

**Sr. No. 249**  
**After Notice**

**HIGH COURT OF JAMMU AND KASHMIR**  
**AT JAMMU**  
**(THROUGH VIRTUAL MODE)**

Bail App No. 211/2020  
CrlM No. 1277 & 1699 of 2020

Reserved on:- 16.12.2020  
Pronounced on:- 24.12.2020

Aman Sagotra

.....Petitioner (s)

Through :- Mr. Gagan Basotra, Sr. Advocate with  
Mr. Salil Gupta, Advocate.

V/s

UT of J&K

.....Respondent (s)

Through :- Mr. Ravinder Gupta, AAG

**Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE**

**JUDGMENT**

1. Through the medium of the instant petition, the petitioner is seeking regular bail in F.I.R No. 04/2020 for offence under Section 376 IPC registered with Police Station, Hiranagar.

2. The facts leading to filing of the instant petition are that on 03.01.2020, the prosecutrix lodged a complaint with Judicial Magistrate 1<sup>st</sup>

Class Hiranagar alleging therein that while she was studying in 10<sup>th</sup> class she

complaint that the petitioner-accused had sexual relation with the complainant and he would threaten her with dire consequences in case she disclosed anything about this relationship to anybody.

3. The aforesaid complaint was forwarded by the learned Judicial Magistrate to incharge Police Station, Hiranagar for taking action under law and, accordingly, F.I.R No. 04/2020 for offence under Section 376 IPC came to be registered. During the investigation of the case, statement of the prosecutrix under Section 164-A Cr.PC was recorded by the police.

4. After investigation of the case, the police found that the offence under Sections 376 IPC is made out against the accused and, accordingly, the challan was produced before the competent Court. The challan, at present is pending disposal before the Court of learned Principal Sessions Judge, Kathua. It appears that the petitioner had approached the trial Court for grant of bail but the same has been dismissed vide order dated 12.10.2020 passed by the trial Court.

5. The petitioner has sought bail on the grounds that the prosecutrix had willfully and intentionally, out of her free consent, entered into a relationship with petitioner/accused, as such, it cannot be stated that sexual relationship between the petitioner and the prosecutrix had taken place on account of any misconception; that the statement of the prosecutrix recorded under Section 164-A Cr.PC does not inspire confidence; that the prosecutrix, during the investigation of the case, has refused to undergo medical

that investigation of the case is complete and the petitioner is in custody for the last more than 08 months as such, no useful purpose will be served in keeping the petitioner behind the bars.

6. The application has been resisted by the respondents by filing a reply thereto. In the reply, it is contended that during the investigation of the case, it was found that there was a deep rooted friendship between the petitioner and the prosecutrix, which lasted for about 02 years and that the petitioner had promised to marry her. It is further averred that on 22.10.2019, the petitioner had picked up the prosecutrix in his car and committed rape upon her. Thus, according to the prosecution, offence under Section 376 IPC stands established against the petitioner, who has been arrested on 15.01.2020. It is contended that the allegations against the petitioner are serious in nature and as such, he is not entitled to bail. It is also contended that there is sufficient material on record to show that the petitioner has committed the alleged offence and having regard to the interest of the society in general, the petitioner is not entitled to concession of bail.

7. Before coming to other aspects of the case, it is necessary to deal with the contention of the prosecution that the instant bail application is not maintainable because the earlier bail application of the petitioner, after filing of the charge-sheet, stands rejected by the trial Court and as such, there is no change of the circumstances.

8. The question that arises for consideration is whether or not

titled *Gurcharan Singh Vs. State (Delhi Administration)*, AIR 1978 SC 179, which has been followed by the Bombay High Court in the case of *Devi Das Raghu Nath Naik Vs. State*, 1987 3 Crimes (HC) 363. Thus, the rejection of the bail application by the Sessions Court does not operate as a bar for the High Court in entertaining similar applications under Section 439 Cr.PC on the same facts and for the same offence.

9. The instant bail application has been made by the petitioner under provisions contained in Section 439 Cr.PC. The amplitude of power to grant bail under Section 439 Cr.PC is wide. However, wider the power and discretion, more the need for its judicious and non-arbitrary exercise.

10. In *Mahipal Vs. Rajesh Kumar and ors.*, 2020 (2) SCC 118, the Supreme Court has, while discussing the amplitude and power under Section 439 Cr.PC observed as under:-

*“12. The determination of whether a case is fit for the grant of bail involves the balancing of numerous factors, among which the nature of the offence, the severity of the punishment and a prima facie view of the involvement of the accused are important. No straitjacket formula exists for courts to assess an application for the grant or rejection of bail. At the stage of assessing whether a case is fit for the grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the*

*considerations involved, the continued custody of the accused subserves the purpose of the criminal justice system. Where bail has been granted by a lower court, an appellate court must be slow to interfere and ought to be guided by the principles set out for the exercise of the power to set aside bail.*

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*"14. The provision for an accused to be released on bail touches upon the liberty of an individual. It is for this reason that this Court does not ordinarily interfere with an order of the High Court granting bail. However, where the discretion of the High Court to grant bail has been exercised without the due application of mind or in contravention of the directions of this Court, such an order granting bail is liable to be set aside. The Court is required to factor, amongst other things, a prima facie view that the accused had committed the offence, the nature and gravity of the offence and the likelihood of the accused obstructing the proceedings of the trial in any manner or evading the course of justice. The provision for being released on bail draws an appropriate balance between public interest in the administration of justice and the protection of individual liberty pending adjudication of the case. However, the grant of bail is to be secured within the bounds of*

*determination is whether, on an analysis of the record, it appears that there is a prima facie or reasonable cause to believe that the accused had committed the crime. It is not relevant at this stage for the court to examine in detail the evidence on record to come to a conclusive finding."*

11. From the aforequoted observations of the Supreme Court, the factors required to be considered for deciding an application for bail can be restated as under:-

- (i) Whether there is any prima facie or reasonable ground to believe that the accused has committed offence;
- (ii) Nature and gravity of the charge;
- (iii) Severity of punishment in the event of conviction;
- (iv) Danger of the accused absconding or fleeing after release on bail;
- (v) character, behaviour, means, position and standing of the accused;
- (vi) likelihood of the offence being repeated;
- (vii) reasonable apprehension of the witnesses being tampered with and
- (viii) danger of justice being thwarted by grant of bail.

the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to bail.

13. In the instant case, it is alleged by the prosecution that the prosecutrix was subjected to sexual intercourse by petitioner/accused and in this regard consent was given by the prosecutrix under the misconception that the petitioner would enter into wedlock with her. According to the prosecution case, on 22.10.2019, the petitioner made the prosecutrix to board his car, whereafter, he committed rape upon her.

14. It has been vehemently contended by learned counsel for the petitioner that there was no promise of marriage extended by the petitioner to the prosecutrix and in fact, prosecutrix and the petitioner were deeply in love with each other and as result of passions, which the parties had towards each other, they developed physical relationship. On this ground, it is urged that sexual relationship between the prosecutrix and the petitioner, if at all it has taken place was consensual one and the prosecutrix, at the relevant time, had attained the age of majority. Mr. Gagan Basotra, learned senior counsel has referred to the judgments rendered by the Supreme Court in the cases of *Maherswar Tigga Vs. State of Jharkhand*, (Criminal Appeal No. 635 of 2020, Date of Decision:- 28.09.2020) and *Pramod Suryabhan Pawar Vs. State of Maharashtra*, AIR 2019 SC 4010. He has also referred to the judgment rendered by this High Court in the case of *Yash Pal Vs.State of J&K*, (Petition under Section 561-A Cr.PC No. 549/2015, Date of Decision 23.10.2017) and

had acquaintance with petitioner/accused right from the time she was studying in 10<sup>th</sup> class. It is further alleged in the complaint that the petitioner/accused had sexual intercourse with her without her consent and he also promised her that he would marry her at the appropriate time. In her statement recorded under Section 164-A Cr.PC, the prosecutrix has further explained that she was friendly with the petitioner and this relationship between them continued for quite a long time. She has stated that one day, petitioner picked her up from Life Care Center and committed rape upon her against her consent. She has also stated that the petitioner had conveyed to her that he cannot marry her but he would try to talk to his family and would convey to her in this regard at appropriate time. The investigating agency after investigating the case has concluded that the prosecutrix was sexually assaulted by the petitioner on 22.10.2019 at about 6/6.30 p.m.

16. At this stage, when the question of framing of charges against the petitioner is yet to be determined by the trial Court, a deep and meticulous analysis of the material on record of the challan is required to be avoided in these bail proceedings lest it may prejudice the case of the parties before the trial Court. However, there appears to be some merit in the submissions of learned counsel for the respondents that though as per the material on record, the prosecutrix was quite friendly with the petitioner for a long time, yet the same does not give a license to petitioner/accused to have sexual relations with her, without her consent. Thus, prima-facie, it appears that case of the



17. The judgments referred to by learned senior counsel for the petitioners pertain to cases of false promise of marriage and not to cases where the prosecutrix has been subjected to sexual assault by her boyfriend without her consent. The same, therefore, are not applicable to the facts of the instant case. Further it is pertinent to note here that the prosecutrix had barely attained the age of majority a few months prior to the lodging of the F.I.R. Hence, the contention of the learned counsel for the petitioner that the prosecutrix due to her love and passion for the petitioner had developed sexual relationship with him since the time she was studying in 10<sup>th</sup> class, may not be of any help to the case of the petitioner for the reason that the past sexual relationship of the prosecutrix with the petitioner, if any, would constitute offence of rape, irrespective of the consent, the prosecutrix being minor at the relevant time. Thus, the fact that the prosecutrix was not matured enough would certainly have an adverse impact on the case of the petitioner pertaining to grant of bail.

18. That takes us to the gravity of offence. The offence of rape carries punishment of rigorous imprisonment of not less than 10 years and it may also extend to imprisonment for life with fine. Thus, the offence alleged to have committed by the petitioner is grave in nature. In fact, rape is not merely a physical assault but it is destruction of the personality of the victim. Therefore, cases relating to grant of bail in offence of rape are required to be approached differently as releasing of the accused on bail in such cases by adopting a liberal approach would be against the interests of the society.

stated that on 27.12.2019, she was threatened by the petitioner and his friends that her family would be done away with in case she does not withdraw the case against him. This raises the apprehension that in case the petitioner is enlarged on bail, he may threaten the prosecutrix. Hence, enlarging the petitioner to bail at this stage, when the statement of the prosecutrix is yet to be recorded, may thwart the course of justice.

20. For all the foregoing reasons, I do not find any merit in this application at this stage. The same is, accordingly, dismissed. The petitioner is, however, at liberty to move the trial Court after statement of the prosecutrix is recorded in the case.

21. Anything said in this order shall not be taken as an expression of opinion on the merits of the case. The learned trial Court shall, at the time of considering the question of framing of charges, be at liberty to frame its own conclusion uninfluenced by the observations of this Court made in this order.

22. The petition stands disposed of.

**(SANJAY DHAR)**  
**JUDGE**

Jammu  
24.12.2020  
Tarun

Whether the order is speaking?	Yes
Whether the order is reportable?	Yes