

# Date Of Decision: 30.8.2024 vs State Of Himachal Pradesh on 30 August, 2024

**Author: Sandeep Sharma**

**Bench: Sandeep Sharma**

2024:HHC:780

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.MP(M) No.1798 of 2024

Date of Decision: 30.8.2024

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Bhupesh Thakur

Versus

State of Himachal Pradesh

.....Petitioner

.....Respondent

Coram

Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting? Yes.

For the Petitioner: Mr. Ajay Kochhar, Senior Advocate with Mr.

Anubhav Chopra, Advocate.

For the Respondents: Mr. Rajan Kahol, Mr. Vishal Panwar and Mr. B.C.

Verma, Additional Advocates General with Mr. Ravi Chauhan, Deputy Advocates General, for the State.

Ms. Bhawna Sharma, Legal Aid Counsel, for the complainant.  
ASI Vijay Pal Singh, I.O. WPS Baddi, District Solan,

Himachal Pradesh, present in person.

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Sandeep Sharma, J. (Oral)

Sequel to orders dated 14/21.8.2024, whereby bail petitioner was ordered to be enlarged on interim bail in case FIR No.20/24, dated 18.7.2024, registered at Women Police Station Baddi, District Solan, Himachal Pradesh, under Section 69 of the Bharatiya Nyaya Sanhita, 2023 (in short "BNS") and Section 18 (d) of the Transgender Persons (Protection of Rights) Act 2019 (in short "Act"), respondent-State has filed the status 2 2024:HHC:7806 report and ASI Vijay Pal Singh, I.O. WPS Baddi, has come present with .

record. Record perused and returned.

2. Close scrutiny of record/status report reveals that on 18.7.2024, victim-prosecutrix lodged a complaint at WPS Baddi, alleging therein that during lockdown on account of Covid-19, she had come in contact of the bail petitioner through Facebook and since then, they both had been meeting and talking to each other. She alleged that though factum with regard to her being transgender was disclosed to the petitioner from day one, but yet he kept on insisting on solemnizing marriage with her. She alleged that after lifting of lockdown in the wake of Covid-19, bail petitioner took her to Naina Devi and Agra and applied Sindoor on her forehead to assure her of their marriage. She alleged that though factum of relationship inter-se her and bail petitioner was in the knowledge of families of both the persons, but yet parents of bail petitioner expressed their inability to solemnize marriage. She alleged that bail petitioner and his father told her to first become woman and as such, she got her sex changed at AIIMS Delhi. She alleged that though on the insistence of the bail petitioner and his family members, she has got her sex changed, but bail petitioner has refused to solemnize marriage. She alleged that she has come to know that family of the bail petitioner has fixed his marriage with 3 2024:HHC:7806 some other person and as such, appropriate action in accordance with law .

be taken against him. In view aforesaid background, FIR, as detailed herein above, came to be lodged against the petitioner, but before he could be apprehended, he approached this Court

through instant petition, praying therein for grant of interim bail. Vide order dated 14.8.2024, this Court enlarged the bail petitioner on interim bail subject to his joining investigation. Since bail petitioner has already joined investigation and nothing remains to be recovered from him, prayer has been made on his behalf for confirmation of interim bail granted vide order dated 14.8.2024.

3. Mr. Ajay Kochhar, learned senior counsel representing the petitioner while making this Court peruse contents of the FIR vis-à-vis provisions contained under Section 69 of the BNS, submits that no case much less under Section 69 is made out, rather case, if any, is made out against the petitioner under Section 18 (d) of the Act, wherein maximum punishment of two years can be awarded. While making this Court peruse status report/record made available to this Court, Mr. Kochhar, further submits that though victim-prosecutrix repeatedly claimed that on the askance of the petitioner and his family members, she got her sex changed, but such fact is yet to be established on record by leading cogent and convincing evidence. While referring to MLC adduced on record, Mr. 4 2024:HHC:7806 Kochhar, states that victim-prosecutrix refused to get herself medically .

examined, as a result thereof, there is ample evidence adduced on record till date with regard to surgery, if any, got conducted by the prosecutrix for getting her sex changed. Mr. Kochhar further states that allegation of maintaining physical relations with victim-prosecutrix are false, but since such relation was allegedly maintained prior to surgery, if any, got conducted by the victim-prosecutrix, whereby she allegedly got her sex changed, no offence, if any, under Sections 69 of BNSS and 18 (d) of the Act, can be stated to have been committed. He states that since petitioner has already joined the investigation and nothing remains to be recovered from him, interim bail granted in his favour vide order dated 14.8.2024, deserves to be confirmed in view of the peculiar facts and circumstances of the case.

4. While fairly admitting the factum with regard to filing of Challan in the competent court of law, Mr. Rajan Kahol, learned Additional Advocate General, contends that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of offence alleged to have been committed by him, he does not deserve leniency. While making this Court peruse the contents of FIR, Mr. Kahol, contends that though victim-prosecutrix refused to undergo medical checkup for establishing her 5 2024:HHC:7806 sex, but there is no material evidence adduced on record suggestive of the .

fact that victim-prosecutrix got the surgery done for changing her sex. He states that though there is overwhelming evidence adduced on record to prove that the bail petitioner had been sexually exploiting the victim-

prosecutrix on the pretext of marriage despite his fully knowing the fact that victim-prosecutrix is a transgender, but even if it is presumed that factum with regard to victim-prosecutrix having changed her sex was not in the knowledge of the bail petitioner, he cannot be spared of his having attempted to spoil the life of victim-prosecutrix. Mr. Kahol, fairly submits that bare perusal of Aadhar Card of victim-prosecutrix adduced on record clearly reveals that her gender is female, if it is so, bail petitioner has been rightly booked under Section 69 of the BNS. While referring to the provisions contained under Section 69, Mr. Kahol states that offence committed under the aforesaid

provision of law is punishable upto ten years. He states that since bail petitioner has committed heinous crime under Section 69 of the BNS and Section 18 (d) of the Act, prayer made on his behalf for grant of interim bail, deserves to be rejected outrightly.

5. Ms. Bhawana Sharma, learned Legal Aid Counsel, appearing for the complainant/victim-prosecutrix, also supported the arguments advanced by the learned Additional Advocate General.

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6. Having heard learned counsel for the parties and perused .

material available on record, this court finds that pursuant to order dated 14.8.2024, bail petitioner has already joined the investigation and nothing remains to be recovered from him. Though bare perusal of contents of FIR suggests that bail petitioner has committed heinous crime, but such fact, if any, is yet to be established on record by the prosecution by leading cogent and convincing evidence. In the case at hand, case under Section 69 of the BNS and Section 18 (d) of the Act, has been registered against the petitioner, but bare perusal of afore provision of law, which is reproduced herein below suggests that aforesaid provision of law can only be invoked if complainant is a woman.

"69. Sexual intercourse by employing deceitful means, etc. Whoever, by deceitful means or by making promise to marry to a woman without any intention of fulfilling the same, has sexual intercourse with her, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Explanation.--"deceitful means" shall include inducement for, or false promise of employment or promotion, or marrying by suppressing identity."

7. In aforesaid provision of law, it has been categorically provided that whoever by deceitful means or by making promise to marry to a 7 2024:HHC:7806 woman without any intention of fulfilling the same, has sexual intercourse .

with her, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term, which may extend to ten years and shall also be also liable to pay fine.

8. Having perused the aforesaid provision of law coupled with the statement of victim-prosecutrix recorded under Sections 154 and 164 CrPC, wherein she specifically admitted herself to be a transgender, there appears to be merit in the contention of Sh. Ajay Kochhar, learned Senior counsel appearing for the petitioner that no case, if any, is made out against the petitioner under Section 69 of the BNS.

9. At this stage, it would be apt to take note of section 2 of BNS, wherein word "gender" has been defined under Section 2 (10). Section 2 (10) of the BNS is reproduced herein below:

"2(10) "gender".--The pronoun "he" and its derivatives are used of any person, whether male, female or transgender. Explanation.--

"transgender" shall have the meaning assigned to it in clause (k) of section 2 of the Transgender Persons (Protection of Rights) Act, 2019

10. As per definition pronoun "he" and its derivatives are used of any person, whether male, female or transgender. For the first time, word "transgender" has been included in the definition of "gender", meaning thereby, transgenders cannot claim themselves to be male or female as they are given separate identity.

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11. Section 2(35) of BNS defines "Woman" as under:

"2 (35) "woman" means a female human being of any age."

12. As per aforesaid provision of law, woman means female human being of any age. Since under BNS, "woman" and "transgender" have been given different identity and have been defined independently, under Section 2 coupled with the fact that physical relationship inter-se victim-

prosecutrix and bail petitioner, if any, was developed prior to surgery of victim-prosecutrix, whereby she allegedly got her sex changed, there appears to be force in the claim of the bail petitioner that he could not have been booked under Section 69 of the BNS, rather he is required to be dealt with in terms of the under Section 18 (d) of the Act, which reads as under:

"(d) harms or injures or endangers the life, safety, health or well-

being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine."

13. As per Section 18 (d), whoever harms or injures or endangers the life, safety, health or well being , whether mental or physical of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term, which shall not be less than six 9 2024:HHC:7806 months, which may extend to two years and with fine. Moreover, this court .

finds that nothing has been adduced on record till date, suggestive of the fact that attempt to develop physical relationship, if any, by the petitioner with victim-prosecutrix was ever made after the alleged surgery, whereby victim-prosecutrix got her sex changed.

14. Though case at hand shall be decided by the court below in the totality of evidence collected on record by the prosecution, but keeping in view the aforesaid glaring aspect of the matter, there appears to be no justification for this court to send the bail petitioner in judicial custody, especially when nothing remains to be recovered from him.

15. No doubt, offence alleged to have been committed by the bail petitioner is of heinous nature, but guilt, if any, of the petitioner is yet to be established on record by leading cogent and convincing evidence. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly held that one is deemed to be innocent till the time, guilt of his/her is not proved in accordance with law. In the case at hand, guilt if any of the bail petitioner is yet to be established on record by the Investigating Agency by leading cogent and convincing evidence and as such, his freedom cannot be curtailed for an indefinite period during trial. Apprehension expressed by the learned Additional Advocate General that in the event of petitioner's 10 2024:HHC:7806 being enlarged on bail, he may flee from justice, can be best met by putting .

the bail petitioner to stringent conditions as has been fairly stated by the learned counsel for the petitioner.

16. Needless to say, object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail.

Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime. See: Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49 and Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496.

17. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, Dataram Singh vs. State of Uttar Pradesh & Anr., decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important 11 2024:HHC:7806 to ascertain whether the accused was participating in the investigations to .

the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case.

18. Consequently, in view of the above, orders dated 14/21.8.2024, passed by this Court, is made absolute, subject to the following conditions:

- (a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;
- (b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;
- (c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and
- (d) He shall not leave the territory of India without the prior permission of the Court.

19. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

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20. Any observations made hereinabove shall not be construed to .

be a reflection on the merits of the case and shall remain confined to the disposal of this application alone. The petition stands accordingly disposed of.

21. The petitioner is permitted to produce copy of the order downloaded from the High Court Website and the trial court shall not insist for certified copy of the order, however, it may verify the order from the High Court website or otherwise.

August 30, 2024  
(manjit)

(Sandeep Sharma),  
Judge