
(2020) 08 J&K CK 0082

Jammu And Kashmir High Court

Case No: Criminal Miscellaneous Petition (M) No. 156 Of 2020, Criminal Miscellaneous No. 436 Of 2020

Mohd Naseem

APPELLANT

Vs

Union Territory Of J&K
And Others

RESPONDENT

Date of Decision: Aug. 4, 2020

Acts Referred:

- Code Of Criminal Procedure, 1973 - Section 161, 164, 437, 437(1)(i), 482
- Indian Penal Code, 1860 - Section 109, 376(D), 363
- Protection Of Children From Sexual Offences (POCSO) Act, 2012 - Section 4

Hon'ble Judges: Javed Iqbal Wani, J

Bench: Single Bench

Advocate: Jagpaal Singh, Aijaz Lone, Anwar Chowdhary

Final Decision: Disposed Off

Judgement

Javed Iqbal Wani, J

1. In this petition filed under section 482 Cr.PC, petitioner/ complainant (father of alleged minor rape victim) has sought indulgence of this court for

quashment of order dated 30.03.2020 passed by the court of Principal Sessions Judge, Samba (hereinafter to be referred as court below), in terms

whereof respondent No. 2 has been granted bail in case FIR No. 29/2020 for commission of offences punishable under section 376-D, 363, 109 IPC

and section 4 POCSO Act 2012. Respondent No. 1 after entering appearance through State counsel has filed status report, as also has respondent No.

2 filed objections in opposition to the petition.

2. This case reflects a sad and sordid state of affairs. According to the petitioner/ complainant his minor daughter came to be abducted by respondent

No. 2 along with his two associates on 11.02.2020, (one among them namely Zahid Chowdhary S/o Saif Ali R/o Swankhi Bari Brahmana, Samba),

and on 12.02.2020 at about 06:00 am was found in a field near his house in unconscious state of mind where after the petitioner got FIR No. 29/2020

dated 12.02.2020 registered for commission of offences punishable under section 376-D, 363, 109 IPC and section 4 POCSO Act with respondent

No. 1, against the accused persons including respondent No. 2 and investigation set into motion. According to the petitioner/ complainant statement of

victim daughter was recorded under section 164 Cr.PC wherein the victim categorically stated that the respondent No. 2 along with his cousin Zahid

Choudhary kidnapped her and committed rape upon her. According to the petitioner respondent No. 2 along with aforesaid co-accused moved a bail

application before court below on 27.02.2020 which came to be opposed by the petitioner and same came to be dismissed on 18.03.2020. However,

according to the petitioner, respondent No. 2 seem to have filed another bail application before the same court on 11.03.2020, during the pendency of

first bail application and that the petitioner was not aware of the said subsequent bail application, as no notice whatsoever had been issued to the

petitioner by the court below and that the trial court in the subsequent bail application at the back of the petitioner granted bail to the respondent No. 2,

in terms of impugned order dated 30.03.2020. According to the petitioner, the above exercise had been done at his back in order to enlarge the

respondent No. 2 on bail in a camouflaged manner.

3. The petitioner has questioned the aforesaid order inter-alia on the grounds that the impugned order has been passed in a very casual and mechanical

manner and without application of mind to the peculiar facts and circumstances of the case and has been passed in a superficial manner without taking

note of settled principles of law qua granting of bail in such type of heinous offences committed against minor girl in as much as, that the impugned

order has been passed by the court below without giving an opportunity of being heard to the petitioner, as is envisaged under law. The petitioner has

further urged in the grounds of challenge that the impugned order has been passed by the court below in breach of the mandate provided under section

437 Cr.PC and in the process the court below while passing the impugned order seemingly has not drawn any satisfaction as required under section

437 (1)(i) Cr.PC. It is next urged in the ground of challenge by the petitioner that besides observing in breach the aforesaid provision of section 437

Cr.PC, the court below has failed to take into account the statement of the victim recorded under section 164 Cr.PC wherein the victim had

categorically stated that the respondent No. 2 along with his above named cousin kidnapped her and both committed rape upon her and in this view of

the matter, coupled with the status report filed by the respondent No. 1 before the court below, there was no occasion in law for the court below to

grant bail to the respondent No. 2. It is further urged in the grounds of challenge by the petitioner that the court below failed to follow parameters

enunciated by Supreme Court which provide for grant of bail in non-bailable offences. It is next urged in the grounds that the court below even ignored

and did not follow the procedure / norms/ guidelines prescribed to be followed for grant of bail to under trials during the period of lockdown due to

outbreak of COVID-19, where under in the corrigendum dated 01.04.2020 it had been specifically provided that no bail shall be granted to the accused

booked under POCSO Act, and that the court below while rejecting bail in number of similar other cases involving POCSO Act granted bail to the

respondent No. 2, although involved under the POCSO Act.

4. Respondent No. 1, in the status report filed while reiterating the contents of the status report filed before the trial court has stated that upon

registration of aforesaid FIR No. 29/2020 against the respondent No. 2 and above named accused namely Zahid Choudhary, investigation was set into

motion and that after respondent No. 2 was arrested the other accused namely Zahid Choudhary absconded and that during the course of

investigation, medical examination of the victim was conducted under law and her clothes were seized besides recording statement of circumstantial

witnesses under section 161 Cr.PC, statement of the victim under section 164 Cr.PC was got recorded wherein the victim alleged her kidnapping by

accused / respondent No. 2 with his above named cousin in a car as also alleged committing of rape upon her. It is further stated in the said status

report that after the respondent No. 2 was bailed out by the court below he failed to cooperate with the investigation despite having been summoned

by the I.O. The status report further provide that FSL report is awaited as also arrest of above named accused namely Zahid is yet to be effected and

that since the respondent No. 2 is involved for the commission of grave and heinous offences was not entitled to be enlarged on bail by the court

below and that non-cooperation into investigation entails cancellation of his bail also for the reason that the co-accused namely Zahid is absconding

and both respondent No. 2 and said absconder being at large are likely to hamper investigation as also to influence the witnesses.

5. Per contra respondent No. 2 in his objections filed in opposition to the petition has resisted and controverted the petition on multiple grounds seeking

dismissal of the same primarily upon maiden/ preliminary objection qua the maintainability of the petition on the premise that the order under challenge

is an interim order, as such, not open to challenge under section 482 Cr.PC. It is further stated in the objections that investigation of the case is

complete and that the medical checkup of the girl during the course of investigation has come out negative for rape and that the whole case is falsified

and that the statement under section 164 Cr.PC of the victim has been got recorded under threat and undue influence by the petitioner. Refuting to

have filed two bail applications before the court below, respondent No. 2 in the objections has stated that initially an anticipatory bail application came

to be filed by him along with co-accused Zahid and during its pendency the respondent No. 2 was arrested constraining him to withdraw the said

application and to move a fresh regular bail application wherein order under challenge came to be passed. It is also controverted in the objections that

the order under challenge was not passed at the back of the complainant/ petitioner or else without notice to him.

6. Heard and considered.

7. Before advertng to the facts and issues involved in the petition in hand it would be appropriate and advantageous to refer to law laid down by the

Hon'ble Supreme Court relating to the subject of bail and issues connected thereto. In *Puran Vs. Rambilas* reported in 2001 (6) SCC 338, in para

10, it has been noted as follows:

“It has been held that generally speaking the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course

administration of justice or evasion or attempt to evade the due course of justice or abuse the concession granted to the accused in any manner. It is

however to be noted that this court has clarified that these instances are merely illustrative and not exhaustive. One such ground for cancellation of

bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of this nature and that too

without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set

aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the society. Therefore, an

arbitrary and wrong exercise of discretion by the trial court has to be corrected.

In para 11 of the judgement supra it has been also noted as under: -

“Further, it is to be kept in mind that concept of setting aside the unjustified illegal or perverse order is totally different from the concept of

cancelling of bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation.

8. In *Kalyan Chandra Sarkar Vs. Rajesh Rangan @ Pappu Yadav and another Vs.* (2004(7) SCC 528), In para 11 it has been noted as follows:

“The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious

manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation

of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was

being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would

suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following

factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay V. Sudharshan Singh (2002 (3) SCC 598)

and Puran V. Rambilas (2001 (6) SCC 338).

It is also noted in the case supra at para 14 and 16, that the conditions laid down under Section 437 (1) (i) is sine qua non for granting bail even under

Section 439 of the Code and also that grant of bail on the ground of period of incarceration by itself was not proper.

9. The law evolved on the subject by the Supreme Court provides that although a conclusive finding in regard to the points urged by the parties is not

expecting of the court considering the bail application, yet giving reasons is different from discussing merits or demerits. As noted above, at the stage

of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. But that does not

mean that while granting bail some reasons for prima- facie concluding why bail was being granted is not required to be indicated.

10. Looking at the instant petition, the impugned order and the other material on record from the perspective of above referred law laid down by the

Hon'ble Supreme Court above what gets revealed that the court below has overlooked the aforesaid propositions, principles and parameters while

passing the impugned order. The status report filed before the court below by respondent No. 1 prima-facie suggested commission of the offences in

the light of facts particularly the statement of victim recorded under section 164. CrPC wherein on the face of the statement of the victim a heinous,

horrid and a horrendous crime had been committed by the accused, released on bail. No reasons worth the name have been spelt out by the court

below while admitting the respondent No. 2 to bail, except that the medical opinion provided no proof of recent sexual intercourse which medical

opinion upon being summoned by this court nowhere provides so, except for a pathological opinion stating that of the two stained vaginal smear slides

shows no spermatozoa, which in law could not said to be a determinative factor or conclusive proof to dislodge theory of rape. The opinion nowhere

provides the expression "No proof of recent sexual intercourse" as is recorded by the court below in the order impugned. Reference in this regard

would be advantageous to Wahid Khan Vs. State of Madhya Pradesh, (2010 (2) SCC 9 wherein para 20, following is noted;

"It is appropriate in this context to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (22nd Edn.) at

p.495 which reads thus:

"Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and

rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or

even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of

rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the

negative facts in his report, but should not give his opinion that no rape had been committed. Rape is a crime and not a medical condition.

Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the

medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal

conclusion, not a medical one.

Reference to para 17 of the judgement supra would also be appropriate which is noted as under;

It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully

aware of the repercussions flowing there from. If she is found to be false, she would be looked at by the society with contempt throughout

her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or

a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She

would also be conscious of the danger of being ostracized by the society. It would indeed be difficult for her to survive in Indian society

which is, of course, not as forward-looking as the western countries are.

11. The preliminary objection supra qua the maintainability of the petition as raised by the respondent No. 2 can be well answered while referring to

and placing reliance on para 6 noted as under, of State of Karnataka Vs. Devenderappa and anr. 2002 (3) SCC 89.

“ It has been laid down that all courts whether civil or criminal possess, in the absence of express provision, as inherent in their constitution, all such

powers as are necessary to do the right and to undo a wrong in the course of administration of justice and that qua an interlocutory order as well

power under section 482 can be exercised by the High Court in case the impugned order clearly brings out a situation which is an abuse of process of

court, or for the purpose of securing the ends of justice interference of High Court is absolutely necessary, then nothing contained in section 397 can

limit or affect the exercise of inherent power of High Court

AND

Para 17 of Puran Vs. Rambilas (supra), noted as under;

“Further, even if it is an interlocutory order, the High Courts inherent jurisdiction under section 482 is not affected by the provisions of section 397

(3) of Code of Criminal procedure. That the High Court may refuse to exercise its jurisdiction under section 482 on the basis of self imposed

restriction is a different aspect. It cannot be denied that for securing ends of justice, the High Court can interfere with the order which causes

miscarriage of justice or is palpably illegal or is unjustified. (Madhu Limaye Vs. State of Maharashtra 1977 (4) SCC 551 and Krishnan Vs.

Krishnaveni 1997 (4) SCC 241.

12. In view of the nature of offences, the ferocity of the crime, the statement of the victim recorded under section 164 Cr.PC, the apprehension of the

threat to the victim at the hands of the accused and absconding co-accused, the provision of section 437 Cr. PC there seem to be no reason for the

trial court to have admitted the accused / respondent No. 2 to bail in a crime which has a serious magnitude and it will be a sheer abuse of process of

law, in case the impugned order is allowed to continue, more so, in view of the specific objection of the respondent No. 1, that the accused is not

cooperating with the investigation agency and has failed to appear before the Investigating Officer despite repeated calls / messages to attend the

investigation.

13. For all that has been observed and discussed above this court while exercising powers under section 482 set aside the impugned order dated

30.03.2020 passed by the Principal Sessions Judge, Samba, as a corollary of which the accused/ respondent No. 2 shall be taken into custody by

respondent No. 1 who shall also take effective steps for arresting the absconding co-accused namely Zahid Choudhary, (if not already arrested)

forthwith and to conclude the investigation diligently in accordance with law.

14. It is made clear that any observation made hereinabove while testing the validity and the legality of impugned order dated 30.03.2020 in the petition

in hand shall not be construed to be expression of any opinion about the guilt or otherwise of the accused(s), and shall also not deemed to be

expression of any opinion about the merits of the case.

15. Disposed of along with all connected CrLM(s).