

**HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

561-A no.06/2017
MP no.01/2017
561-A no.215/2016
MP no.01/2016

Date of order: 31.01.2017

Reyaz Ahmad Sheikh & another

Versus

State of J&K and another

Coram:

Hon'ble Mr Justice Ali Mohammad Magrey, Judge

Appearing Counsel:

For Petitioner(s): Mr Parvaiz Nazir, Advocate (561-A no.06/2017)
Mr T. A. Lone, Advocate (561-A no.215/2016)

For Respondent(s): Mr B.A.Dar, AAG

Whether to be approved for reporting:	Yes/No
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1. The moment matter was taken up, Mr B.A.Dar, learned AAG, stated at bar that on the same subject-matter, petition under Section 561-A, being No.215/2016, titled *Abdul Subhan Lone v. Director General of Police and others*) has been filed by father of prosecutrix. Accordingly, registry was directed to list the said petition as well, so that both petitions are taken together.

2. The petitions are taken sequentially.

561-A no.06/2017

3. Petitioners in instant petition seek quashment of order dated 31.12.2016 passed by learned Principal District & Sessions Judge, Kupwara, setting-aside Judicial

Magistrate 1st Class (Munsiff) Sogam's order dated 06.12.2016, whereby bail was granted in favour of present petitioners, on the grounds set out in petition on hand.

4. I have heard learned counsel for parties. I have gone through the pleadings as also impugned order and considered the matter.
5. Perusal of impugned order reveals that Revisional Court has made meticulous examination of the matter and elaborately discussed and dealt with the issue of granting bail in respect of offences inflicting women. Revisional Court has quoted, and rightly so, Section 497-C of Code of Criminal Procedure, which provides that notwithstanding anything contained in the Code, no person accused of an offence punishable under sections 304-B, 326-A, 370, 376, 376A, 376C, 376D or 376E of Ranbir Penal Code, shall, if in custody, be released on bail or on his own bond unless the public prosecutor is given opportunity of being heard on the application for such release, provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of case diary or the report made under section 173 of the Code, is of the opinion that there are reasonable grounds for

believing that the accusation against such persons is prima facie true.

6. Revisional Court order, impugned in this petition, does not suffer from any legal infirmity. There is nothing bad in the order impugned and no interference, therefore, is warranted. Petition on hand is devoid of merit and is **dismissed** accordingly.

561-A no.215/2016

7. Petitioner questions order dated 05.07.2016, whereby learned Judicial Magistrate 1st Class, Kupwara, has granted bail, amongst others, in favour of one of accused persons, arrested in connection with case FIR no.27/2016 under Section 363, 376, 109 RPC P/S Sogam and seeks quashment thereof, with further prayer that respondent no.6 be directed to be arrested and committed to custody. Petitioner also prays that official respondents be directed to arrest all private respondents and after completing investigation, produce charge-sheet before competent court of law.
8. Heard and considered.
9. Mr B. A. Dar, learned AAG, states that interim bail granted by learned Judicial Magistrate Sogam, vide order dated 6.12.2016 in favour of one of accused

persons (respondents 7 and 10 herein) has been, vide order dated 31.12.2016 by Principal District & Sessions Judge, Kupwara, set-aside. The petition on hand, according to learned AAG, has become infructuous.

10. Per contra, learned counsel for petitioner submits that the reference made by learned AAG qua order dated 31.12.2016 of learned Principal Sessions Judge, Kupwara, relates to only respondents 7&10 and not respondent no.6 or for that matter rest of accused persons. The said contention has substance.
11. The case set up by petitioner is that on 2nd May 2016, his minor daughter, namely *SaimaSubhan*, was kidnapped by respondents 6 to 10, forcing him to approach police station Sogam, which lodged FIR no.27/2016 under Sections 363, 109 RPC on 3rd May 2016 against accused/respondent 6 to 10. During investigation prosecutrix was recovered from accused persons and accused, Zahoorahmad Sheikh (respondent no.6 herein) was arrested on spot while as other accused persons gave slip to the recovery team.
12. Prosecutrix was put to medical examination and it was found that accused persons have committed

commission of offence punishable under Section 376 RPC as well. The statement of prosecutrix was recorded by Judicial Magistrate 1st Class, Kupwara on 10th May 2016, in which she deposed and admitted her kidnapping by respondents as also commission of rape upon her person.

13. Though accused, Zahoor Ahmad Sheikh (respondent no.6 herein) was arrested, learned Judicial Magistrate 1st Class, Kupwara, on his application for enlargement of bail, to which objections were filed, resisting the bail and report was submitted by police mentioning therein that investigation was on and search for other accused person was in motion, granted bail vide impugned order dated 05.07.2016 in favour of accused/respondent no.6.
14. Learned counsel for petitioner states that Trial Magistrate has ignored the statement of prosecutrix, recorded by the same Magistrate under Section 164-A Cr.P.C., which shows order impugned has been passed without application of judicial mind, as such, has caused failure and miscarriage of justice. According to learned counsel the order impugned is bad in law and not sustainable in the eyes of law.

15. It may not be out of place to mention here that rape is one of most barbaric and heinous crimes not only against the victim of rape but also against the family of victim of rape and society as a whole. The cases of rape, gang rape and digital rape are on increase and perpetrators of this inhuman and brutal crime are worse than even beasts and deserve to be dealt with a heavy hand. The entire country is seriously debating this issue and there are proposals coming forth that death penalty should be the answer to deal with the accused involved in such heinous crime. Having said this, no one should be allowed to trivialise the gravity of offence by misusing the same as a weapon for vengeance or vendetta.
16. It is appalling to see that rape rears its ugly facade almost every day. Rape being fastest growing crime is undoubtedly one of most deplorable, belligerent and atrocious act committed against dignity of a woman. Rape has been held to be even more serious than murder that not only destroys woman physically but also shatters her inner-self by destroying her each living moment emotionally and psychologically.
17. Rape is a crime against one's mind, psyche and reputation. Rape leaves a permanent scar on the life

of the victim and it becomes horrendous for victim of rape to lead a dignified and well respected life in the society. It is very unfortunate that there is a high increase in the rape instances and ravenous maniacs are not even sparing girls of a very tender age. Some of the recent rape cases have been so horrifying that the entire nation protested to condemn these barbaric acts and raised a voice to curb said menace by inflicting more severe punishment. In view of grave ramifications of crime committed upon women, a special provision has been inserted in Code of Criminal Procedure by Act No.XI of 2014 dated 22nd March 2014. The said provision has been placed as Section 497-C. It envisages:

“497-C. Special provision regarding bail in certain offences against women etc.

(1) Notwithstanding anything contained in the Code, no person accused of an offence punishable under sections 304-B, 326-A, 370, 376, 376A, 376C, 376D or 376E of Ranbir Penal Code, shall if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code, is of the opinion that there are reasonable grounds for believing that the accusation against such persons is prima facie true.

(2) The restrictions on granting of bail specified in sub-section (1) shall be in addition to the restrictions under the Code or any other law for the time being in force on granting bail.

(3) Nothing in section 497A of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence specified in sub-section (1).”

18. From the above, a person, accused of offence punishable under Section 376 RPC, should not be released on bail unless the Public Prosecutor has been given an opportunity of being heard on the application for such release and it is also strenuously provided that such accused person should not be released on bail if on the perusal of the case diary or the report, the court is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true. The Judicial Magistrate, in the present case, unmindful of the statement recorded by the very Judicial Magistrate, of the prosecutrix under Section 164-A Cr.P.C. and certificate given the same Judicial Magistrate on the said statement that the statement was read over and explained to the witness, who admitted it to be true and correct and that the Judicial Magistrate believed that the statement has been made voluntarily, has granted bail in favour of accused persons, including accused/respondent no.6 herein. This *per se* shows and depicts non-application of mind on part of Trial Magistrate while granting bail in favour of accused. Thus the order impugned has caused miscarriage of justice and is liable to be struck down.

19. It is pertinent to mention here that the case in hand relates to kidnapping and raping of a minor girl. In such cases, the court should always remain alive to the nature of sufferings of the victim resulting from the alleged crime because in that lies the larger interest of the public. So where in the larger public interest is found to keep the accused out of the circulation from the society, the bail should be refused. However, the Trial Magistrate, oblivious to the said well settled law, has granted bail in favour of accused persons. The order impugned obviously depicts non-application of mind on part of Trial Magistrate inasmuch as it has caused miscarriage of justice.
20. For all what has been discussed above, petition on hand is allowed and order dated 05.07.2016 passed by Judicial Magistrate 1st Class Kupwara, granting bail in favour of respondent no.6, is set-aside. Senior Superintendent of Police, Kupwara, is directed to take into custody accused/ respondent no.6 and report compliance.
21. **Disposed of.**
22. Registrar Judicial, High Court of J&K, Srinagar, to forward copy of this order to Registrar General, High Court of J&K, Jammu, who shall call for explanation from Judicial Magistrate 1st Class, Kupwara, and also place the order before the Lord Chief Justice for perusal and necessary orders for action from administrative side against the Judicial Magistrate, Kupwara.

(Ali Mohammad Magrey)
Judge

Srinagar
January 31, 2017
Ajaz Ahmad