

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT JAMMU  
(Through Virtual Mode)**

CRM(M) No.288/2021  
CrIM No. 815/2021, 816/2021 &  
2460/2021  
c/w  
Bail App No.144/2021  
CrIM Nos.1936/2021 & 892/2021

Santosh Kesar and another .....Appellant(s)/Petitioner(s)

Through: Mr. Vikas Sharma, Advocate.

**Vs**

Union Territory of Jammu and Kashmir ..... Respondent(s)  
and another

Through: Mr. Amit Gupta, AAG.

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

**ORDER**  
01.02.2022

**Bail App No.144/2021**

1. The instant application for grant of bail has been moved by the petitioner-accused whereby he has sought bail in case arising out of FIR No.73/2021 for offences under Section 420, 376 IPC registered with Police Station, Satwari Jammu. It is pertinent to mention here that initially the petition was moved for grant of bail in anticipation of arrest but during the pendency of the petition, the petitioner came to be arrested whereafter he moved another application with a prayer that his earlier application be treated as one for grant of regular bail. Accordingly the application has been treated as one for grant of regular bail.

2. Briefly stated the case of the prosecution is that the prosecutrix on 24.03.2021 lodged a written complaint before the Court of learned Judicial Magistrate Ist Class, Sub Registrar, Jammu. Vide order dated 24.03.2021, the learned Magistrate directed the police to register the FIR and investigate the case. Accordingly, FIR No.73/2021 for offences under Section 376/420 IPC came be registered.

3. In the complaint lodged by the prosecutrix it has been alleged that she was living with her elder sister at Digiana, Jammu. She was working as a Teacher in a School and besides this she was also performing part time job of selling health products. It was alleged in the complaint that in the last week of February, 2020, the accused came in contact with her in connection with purchase of health products from her and both of them got to know each other. The accused extended the promise of marriage to the prosecutrix but she refused as the accused is a non-sikh. During the interaction of prosecutrix with the accused both of them developed faith on each other. The accused and his mother gained confidence of the prosecutrix whereafter accused started extracting money from her in cash as well as in the form of gold items including gold ornaments, which belonged to the sister of the prosecutrix. It is alleged that the prosecutrix even availed the loan from Jammu and Kashmir Bank Ltd and this amount was also taken away by the accused from her. Despite demands from the prosecutrix, the accused did not return the money and gold items taken away by him. The prosecutrix further goes on to allege that on 31.10.2020 the accused came to her in a drunken position and made sexual advances towards her and ultimately forcibly committed sexual intercourse with her. In the month of November, 2020,

the elder sister of prosecutrix came to know about the withdrawal of money from the bank account whereafter the prosecutrix started contacting the accused so as to get back her money but the accused avoided to do so. On 13.01.2021, the prosecutrix along with her sister contacted the accused/petitioner, who flatly refused to identify them and hurled abuses upon them. According to the prosecutrix, the accused-petitioner has duped her of Rs.7,20,000/- and besides this he has misappropriated the gold ornaments which she had given to him. The investigation of the case is stated to be in progress and offences under Sections 376/420/201 IPC are stated to have been established against the accused-petitioner. During the course of investigation of the case, the statement of prosecutrix under Section 164 Cr.P.C has also been recorded and her said statement is more or less on the same lines.

**4.** According to the petitioner, the allegations made in the FIR are vexatious and baseless. It is contended that on 29.01.2021, the prosecutrix has lodged a complaint against the petitioner before Women's Police Station Gandhi Nagar, Jammu in which she had not leveled any allegations of rape or sexual assault against him. It is also contended that the FIR has been lodged by the prosecutrix against the petitioner after a delay of about five months without giving any explanation for the same. According to the petitioner, the FIR has been lodged by the prosecutrix simply to blackmail him.

**5.** Per contra, learned AAG appearing for the respondent has vehemently contended that the petitioner has committed a serious offence inasmuch as he has not only duped the prosecutrix of her money and

ornaments but he has also committed sexual assault upon her. It is contended that the prosecutrix has, while making her statement under Section 164 Cr.P.C, reiterated the allegations against the petitioner and as such it cannot be stated that no offence is made out against the petitioner. Learned AAG has further contended that keeping in view the gravity of the offence and the public interest involved, the petitioner does not deserve the concession of bail.

6. I have heard learned counsel for the parties and perused the record of case including the case diary.

7. So far as the principles governing the grant or refusal of bail are concerned, the same are elucidated in a large number of judgements rendered by the Supreme Court and our own High Court. These principles may be summarised as under:

- i. The gravity of the offence and the nature of the accusation including severity of punishment in the case of conviction;
- ii. The position and status of the accused vis-à-vis the victims/witnesses;
- iii. The likelihood of the accused fleeing from justice;
- iv. The possibility of the accused tampering with the evidence and/or witnesses and obstructing the course of justice;
- v. The possibility of repetition of the offence;
- vi. The prima facie satisfaction of the Court in support of the charge including frivolity of the charge;
- vii. Stage of the investigation;
- viii. Larger interest of the public or the State.

8. The guidelines relating to grant of bail have been laid down in Sections 437 and 439 of Cr.P.C. While in Section 437 Cr.P.C, certain

restrictions and conditions have been laid down for grant of bail by a Court, the power to grant bail under Section 439 Cr.P.C for the High Court or the Sessions Court is wider. The overriding considerations in granting bail as laid down in Section 437 (1) and Section 439(1) of Cr.P.C, are the nature and gravity of the offence, the frivolity or otherwise of the prosecution case, the position and status of the accused with reference to the victim and witnesses, the likelihood of accused fleeing from justice, the chances of repeating of offence by the accused, the chances of tampering with the witnesses, the stage of investigation and the public interest.

9. The Supreme Court in the case of **Mahipal vs. Rajesh Kumar and another, (2020) 2 SCC 118**, while discussing the amplitude and power of the Court under Section 439 Cr.P.C, has observed as under:

*“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 straight jacket 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 commission of the crime by the accused. That is a matter for trial. However, the Court is required to examine whether there is a prima facie or reasonable ground to believe that the accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused sub-serves the purpose of the criminal justice system.”*

**10.** From the foregoing discussion of law on the subject, it is clear that while the nature of offence and severity of punishment is an important consideration for determining the bail plea of an accused, a *prima facie* view of involvement of the accused in the alleged crime is a factor which is also required to be considered. On this aspect of the matter, the learned counsel for the petitioner has highlighted the fact that on 29.01.2021 the prosecutrix had lodged a complaint before Women Police Station, Gandhi Nagar, Jammu against the petitioner. A copy of the said complaint has been placed on record. In the said complaint, the prosecutrix has not made even a whisper as regards the allegation of sexual assault committed by the petitioner upon her, though as per the case of the prosecution, the said sexual assault has taken place on 31.10.2020, much prior to the lodging of the aforesaid complaint. The only allegations made in the said complaint are that on the pretext of help, the petitioner has taken gold ornaments and money from her which he is not returning and instead is threatening her. The question as to why the prosecutrix did not disclose the incident of rape while making her earlier complaint before the police is a matter for the investigating agency to probe but one thing is clear that this circumstance does offer a defence to the petitioner against the charge of rape.

**11.** So far as the incident of alleged rape is concerned, the same has taken place on 31.10.2020 but the report regarding the incident has been lodged by the prosecutrix after about five months. Even though the complaint on the basis of which, the FIR has been lodged runs into as many as ten pages but there is no explanation given in the complaint as regards the delay in lodging the report. It would be premature for this Court to deeply

analyse this aspect of the matter at this stage of the case, yet, for the limited purpose of deciding this application, the aforesaid circumstance is required to be taken into account. The mystery that has to be unravelled by the investigating agency in these circumstances would be whether the allegations of rape leveled by the prosecutrix against the accused are based on facts or the same are an afterthought to pressurize the petitioner to settle the monetary transaction with the prosecutrix. This Court would not like to comment on the matter at this stage but the material on record does suggest that there is a genuine defence available to the petitioner against the charge of rape leveled against him by the prosecutrix.

**12.** Apart from the above, the petitioner has been in custody for the last about four months and the case diary reveals that the investigation of the case is almost complete. In these circumstances denying the petitioner the concession of bail would amount to inflicting punishment upon him without trial and the same may prejudice his right to prepare defence against the charge that has been laid against him. Further, there is nothing on record to even remotely suggest that in case the petitioner is granted bail, he would be fleeing or thwarting the course of justice.

**13.** For the foregoing reasons, the petition is allowed and the petitioner is admitted to bail subject to the following conditions:

- i. That he shall furnish personal bond in the amount of Rs.50,000/ with one surety of the like amount to the satisfaction of the incharge of concerned jail;

- ii. That he shall appear before the investigating agency as well as before the trial court as and when directed;
- iii. That he shall not leave the territorial limits of Union Territory of J&K without prior permission of the investigating officer;
- iv. That he shall not tamper with the prosecution witnesses.

The petition stands disposed of.

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The Investigating Officer is present in the Court and he has produced the case dairy. As per the case dairy, the investigation of the case is almost complete and the chargesheet is to be laid before the competent Court.

In view of this position, order dated 27.05.2021 passed by this Court is modified to the extent that the Investigating agency is permitted to file the challan before the competent Court.

List this matter for consideration on 30.03.2022.

**(Sanjay Dhar)**  
**Judge**

**Jammu**  
01.02.2022  
*Surinder*