

1. State of Jandk; Vs. 1. Shaheed Iqbal.

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Court : Jammu and Kashmir

Decided On : Aug-08-2013

Judge : Hon'ble Mr. Justice Bansi Lal Bhat

Appellant : 1. State of Jandk;

Respondent : 1. Shaheed Iqbal.

Judgement :

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU. Cr Ref No. 2 OF 201.AND
Cr Ref No. 3 OF 201.AND Cr Ref No. 4 OF 201.1. State of J&K 2.State of J&K.

3. State of J&K 4.Hanifa Bi & anr 5. Hanifa Bi & anr 6. Hanifa Bi & anr Petitioners
1. Shaheed Iqbal.

2. Shahnaz Akhter.

3. Maqsood Hussain.

4. State of J&K & ors.

5. State of J&K & ors.

6. State of J&K & ors.. Respondent !Mr. S. S. Ahmed, Advocate ^Mr. P.N. Raina,
Sr. Advocate with Mr. J.

A. Hamal, Advocate. Mr.K.M.Bhatti, Advocate Honble Mr. Justice Bansi Lal Bhat,
Judge Date:

08. 08.2013 :

JUDGMENT

: Cr. Ref. Nos. 2/2011, 3/2011 & 4/2011 & 561-A No. 264/2010, 03/2011& 30/2012
Date of Order:

08. 08.2013 State of J&K. V. Shaheed Iqbal. State of J&K. V. Shahnaz Akhter. State of J&K. V. Maqsood Hussain. Hanifa Bi & anr. V. State of J&K & ors. Hanifa Bi & anr. V. State of J&K & ors. Hanifa Bi & anr. V. State of J&K & ors. Injustice anywhere is a threat to justice everywhere. Said Martin Luther King Jr. Injustice in the very cathedral of justice is still worst. It may amount to judicial complicity. The damage suffered may be incalculable in terms of erosion of confidence in the institution of judiciary and the rule of law. (2) My Lord Honble Mr Justice Mohd Yaqoob Mir, in his Lordships capacity as the Administrative Judge of District Poonch, called the record of three Bail Applications titled Maqsood Hussain vs. State of J&K, Shahid Iqbal vs. State of J&K and Shahnaz Akhter vs. State of J&K from the Court of Chief Judicial Magistrate (CJM) Poonch. These related to a case registered under FIR No. 138/2010 for offences punishable under Sections 363/109 of RPC in which the accused had been admitted to bail. On perusal of record his Lordship was of the opinion that exercise of powers under Section 561-A and 498(2) of Cr PC may be required to be invoked so as to secure ends of justice. The record of these three files was accordingly placed before Lord Chief Justice who directed listing of the same on judicial side. These were registered as Criminal Reference Nos. 2/2011, 3/2011 and 4/2011. Meanwhile, prosecutrix Rubina Akhter and her mother Hanifa Bi filed petitions under Section 561-A Cr PC titled Hanifa Bi & anr Vs State of J&K seeking quashing of orders dated 10.11.2010 and 21.12.2010 passed by CJM Poonch in terms whereof bail was granted to accused Maqsood Hussain, Shahnaz Akhter and Shahid Iqbal with further prayer for getting the matter reinvestigated and for providing security to the petitioners. Prosecutrix and her mother have filed another petition under Section 561-A Cr PC No. 30/2012 seeking quashment of order dated 04.08.2011 in terms

whereof Sessions Judge Poonch granted bail to accused Mohd Maqsood S/o Mohd Sadiq. Prosecutrix and her mother Hanifa Bi have also filed petition under Section 561-A Cr PC being numbered as 3/2011 wherein fresh investigation has been sought with further prayer of incorporating of (3) Section 376 of RPC against the private respondents and for cancellation of bail. Since the accused-respondents adopted dilatory tactics and this Court was of the view that they were deliberately making attempts to delay hearing and disposal of the Reference and the petitions, their presence was secured by adopting legally permissible coercive methods in the form of issuance of arrest warrants. Accused Maqsood Hussain and Shahid Iqbal were sent to judicial custody till further orders and warrants against accused Shahnaz Akhter were recalled on production of certificate indicating that she was a Juvenile. Before proceeding to determine the legality, propriety or correctness of the orders impugned in the petitions filed by Prosecutrix Rubina Akhter and her mother Hanifa Bi (who is also complainant) it would be appropriate to ascertain the factual matrix in the context of allegations of kidnapping of Prosecutrix emanating from the complainant together with the allegations of gang-rape which Prosecutrix attributed to accused. On 19.08.2010 petitioner-Hanifa Bi w/o Mohd Shabir R/o Mangnar-Poonch (hereinafter referred to as complainant) filed a written report at Police Station Poonch wherein it was alleged that on 18.08.2010 at 7.00 am her daughter Rubina Akhter (hereinafter referred to as Prosecutrix) who had left for her school, was kidnapped by accused Mohd Maqsood S/o Akbar Hussain in connivance with accused Shahnaz Akhter, Abdul Wahid, Shahid Iqbal and Maqsood Hussain. Allegedly prosecutrix was forced to (4) board a Tata Sumo bearing registration no. 3144/JK12. Complainant further alleged that accused Shahid who was plying the Tata Sumo had returned after arranging alternate transport for the co- accused taking the Prosecutrix along. Complainant alleged that her daughter was barely sixteen years old and accused had kidnapped her for illicit intercourse. Case under FIR no. 138/2010 for offences punishable under Sections 363/1o9 of RPC came to be registered on the basis of this complaint and the Police swung into action. Prosecutrix was recovered. Statement of Prosecutrix was recorded under Section 164-A of Cr PC. The investigation revealed that accused Maqsood Husain, Mohd Maqsood and Shahid Iqbal had, in conspiracy with Shahnaz Akhter and Abdul Wahid, kidnapped the

Prosecutrix with criminal intention. Accused Shahid Iqbal was arrested and the Tata Sumo was seized. Accused Maqsood Hussain was also arrested. Accused Mohd Maqsood was at large. In her statement recorded under Section 164-A Cr PC prosecutrix implicated accused Shaheen Akhter by alleging that she had deceitfully made her to board the Tata Sumo under pretext of paying obeisance at Shahdra Sharief but after covering some distance Shaheen Akhter alighted from the vehicle while accused Maqsood Hussain and Mohd Maqsood, who were hiding beneath the tarpaulin on the rear seat of the vehicle, jumped in, gagged her mouth, brandished a knife and threatened to eliminate her. They changed vehicle at Thana Mandi at the instance of Shaheen Akhter who advised them to do so by making a phone call. She was taken to Jammu, lodged in a room in a Hotel and gang-raped by both the accused at night. She also alleged that accused Maqsood Hussain (5) had ravished her in a bathroom as well. She was then taken to Delhi, lodged in a Hotel and again gang-raped by both the accused. Then she was brought back to Poonch where she was kept in a Dhara and again gang-raped by both the accused. Then she was taken to the house of Akbar Hussain where accused Shaheen detained her in an underground room from where she was recovered by Police. She was subjected to medical examination which did not find recent evidence of sexual assault though there was evidence of sexual intercourse in the past. As per record of Government High School Mangnar, date of birth of prosecutrix was recorded as 20.04.1997. However, the accused have supported their bail pleas by a copy of birth certificate of prosecutrix issued by Government Primary School, Dheri Mangnar recording her date of birth as 16.12.1994. Thus it is not disputed at this stage that the prosecutrix was below sixteen years of age on the date of alleged occurrence. Accused Maqsood Hussain was granted interim bail by CJM Poonch on 26.10.2010 which was extended from time to time and finally made absolute in terms of order dated 21.12.2010. Revision preferred against bail order dated 26.10.2010 was dismissed on the ground that the impugned order was an interlocutory order. CJM Poonch also granted interim bail to accused Shaheed Iqbal on 04.09.2010 which was extended from time to time. Accused Shahnaz Akhter was granted interim bail by the same Court vide order dated 10.11.2010. It is the legality, correctness and propriety of these orders that forms the subject-matter of these Reference/561- A Cr PC proceedings. (6) Heard

the rival sides and perused the record. Learned counsel representing the complainant and the prosecutrix has taken strong exception to the approach adopted by CJM Poonch in admitting the accused on bail in a case of a gangrape of a minor and submitted that the CJM not only overlooked the well-settled judicial considerations governing grant of bail in nonbailable offences but also exhibited sheer insensitiveness to the plight of the hapless victim who was deceitfully lured into the trap of accused and subjected to sexual exploitation. Learned Additional Advocate General representing the State has not contradicted the petitioners stand. Per contra, learned counsel for accused submitted that in the light of medical report Court below had passed a reasoned order and the impugned orders could not be termed arbitrary exercise of power. On perusal of record and after giving my thoughtful consideration to the arguments advanced at the Bar I find that CJM Poonch has passed the impugned orders grossly overlooking the gravity of charge and in utter disregard of the settled judicial considerations. The manner and circumstances in which the prosecutrix, a minor girl aged below sixteen years, living in the care and protection of her mother (while her father was away contributing to the defense of the Country, being a member of the Para-Military forces) was lured deceitfully by accused Shaheen Akhter acting in tandem with co-accused, made to board the Tata Sumo on the pretext of joining her to pay obeisance at the holy Tomb of Baba Ghulam Shah Badshah at Shahdra Sharief (7) purportedly after obtaining leave of her mother, with subsequent debarking of accused Shaheen Akhter as the vehicle covered some distance, followed by sudden appearance of accused Maqsood Ahmed and Mohd Maqsood who had concealed their presence under a tarpaulin on the rear seat of the vehicle followed by taking of the prosecutrix to Jammu and then to Delhi where she was confined in Hotel Rooms and gang-raped by accused Maqsood Hussain and Mohd Maqsood till she was brought back to Poonch and subjected to sexual assault at Poonch as well, form a chain of events depicting the plight of a minor girl who was subjected to sexual exploitation which constituted aggravating factors not warranting grant of bail. CJM Poonch overlooked the gravity of charge and the seriousness of accusation against the accused. He approached the bail matter in a manner that carries the impression that he was espousing the cause of accused and pleading for their release on bail. It is indisputable that while dealing with the bail

applications involving charges of rape and gang-rape Court has to exhibit utmost sensitivity looking to the plight of victim who undergoes physical and psychological trauma and runs the risk of being scarred/branded for rest of life, living under the shadow of a stigma and virtually being shunned and ostracized by the society. In bail matters involving non-bailable offences Court has to strike a balance between the personal liberty of accused and the larger social interests. Court has also to consider whether in the event of grant of bail the victim of assault and other witnesses will come forward to depose fearlessly. Thus, the Court has to consider whether a fair trial would be possible. (8) In the instant case, it is noticed with concern that CJM Poonch has acted in the most arbitrary fashion by granting interim bail to the accused when the investigation was at the nascent stage. It appears that the Court below laid undue stress on variation in age of prosecutrix and the medical report. It engaged in a discussion which was uncalled for. It was none of its business to express opinion on merits of the case in regard to the charge of rape. Sifting of material at the stage of investigation was unwarranted. CJM failed to notice that even if there was variation in date of birth of prosecutrix, conclusions deducible from the record and the complaint prima facie established that the prosecutrix, alleging gang-rape, was below sixteen years of age on the date of alleged occurrence. Since she had not attained the age of discretion relevant for offences punishable under Sections 363/366/376 of RPC, her being a consenting party was out of consideration. The medical report did not totally rule out sexual intercourse and the statement of prosecutrix recorded under Section 164-A of Cr PC implicated accused Maqsood Hussain and Mohd Maqsood in the charge of gang-rape. The urgency exhibited by CJM in allowing bail cannot be lightly ignored. It has to be seen in the context of subsequent events. Accused Maqsood Hussain was granted interim bail on 26.10.2010. Same was extended from time to time. The grant of interim bail, in absence of circumstances justifying the same, was unwarranted. Even Learned Sessions Judge was taken for a ride as he dismissed the Revision preferred against the interim bail order on the ground that the same was an interlocutory order which could not be called in question in a Revision Petition. The matter does not rest here. There is something (9) more than that meets the eye. Even after rejection of Revision Petition by learned Sessions Judge, interim bail continued to be extended by the CJM.

Charge-sheet was laid before CJM Poonch on 22.11.2010 in presence of accused other than Mohd Maqsood. CJM committed the case to Court of Sessions after initiating proceedings under Section 512 Cr PC against accused Mohd Maqsood who was declared an absconder. The order dated 22.11.2010 formulated in the Charge-Sheet clearly specifies that the bail applications of accused were attached with the Challan file for being placed before Sessions Judge Poonch for further proceedings on 21.12.2010. Thus, CJM Poonch became functus officio and was divested of jurisdiction after commitment of case to the court of Sessions on 22-11- 2010. It is shocking to note that the CJM retained the record of bail applications with him and on 21.12.2010 he made the interim bail orders absolute in all the three bail applications. This despite the fact that the case had been committed to the Court of Sessions with bail applications attached thereto and on 21.12.2010 the case was supposed to come up for hearing before Learned Sessions Judge Poonch. Undoubtedly CJM Poonch had been divested of jurisdiction after committal of case to the Court of Sessions in terms of his order formulated on 22.11.2010. Viewed thus, making of interim bail orders as absolute after the Magistrate was divested of jurisdiction and usurping of jurisdiction of Sessions Judge in a brazen-faced manner is an abuse of exercise of judicial powers calling for disciplinary action against the delinquent officer besides warranting quashing of the impugned orders. Viewed in the light of aforesaid discussion it can be stated without any fear of (10) contradiction that the impugned orders are an affront to law and the same cannot be overlooked as the same have resulted in miscarriage of justice. Under Section 561-A of Cr PC inherent jurisdiction of High Court can be exercised for advancement of justice and to prevent the abuse of the process of Court provided the High Court considers its interference necessary. Section 561-B of Cr PC enjoins upon the High Court to exercise its continuous superintendence and control over magistracy so as to ensure that there is proper and expeditious disposal of case by the Judicial Magistrates subordinate to it. The supervisory/visitorial jurisdiction of High Court is of paramount importance to examine correctness, legality or propriety of any finding, sentence or order recorded or passed as also regularity of the proceedings of all sub-ordinate Criminal Courts. If the glaring illegality or injustice stares the Court in the face, the Court must exercise its inherent and visitorial powers to

annul that illegality or injustice. The instant case is the appropriate one for invoking of such powers. The impugned orders in the instant case are required to be quashed to annul the manifest illegality writ large on the face of such impugned orders which have been passed in utter disregard of the considerations governing grant of bail in cases of sexual assault like gang-rape involving a minor and made absolute after being divested of jurisdiction. Viewed thus, these impugned orders cannot be supported and are accordingly quashed. Bail granted to the three accused namely Maqsood Hussain, Mohd Maqsood and Shahid Iqbal stands (11) withdrawn. Senior Superintendent of Police Poonch is directed to conduct further investigation into the charge of gang-rape. Such further investigation shall be conducted through a senior Police Officer of the rank of Deputy Superintendent of Police who will convey the result of such investigation to the Trial Court within one month of passing of this order. Further investigation shall also be conducted on the aspect of alleged juvenile status of accused Shahnaz Akhter and in the event of her being found a juvenile, Charge-Sheet shall be laid before the Competent Forum for determination of juvenile delinquency. Copy of this order be sent to Learned Sessions Judge Poonch and Senior Superintendent of Police Poonch for appropriate action. This order shall not, however, preclude the accused to approach the Trial Court for grant of bail after result of further investigation is laid before it. Copy of this order shall also be placed before My Lord Honble the Chief Justice for appropriate orders in regard to the then CJM Poonch Sh. R .K. Abrol for abuse of judicial powers. (Bansi Lal Bhat) Judge Jammu: SunitaSunita. 08.08.2013

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