its case. No doubt it is for the accused to prove his innocence after the prosecution establishes its case in terms of the foundational facts.

23. 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. The offence punishable under 4 of the POCSO Act also charged against the petitioner/accused carries a maximum punishment of life imprisonment.

24. So in view of the punishments provided for the offence of rape under Section 376 IPC and for the offence of penetrative sexual assault under Section 4 of the POCSO Act, the bar created under Section 480 of BNSS is not attracted.

25. Admittedly, the offences charged against the petitioner/accused are heinous in nature and highly antisocial. 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.

26. It is the admitted case of the prosecution that DNA Analysis of the victim, the baby and the petitioner/accused has ruled out the later, i.e., petitioner as being the biological father of the baby.

27. The learned counsel for the petitioner/accused, during his arguments, submitted that the Hon'ble Apex Court in a Criminal Appeal No. 537/2020 tiled ***Jayanat Chatterjee vs. The State of West Bengal*** admitted the appellant/accused therein to bail taking into consideration the DNA Analysis report which did not show him as father of the child born.

28. The learned counsel for the respondent no. 2, in support of his arguments, also relied upon the case law holding that DNA evidence showing a lack of biological connection does not invalidate the seriousness of rape allegations or justify bail based on such evidence alone. He also submitted during his arguments that a Court has to consider the other evidence on the record of the file and shall not decide only on the basis of DNA Analysis report, which is never 100% accurate.

29. A DNA test has to be lent credibility especially after the incorporation of Section 53-A in the Code w.e.f. 23rd June, 2006, which has made it necessary for the prosecution to go for DNA test, in rape cases, facilitating the prosecution to prove its case against the accused prior to 2006, the prosecution could have still resorted to this procedure of getting DNA test for making its case foolproof. The Hon'ble Supreme Court in ***Mukesh and Anr. vs. State for NCT of Delhi and Ors. AIR2017 SC 2061*** decided on 5th May, 2017, has

laid much emphasis on the DNA Analysis being accurate as a technique outcome of recent scientific development. The Apex Court in the said case has, *inter alia,* held at para-87 of the Judgment that DNA evidence is now a predominant forensic technique for identifying criminals when biological issues are left at the scene of crime. It is profitable to reproduce the para-88 of the Judgment.

> *88. Observing that DNA is scientifically accurate and exact science and that the trial court was not justified in rejecting DNA report, in* ***Santosh Kumar Singh v. State through CBI (2010) 9 SCC 747,*** *the Court held as under:-*
>
> > *"65. We now come to the circumstance with regard to the comparison of the semen stains with the blood taken from the appellant. The trial court had found against the prosecution on this aspect. In this connection, we must emphasis that the court cannot substitute its own opinion for that of an expert, more particularly in a science such as DNA profiling which is a recent development."*

30. It is also true that prosecution and the complainant have right under law to lead evidence as against the accuracy of the DNA Analysis report during trial of the case. However, during investigation stage or the initial trial stage, ahead of recording evidence, such analysis report can be considered for consideration of a bail petition.

31. As hereinbefore, mentioned at para-14, a series of guiding factors/underlying principles are needed to be kept in mind while considering a bail application of an accused involved in non-bailable offences, regarding which there is no immediate statutory

bar, as in case of an offence punishable U/s 103 of BNS corresponding to Section 302 IPC or in offences punishable U/ss 19, 24, 27-A and offences in relation to commercial quantities under NDPS Act or, in case of offences mentioned under Chapter-IV and VI, Unlawful Activities Prevention Act of 1967 etc. etc., for exercise of judicial discretion among which the factor, "circumstances under which, offence is committed," also finds its place which needs to be given due weightage.

32. In the facts and circumstances of the case, especially, while considering the DNA Profiling report, which does not connect the petitioner with the alleged crime, and the circumstances under which the crime is alleged to have been committed, this Court is of the opinion that it may meet the ends of justice in case the petitioner is admitted to bail subject to reasonable terms and conditions.

33. It is very needful to mention that petitioner/accused during investigation of the case FIR against him preferred a petition under Section 482 of the Code being CRM (M) No. 368/2022 for quashment of the FIR mainly on the ground that he has been falsely implicated in the case which is evident from the DNA Analysis report which does not connect him with the alleged crime. As per the Order dated 8th May, 2024 of this Court passed in the said petition, the Police concerned was permitted to file police report/challan before the competent Court, but the taking of cognizance on the same has been stayed, pending further orders from this Court. The trial on the main criminal case/challan is needed to be started and to be proceeded expeditiously. After all the outcome of the petition filed under Section 482 of the Code

pending before this Court shall have a direct bearing on the trial of the criminal case.

34. For the foregoing reasons and discussion, the instant application is allowed and the petitioner/accused is admitted to bail subject to his furnishing personal and surety bonds each in the amount of Rs. 50,000/- for complying with the conditions of this order. The surety/bail bond shall be furnished to the satisfaction of the learned Trial Court. The bail order shall, however, be subject to the following conditions:-

    a) The petitioner/accused shall remain punctual at the trial of the case.

    b) The petitioner/accused shall not directly or indirectly, make any inducement, threat or promise to the prosecution witnesses especially the prosecutrix so as to dissuade them from making their statements at the trial of the case.

    c) The petitioner/accused shall not leave the limits of the Jammu, Division of the Union Territory of J&K without the prior permission of the learned Trial Court and shall not repeat the commission of crime.

35. In case the requisite surety/bail bond is furnished and attested, the learned trial court shall issue a formal release order directing the Superintendent of the concerned Jail, where the petitioner is lodged, to release him from the custody in the instant case subject to the furnishing of his requisite personal bond to the satisfaction of Superintendent of the concerned jail.

36. The observations in this order have been so made for the limited purposes of disposal of this bail application filed under Section 483 of BNSS [439 of the Code] and shall not be construed as any interference or prejudging of the merits of the case, to be decided at the conclusion of the trial.

37. The learned Registrar Judicial, Jammu, shall take necessary steps for getting the pending petition under Section 482 of the Code being CRM(M) No. 368/2022 titled ***Pawan Kumar Vs. UT of JK and An***r, specially assigned expeditious speedy disposal thereof to an appropriate Bench of this Court under the orders of Hon'ble the Chief Justice, provided the same is not already disposed of. The pendency of the said petition has halted the trial of the criminal case against the petitioner/accused, who is alleged to have committed the serious offences punishable under Sections 376 IPC, 4 of POCSO Act, being against the society. The petitioner/accused may not be interested in the speedy disposal of the said petition, which has halted the trial of the main criminal case.

38. The learned Trial Court shall, notwithstanding the pendency of the aforesaid petition under Section 482 of the Code before this Court, in which, by Order dated 8th May, 2024, the cognizance on the criminal case has been barred till further orders of this Court, continue to list the same [criminal case/challan] without any effective proceedings till and subject to disposal of the petition (refer to order dated 8th May, 2024 passed therein) with short adjournments, not exceeding 15 days and ensure the presence of the petitioner/accused at the trial with liberty to proceed under the provisions of Sections 491,492 of BNSS, corresponding to Sections

446, 446-A of the Code, in case of t he absconding at the trial of the petitioner/accused.

39. Before parting, it is felt needful to observe that sometimes self induced environment, life situation, opportunity, fear, helplessness and undue influence compels a girl child to fall an easy prey to the sexual assault.

40. The prosecutrix alongwith her sisters and brother was putting up in the house of the petitioner/accused since the time her parents were alive. After the death of the parents of the prosecutrix, none of her relatives came forward to own her and her other sisters. The petitioner/accused had an opportunity to do the illegal act. The prosecutrix being a minor child is supposed to be an unaware of the consequences of the act allegedly committed in relation to her. The situations are different where the illegal acts are being committed by persons having an entrustment or custody of females in their responsible capacities as public servants.

41. Some bare minimum preventive measures in aid of law need to be taken by the prudent parents and guardians in respect of their children/wards to save them from exploitation on account of their vulnerability based on infancy, immaturity, bonafide belief, fear, reputation etc. etc. Sometimes children are thrown voluntarily by their parents and guardians in exploitation prone environment unmindful of the consequences. No doubt the law enforcing agencies are always at high alert but the criminal minded always find an opportunity to commit crime. The chastity of a girl is of

predominating factor in the matter of her marriage. The society looks up with apathy, abhorrence and hatred to an unchaste girl and this includes the girl ravished by force or under compulsion. Most of the incidents relating to sex offences are not at all reported to the police. The court cannot loose sight of the fact that in sexual offences, the failure to report the incident to the police can be due to a variety of reasons particularly due to reluctance of the prosecutrix and her family members go to the police and complain about incident which concerns the reputation of the prosecutrix and the honour of the family members. It is only upon a cool thought that a complaint of sex offences is generally lodged. In the present society and more particularly in conservative villages, the chastity of a girl is of a great importance for her matrimonial relations.

42. A little bit reasonable care and precaution in aid of law is sure to prevent an unfortunate incident of exploitation and save honour and reputation of a child. The long penal provisions containing Proviso upon Proviso cannot repair and restore the loss in terms of honour and reputation. No doubt our Parliament upon taking a serious note of the incidents of rape and gang-rape of women under the age 16 years and 12 years, has made suitable amendments in the Penal Laws and also legislated special Acts for protection of children from sexual offences so as to generate an environment of deterrence by providing stringent punishments. Article 15 of our Constitution *inter alia* confers upon the State powers to make special provisions for children. Further Article 39 *inter alia* provides that the State shall in particular direct its policy towards securing that tender age of the children is not abused and their childhood and youth is

protected against an exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

43. The United Nations Convention on the Rights of the Children, ratified by India on 11th Dec. 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity.

44. The prosecutrix and her other minor sisters being orphans were living in the home of petitioner/accused even after death of their parents and their relatives did not bother to come to their rescue. Even the authorities under the **Juvenile Justice (Care and Protection of Children) Act 2015** (hereinafter for short referred to as the Act) fail to act in respect of the said children in accordance with the provisions of Chapter-VI and VII of the aforesaid Act and the rules framed there under. Guilty are liable for penalty U/s 34 of the Act for non reporting. Concerned Child Welfare Committee(s) shall in a discreet manner swing into action, verify the present position of the prosecutrix/respondent No.2 and her minor sisters and brother and press into the service the measures for their rehabilitation and social re-integration if needed in consultation with their relatives.

45. The learned Trial Court shall verify as to whether an application by or on behalf of the prosecutrix/respondent no. 2 for award of compensation under Victim Compensation Scheme in force stands filed and processed. In case such an application is not found to have been filed, the learned Trial Court shall take necessary steps in

coordination with the District Legal Service Authority, Jammu, so that the entitlement of the prosecutrix to compensation under Victim Compensation Scheme is addressed to at an earliest.

46. Disposed off.

(MOHD YOUSUF WANI)
JUDGE

JAMMU
03.10.2024
Ayaz TF"*Shamim Dar PS*"

i) *Whether the order is speaking:* *Yes*

ii) *Whether the order is reportable:* *Yes*