

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 14.11.2025

Pronounced on: 21.11.2025

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*Whether the operative part
or full judgment is
pronounced: **Full***

Bail App No.60/2025

YASIR AMIN KHANDAY AND ANOTHER

...PETITIONER(S)/APPELLANT(S)

*Through: - Mr. S. T. Hussain, Sr. Advocate,
with Ms. Nida Nazir, Advocate.*

Vs.

UT OF J&K

...RESPONDENT(S)

*Through: - Mr. Zahid Qais Noor, GA.
Mr. Ilyas Nazir Laway, GA.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) Through the medium of present petition, the petitioners are seeking bail in a case arising out of FIR No.18/2024 for offences under Section 376D, 506 of IPC and Section 5(g)/6 of POCSO Act registered with Police Station, Devsar Kulgam

2) The facts leading to the filing of this petition are that on 05.03.2024, the father of the victim lodged a written report with the police alleging therein that on 03.03.2024 his minor daughter (victim) was

called on phone by petitioner No.1/accused who told her that he has got her video in his phone and that if she does not come to him, he would make the said video viral. On account of this threat, the victim went out of her house to meet the said accused. On reaching there, the victim was caught hold of by petitioner No.1, her clothes were torn apart, whereafter he committed rape upon her. At the relevant time, petitioner No.2, the co-accused, was also present on spot who prepared a video with his mobile in respect of the occurrence. Thereafter the said accused threatened the victim that if she does not accede to his demand of sexual intercourse, he would make this video viral. Under this threat, petitioner No.2 also committed rape upon the victim. It was further alleged that at the relevant time sister of the victim, who is also a minor, was with her and she was threatened by both the accused not to narrate the occurrence to anyone.

3) On the basis of the aforesaid report, the FIR was lodged and the investigation was set into motion. During investigation of the case, statements of the victim and her sister under Section 164 of the Cr. P. C were recorded. The

accused were arrested and their mobile cellphones were seized and sent to FSL for examination. The victim was subjected to medical examination and statements of other witnesses were also recorded. After investigation of the case, offences under Section 376D, 506 IPC and 5(g)/6 of the POCSO Act were found proved against the petitioners and the challan was laid before the learned Principal Sessions Judge, Kulgam (hereinafter referred to as “the trial court”).

4) It appears that on 21.05.2024, charges for offences under Section 376D, 506 of IPC and 5(g)/6 of POCSO Act were framed against the petitioners and the trial of the case commenced. The trial court record further shows that statements of as many as four witnesses have already been recorded.

5) The petitioner, it seems, had approached the learned trial court for grant of bail but his bail application has been dismissed vide a detailed order dated 15.03.2025.

6) The petitioner has sought bail on the grounds that as per proviso to Section 309 of the Cr. P. C, the trial in the instant case was required to be completed within a period of two months from the date of filing of the chargesheet and because the

learned trial Court has failed to meet the aforesaid timeline, as such, the petitioners are entitled to bail. It has been further contended that the Court of Principal Sessions Judge, Kulgam, is not vested with the powers of a Special Court in terms of Section 28 of the POCSO Act, as such, the trial of the case before the said court is without jurisdiction. It has been further contended that the petitioners are young boys having good behaviour, therefore, there are no chances of their absconding during trial of the case. It has also been contended that the Public Prosecutor attached to the Court of learned Principal Sessions Judge, Kulgam, has not been appointed in terms of Section 32 of the POCSO Act.

7) On merits, it has been contended that there are material contradictions in the statement of the victim and, as such, the petitioners are entitled to bail.

8) The respondent has filed objections to the bail application, in which, besides narrating the allegations made in the charge sheet, it has been contended that the petitioners are involved in a heinous offence and, as such, they are not entitled

to bail as a matter of right. It has been contended that the victim has supported the prosecution case during trial of the case and, as such, there is strong material in support of the charge laid against the petitioners. It has also been contended that if the petitioners are enlarged on bail, the victim, who is a minor girl, is likely to get frightened with their presence in the locality which would lead to her re-victimization.

9) I have heard learned counsel for the parties and perused record of the case.

10) Before dealing with the ground regarding bail on merits of the case, it would be apt to deal with the legal issues that have been raised by the petitioners in support of their plea of bail.

11) The first contention that has been urged is that the Court of learned Principal Sessions Judge, Kulgam, has not been designated as a Special Court in terms of Section 28 of the POCSO Act. In this regard, it is to be noted that in terms of notification issued by the Government on 25th June, 2018, the Principal Sessions Judges in every District of Jammu and Kashmir have been designated as

Special Courts to try the offences under POCSO Act. Similarly, the Public Prosecutors appointed for aforesaid Courts have been appointed as Special Public Prosecutors in terms of Section 32 of the POCSO Act. Thus, the contention of the learned Senior Counsel appearing for the petitioners in this regard is misconceived and deserves to be rejected.

12) Another contention that has been raised by the learned Senior Counsel appearing for the petitioners is that in the present case the petitioners are facing trial for offence under Section 376D of IPC, as such, in terms of second proviso to Section 309 of the Cr. P. C, the trial had to be completed within a period of two months and once the learned trial court has failed to adhere to this timeline, the petitioners become entitled to grant of bail. To support his contention, the learned Senior Counsel has relied upon the judgments of the Supreme Court in the cases of **Phoolchand vs. State of Rajasthan**, 2023 Supp. SAR (Cri) 947 and **Atmakuri Yadagiri @Chanti vs. State of Telangana**, 2023 Supp. SAR (Cri) 615. It has also been contended that the provisions of Section 309 Cr. P. C are to be read in the light of the provisions contained in Section 167 of the Cr. P. C, which provide that once the

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chargesheet is not filed against an accused within the time stipulated in terms of Section 167 of the Cr. P. C, the accused is entitled to bail. Similarly, if the trial is not completed by a Criminal Court within the stipulated period of two months in a case involving offence under Section 376D of the IPC, the accused would be entitled to bail as a matter of right.

13) I am afraid, the analogy and logic put forward by the learned Senior Counsel for claiming bail in default of the trial court in adhering to the deadline given in proviso to Section 309 of the Cr. P. C cannot be equated with a situation where the Investigating Agency fails to complete investigation within the timeline as provided under Section 167 of the Cr. P. C. This is so because sub-clause (ii) of clause (a) of proviso to sub-section (2) of Section 167 of the Cr. P. C, makes an express provision that in case the investigation is not completed within sixty days/ninety days, as the case may be, the accused person would mandatorily be released on bail if he is prepared to and does furnish bail. There is no such provision made in Section 309 of the Cr. P. C.

the trial court to complete the trial in cases relating to certain offences including offence under Section 376D within two months. The default in adhering to the said deadline would not necessarily lead to enlargement of accused on bail.

14) The aforesaid issue has been deliberated upon by a Division Bench of Karnataka High Court in the case of **Hanumantha Mogaveera vs. State of Karnataka**, 2021 (2) Crimes 374 (Karnt.) in the context of the provisions contained in Section 35 of the POCSO Act, which mandates completion of trial by a Special Court within a period of one month from the date of taking cognizance of offence. It would be apt to refer to the following observations made by the High Court of Karnataka:

41. Be that as it may. The second point of reference is, whether, the accused is entitled to be released on bail if the evidence of the child has not been recorded within a period of thirty days of taking cognizance of the offence or if the Special Court does not complete the trial within a period of one year from the date of taking cognizance. Such an interpretation would be an additional clause under the said provision and giving an additional right to the accused. Even under Section 309 of Cr.P.C., the trial of the proceedings has to be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for the reasons to be recorded. The proviso thereto has been amended

with effect from 03.02.2013 and the proviso thereto deals with trial relating to offence under Section 376 and related Sections of the Indian Penal Code, wherein the trial has to be completed within a period of two months from the date of filing of the charge-sheet, as far as possible. Thus, the expression 'as far as possible' is also found in proviso to sub-section (1) of Section 309 of Cr.P.C. Section 309 of Cr.P.C., also speaks about the circumstances under which no adjournment could be granted. The use of the expression "as far as possible" is also on account of the fact that under Section 37 of the POCSO Act, the trial has to be conducted in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence. But, if the Special Court is of the opinion that the child needs to be examined at the place other than the Court, it shall proceed to issue a commission in accordance with the provisions of Section 284 of Cr.P.C. In such a case, the circumstances under which commission for examination of witness is issued under Section 284 of Cr.P.C., would apply, namely that if the child cannot be procured without an amount of delay, expense or inconvenience, but in the circumstances of the case, would be unreasonable, then the Special Court may dispense with such attendance and may issue a commission for the examination of witness in a place other than the Court. The provisions dealing with Commission for the examination of witness mutatis mutandis apply when the Special Court orders examination of the child at a place other than the Court. Therefore, in such circumstances, there may be delay in recording the evidence of the child within a period of thirty days of taking cognizance of the offence by the Special Court or even delay in completion of trial within a period of one year from the date of taking cognizance of the offence. In such an event, it cannot be treated to be a default, which would enure to the benefit of the accused so as to give the accused a right to be released on bail.

42. It is observed that the object and purpose of Section 35 of the POCSO Act is for the benefit of the child victim and is not to be considered as an

additional clause for the purpose of granting bail to the alleged perpetrator or the accused.

43. As discussed above, there may be various reasons and circumstances beyond the control of the Special Court under which the conclusion of the proceedings within a period of one year may not happen. As already noted, the reasons for the same have been discussed above. Under such circumstances, the accused cannot enforce the right to be released on bail. No such right is envisaged under the said provisions of the Act and the same cannot be read into it by way of an interpretation which may go against the interest of the child victim. If the aforesaid interpretation is to be made then, there would be every attempt made to delay the proceedings before the Special Court beyond the period of one year and seek release of accused on bail. Such a position cannot be encouraged nor is it envisaged under the POCSO Act.

15) From the foregoing analysis of the legal position, it is clear that the mandate regarding completion of trial within a particular period as given in the POCSO Act or under proviso to Section 309 of the Cr. P. C, is for the benefit of the victim and if the timelines set by the statute for completion of trial are not met by the Special Court or the criminal court, the accused would not become entitled to bail automatically.

16) The proviso to Section 309 of the Cr. P. C makes reference to certain offences like Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA or Section 376DB of IPC. The intention of the

legislature in providing for swifter trial of such offences is to ensure speedy justice to the victims of these crimes. This mandate given by the legislature cannot enure to the benefit of the accused. The logic adopted by the Karnataka High Court in interpreting the provisions of Section 35 of the POCSO Act is applicable on all fours to the cases involving sexual offences, regarding which timelines have been laid down for trial in terms of proviso to Section 309 of the Cr. P. C. The contention of the learned Senior Counsel appearing for the petitioners that merely because the learned trial has not completed the trial of the case within two months of filing of the chargesheet, the petitioners are entitled to bail, is wholly misconceived.

17) That takes us to the merits of the case. The settled legal position about the matters to be considered for deciding an application for bail is that the Court has to consider the following factors:

- (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.

18) When it comes to offences punishable under a special enactment, like POCSO Act, something more is required to be kept in mind in view of the special provisions contained in the said enactment. Section 31 of the said Act makes the provisions of the Code of Criminal Procedure applicable to the proceedings before a Special Court and it provides that the provisions of the aforesaid Code including the provisions as to bail and bonds shall apply to the proceedings before a Special Court. It further provides that the Special Court shall be deemed to be a Court of Sessions. Thus, it is clear that the provisions of Cr.P.C including the provisions as to grant of bail are applicable to the proceedings in respect of offences under the POSCO Act.

19) Section 29 of the POCSO Act raises a presumption of commission of an offence under

Sections 3,5,7 and 9 of the said Act against a person who is prosecuted for commission of the said offence, unless contrary is proved. Similarly, Section 30 of the POCSO act raises a presumption with regard to existence of culpable mental state against an accused in prosecution of any offence under the Act which requires a culpable mental state on the part of the accused. However, the accused has been given a right to prove the fact that he had no such mental state. Thus, once chargesheet has been laid against an accused for commission of an offence, *inter-alia*, under Section 5 of the POCSO Act, the presumption under Section 29 and 30 shall come into play. In the present case, not only the chargesheet has been produced against the petitioners but even the charges have been framed against them, *inter-alia*, for offence under Section 5(g) of the POCSO Act. Therefore, it has to be presumed that the petitioners have committed the said offence unless it is shown by them on the basis of the evidence led before the trial court that such presumption gets rebutted.

20) The Supreme Court has, in the case of **State of Bihar vs. Rajballav, (2017) 2 SCC 178**, held

that the presumption of innocence of an accused is not applicable to the cases where there is a contrary statutory presumption of his guilt, such as when prosecuted under Sections 3,5,7 & 9 of the POCSO Act.

21) With the aforesaid legal position in mind, let us now proceed to consider the present case on its merits.

22) If we have a look at the statement of the victim recorded during trial of the case, she has clearly stated that on the fateful day she was called by petitioner No.1 on her phone and was told that he has her video in his phone. Petitioner No. 1 threatened her that if she does not come to him, he will make the video viral, so she, along with her sister, proceeded to meet petitioner No.1. She further stated that when she met petitioner No.1, he was getting many calls on his phone and she suspected that he does not have any of her videos and when tried to slip away from the spot, petitioner No.1 caught hold of her arm, gagged her mouth and laid her down, whereafter he committed rape upon her. She further stated that in the meantime, petitioner No.2 came on spot and he recorded the

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act on his phone. She told petitioner No.2 to delete the video but he slapped her and told her that if she meets her demand of sexual intercourse, he will delete the video, whereafter petitioner No.2 also committed rape upon her. Her sister was threatened not to disclose the occurrence to anyone. The victim was also threatened that in case she discloses the occurrence to anyone, her video will be made viral. On the next day, she had to take examination and on coming back, she narrated the occurrence to her elder sister. The victim has been cross-examined at length by the defence counsel.

23) Although at the time of considering a bail application, a meticulous analysis of the evidence has to be avoided, yet, for the limited purpose of considering whether there is a prima facie case against the petitioners/accused, when we have a cursory look at the statement of the victim, it does appear that she has prima facie supported the prosecution case. Her sister, who is the eye witness, has also prima facie supported the prosecution case while making her statement during trial of the case. The petitioners have, therefore, not succeeded in bringing to the fore any material that would rebut

the presumption that has triggered against them in view of the provisions contained in Section 29 and 30 of the POCSO Act.

24) The petitioners are alleged to have committed gang rape upon a minor girl, who, at the relevant time, was barely 13 years of age. The petitioners are grownup persons. While petitioner No.1 is aged 28 years, petitioner No.2 is aged 32 years. So, it is not a case of teen age love but it is a case where grownup men have molested a girl aged about 13 years. This makes the alleged act of the petitioners more heinous in nature and it shows an element of perversion in the offence alleged, which carries maximum of life imprisonment for remainder of natural life with minimum punishment of 20 years. Even sentence of death is provided as punishment under Section 6 of the POCSO Act. Therefore, at this stage, the petitioners cannot claim bail in their favour.

25) The contention of learned Senior Counsel for the petitioners that there has been delay in conclusion of the trial in the present case, is also belied from the minutes of proceedings of the trial court. It appears that the trial of the case is progressing at good pace and out of twelve listed

witnesses, five witnesses had already been examined at the time of summoning of the trial court record in the month of May, 2025. Therefore, it is not a case where the petitioners have remained incarcerated for a long period of time on account of delay in progress of trial. On this ground also, the petitioners cannot claim bail in their favour.

26) For the foregoing reasons, I do not find any merit in this petition. The same is dismissed accordingly.

(SANJAY DHAR)
JUDGE

Srinagar
21.11.2025
“Bhat Altaf”

Whether the Judgment is speaking:	Yes
Whether the judgment is reportable:	Yes