



IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cr. MP (M) No. 1849 of 2023

Reserved on: 11.08.2023

Date of Decision: 16.08.2023

Hari Raj Moli

Versus

...Petitioner

State of Himachal Pradesh

...Respondent

Coram:

The Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting?¹

For the Petitioner:

Mr. Ashwani Dhiman, Advocate.

For the Respondent:

Mr. Rajan Kahol, Mr. Vishal Panwar and Mr. B.C.Verma, Additional Advocate Generals with Mr. Rahul Thakur, and Mr. Ravi Chauhan, Deputy Advocate Generals.

Sandeep Sharma, J. (Oral)

Bail petitioner namely, Hari Raj Moli, who is behind the bars since 26.6.2021 has approached this Court in the instant proceedings filed under Section 439 Cr.P.C, for grant of regular bail in case, FIR No.32 of 2021, dated 26.6.2021, under Sections 376, 341, 323 and 506 of IPC, registered at police Station Kotkhaj, District Shimla, H.P.

2. Respondent-State has filed status report and ASI Pankaj Sharma, has come present alongwith the record. Record perused and returned.

¹ Whether reporters of the local papers may be allowed to see the judgment?

3. Close scrutiny of the record/status report reveals that on 20.6.2021, victim/prosecutrix (***name withheld to protect her identity***) aged 50 years, lodged a complaint at police Station, Kotkhai, alleging therein that though she hails from Sunni but few days back had come to Gumma to meet her niece. She alleged that on 19.6.2021, at 7.30 PM, while she was going towards Huli Bazaar for buying vegetables, one person caught hold of her neck from behind and dragged her towards apple orchard below the road leading to Anu. She alleged that aforesaid person not only gave her beatings, but sexually assaulted her against her wishes. She alleged that since she had not reached home, her niece had lodged her missing report on the police help line number. Though, police taking note of aforesaid missing report had started investigation, but since victim/prosecutrix had reached home, complaint lodged by her niece was withdrawn. She alleged that when she disclosed entire incident to her niece, she took her to police Station on 20.6.2021 and in that background aforesaid complaint came to be lodged. Police after having got the victim/prosecutrix medically examined at CHC, Kotkhai also got her statement recorded under Section 164 Cr.P.C, wherein she reiterated the allegations, as have been taken note hereinabove. After lodging the FIR, as detailed hereinabove, bail petitioner was arrested on 20.6.2021 and since then he is behind the bars. Since

challan stands filed in the competent Court of law and nothing remains to be recovered from the bail petitioner, coupled with the fact that all the prosecution witnesses stand examined, prayer has been made on behalf of the petitioner for grant of regular bail.

4. Mr. Ashwani Dhiman, learned counsel for the petitioner vehemently argued that petitioner has been falsely implicated. He submitted that bare perusal of the statement of victim/prosecutrix recorded in the trial Court itself suggests that she was unable to identify the accused. Learned counsel representing the petitioner further argued that initially in examination-in-chief victim/prosecutrix stated that she does not recognize the accused, but subsequently on some other day when her examination-in-chief resumed, she stated that accused present in Court is the person, who has raped her. However, in cross-examination, she categorically stated that she does not recognize the accused. Learned counsel representing the petitioner stated that otherwise also, other evidence led on record, especially medical evidence nowhere connects accused with the commission of the offence inasmuch as under Section 376 of IPC. He submitted that after completion of the trial, when accused wanted to file an application under Section 293 Cr.P.C for cross examination of scientific expert it transpired that petitioner has been wrongly charge sheeted for the commission of the offence under Protection of Children from

Sexual Offence Act and as such, Court adjourned the case for amendment of the charge. On 12.7.2023, learned Court below *Suo Moto* altered the charge against the accused without calling any application from the prosecution and reply from the petitioner, whereby amended charge under Sections 376, 341, 323 and 506 of IPC was put to the accused. He submitted that for no fault of petitioner, who has already suffered for more than one year, trial is being delayed and as such, he deserves to be enlarged on bail.

5. While fairly acknowledging factum with regard to filing of the challan in the competent Court of law, Mr. Rajan Kahol, learned Additional Advocate General, submitted that though nothing remains to be recovered from the bail petitioner, but keeping in view gravity of the offence alleged to have been committed by him he does not deserve any leniency. He further submitted that there is overwhelming evidence adduced on record by the prosecution suggestive of the fact that victim/prosecutrix was not only raped by the bail petitioner, but was also given merciless beatings and as such, he does not deserve any leniency. Learned Additional Advocate General further submitted that bare perusal of statement of victim/prosecutrix recorded in the trial Court, nowhere suggests that she was unable to identify the accused. He further submitted that since prosecution evidence already stands concluded, prayer made on behalf of the petitioner

for grant of bail on the ground of inordinate delay in conclusion of trial is otherwise not tenable and as such, deserves outright rejection.

6. Having heard learned counsel for the parties and perused material available on record, this Court finds that allegedly on 19th June 2021, victim/prosecutrix was dragged into the apple orchard by petitioner and thereafter she was raped, but interestingly no complaint at that juncture was filed by the victim/prosecutrix. Interestingly, in the case at hand niece of the victim/prosecutrix prior to lodging of the FIR had lodged the missing report to the police, it is not understood that when victim/prosecutrix at 7.30 PM had gone to buy vegetable, where was the occasion for her niece to lodge missing report. Apart from above, victim/prosecutrix alleged that accused dragged her to apple orchard near Anu road, while she had gone Huli Bazaar at 7.30-8.00 PM for bringing vegetables. It is not understood what prevented victim/prosecutrix from raising hue and cry, especially when spot of alleged occurrence was adjacent to the bazaar.

7. Leaving everything aside, this Court finds that victim/prosecutrix in her statement recorded before the trial Court at first instance categorically stated that she is unable to recognize the accused, but once her examination-in-chief resumed again on subsequent date she claimed that accused present in Court is the

person, who raped her. However, interestingly in cross-examination she again stated that she is unable to recognize the accused. Moreover, at no point of time identification parade ever came to be conducted by the police. If the entire statement of the victim/prosecutrix is read, it clearly emerges that she was not aware at first instance that who was the person, who dragged her to apple orchard, but while lodging complaint she specifically alleged that bail petitioner herein is the person, who had raped her. Most importantly, in the case at hand initially charge against the bail petitioner was framed under various provisions of POCSO, but after two years of filing of the challan, it came to be transpired that victim/prosecutrix was major and as such, a case under Sections 376, 341, 323 and 506 of IPC was required to be registered against bail petitioner and as such, Court *Suo Moto* altered the charge, as a result of which, trial of the accused, who is already behind the bars for more than two years further came to be delayed.

8. Medical evidence adduced on record in the case at hand is not that much sound/ convincing that conviction of accused can be recorded on that basis only. No doubt, SFSL Report suggests that DNA profile of the lady was found on the cloth of the accused and the same completely matches with the DNA of the victim/prosecutrix but such fact may not be sufficient to conclude

guilt, if any, of the bail petitioner for his having allegedly committed offence punishable under S.376 IPC, especially when no semen of the bail petitioner was found on the person of victim/prosecutrix.

9. Though, case at hand is to be decided by learned trial Court in the totality of evidence collected on record by the prosecution, but keeping in view the aforesaid glaring aspects of the matter, there appears to be no justification to let the bail petitioner incarcerate in jail for an indefinite period during trial, especially when he has already suffered for more than two years. Apart from above, this court finds that statement of the victim/prosecutrix already stands recorded and as such, there is no scope left for petitioner to tamper with the prosecution evidence. Bail petitioner is behind bars for the more than two years and in the case at hand, trial is not being delayed on account of the fault, if any, of the bail petitioner, rather on account of fault of the prosecution as well as learned Court below, who at first instance failed to frame charges under appropriate provisions of law. It is not understood that how prosecution and learned Court below could commit such a glaring mistake of framing charge under provision of POCSO against the bail petitioner, especially when at the time of alleged incident, age of the victim/prosecutrix was more than 50 years. Now on account of alteration of charge, there is every likelihood of further delay in conclusion of trial.

10. By now it is well settled that speedy trial is legal right of the accused and one cannot be made to suffer indefinitely for delay in trial and as such, this Court sees no reason to keep the bail petitioner behind the bars for indefinite period during trial. Delay in trial has been held to be in violation of the right guaranteed under article 21 of Constitution of India. Reliance is placed on judgment passed by the Hon'ble Apex Court in case titled **Umarmia Alias Mamumia v. State of Gujarat**, (2017) 2 SCC 731, relevant para whereof has been reproduced herein below:-

"11. This Court has consistently recognised the right of the accused for a speedy trial. Delay in criminal trial has been held to be in violation of the right guaranteed to an accused under [Article 21](#) of the Constitution of India. (See: Supreme Court [Legal Aid Committee v. Union of India](#), (1994) 6 SCC 731; [Shaheen Welfare Assn. v. Union of India](#), (1996) 2 SCC 616) Accused, even in cases under TADA, have been released on bail on the ground that they have been in jail for a long period of time and there was no likelihood of the completion of the trial at the earliest. (See: [Paramjit Singh v. State \(NCT of Delhi\)](#), (1999) 9 SCC 252 and [Babba v. State of Maharashtra](#), (2005) 11 SCC 569).

11. Hon'ble Apex Court as well as this Court have held in a catena of judgments that one is deemed to be innocent, till the time his/her guilt is proved in accordance with law, as such, there is no justification to let bail petitioner incarcerate in jail for an indefinite period during trial. Apprehension expressed by learned Additional Advocate General that in the event of bail petitioners

being enlarged on bail, he may flee from justice, can be best met by putting the bail petitioner to stringent conditions.

12. Hon'ble Apex Court having taken note of inordinate delay in conclusion of trial in similar facts ordered for enlargement of accused on bail in **Nitish Adhikary @ Bapan v. The State of West Bengal**, Special Leave to Appeal (Crl.) No. 5769 of 2022 decided on 1.8.2022 and in **Abdul Majeed Lone v. Union Territory of Jammu and Kashmir**, Special Leave to Appeal (Crl) No. 3961 of 2022, decided on 1.8.2022, who were framed under Narcotic Drugs and Psychotropic Substances Act and were behind the bars for approximately two years and there was no likelihood of conclusion of trial in near future, subject to certain conditions.

13. 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 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. The relevant paras of the aforesaid judgment are reproduced as under:

2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important 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. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear

of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to [Section 436](#) of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting [Section 436A](#) in [the Code](#) of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of [Article 21](#) of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in *In Re-Inhuman Conditions in 1382 Prisons*

14. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)¹ Supreme Court Cases

49; held as under:-

“ The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, “necessity” is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should

be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

15. 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.

16. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

- (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

- (ii) nature and gravity of the accusation;
- (iii) severity of the punishment in the event of conviction;
- (iv) danger of the accused absconding or fleeing, if released 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 influenced; and
- (viii) danger, of course, of justice being thwarted by grant of bail.
- (ix)

17. In view of above, bail petitioner has carved out a case for himself, as such, present petition is allowed. Bail petitioner is ordered to be enlarged on bail, subject to his furnishing bail bonds in the sum of Rs.2.00 Lakh with two sureties surety in the like amount each, to the satisfaction of the learned trial Court, besides 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.

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

19. 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 petition alone. The petition stands accordingly disposed of.

20. A downloaded copy of this order shall be accepted by the learned trial Court, while accepting the bail bonds from the petitioner and in case, said court intends to ascertain the veracity of the downloaded copy of order presented to it, same may be ascertained from the official website of this Court.

(Sandeep Sharma)
Judge

August 16,2023
(shankar)