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## vs State Of Himachal Pradesh on 19 January, 2018

**Author: Sandeep Sharma**

**Bench: Sandeep Sharma**

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.MP(M) No. 1518 of 2017

Date of Decision No.19.01.2018

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Manoj Kumar

..... Petitioner

Versus

State of Himachal Pradesh

.....Respondent.

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Coram:

Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting? 1

For the petitioner:

Mr. Navlesh Verma, Advocate.

For the respondent:

Mr. J.K.Verma, Deputy Advocate  
General, with Mr. Rajat Chauhan, Law

Officer.

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Sandeep Sharma, Judge (oral):

Bail petitioner namely Manoj Kumar, who is in custody since 3.12.2017, has approached this Court for grant of regular bail under Section 439 of the Code of Criminal Procedure in case FIR No.112 of 2017, dated 3.12.2017, under Sections 366, 376, 504 of the Indian Penal Code registered at Police Station, Arki, District Solan, Himachal Pradesh.

2. Sequel to orders dated 19.12.2017 and 2.1.2018, SI/SHO Ganga Ram, Police Station, Arki, has come present in Court alongwith the record of the case. Mr. Rajat Chauhan, learned Law Officer, has also placed on record status report Whether the reporters of the local papers may be allowed to see the judgment?

prepared on the basis of the investigation carried out by the investigating agency.

3. Perusal of the record/status report suggest that FIR, .

detailed hereinabove, came to be lodged at police Station, Arki at the behest of the complainant/prosecutrix, who alleged that on 2.12.2017, she had come to attend retirement party of her father and at around 7:00 PM, bail petitioner, who was known to her, had telephonically called her on the road. Complainant/ prosecutrix alongwith her cousin namely Usha came on the road to meet the bail petitioner, whereafter bail petitioner allegedly took both of them in his car bearing No.HP-11-A-1678 towards Chhibbar. Subsequently, bail petitioner dropped Usha i.e. cousin of complainant/prosecutrix and thereafter he alongwith prosecutrix proceeded towards Chhibbar. Complainant further alleged that the bail petitioner threatened her by showing knife and compelled her to solemnize marriage with him. Complainant/ prosecutrix apprehending danger to her life, agreed to aforesaid proposal of marriage given by the bail petitioner and thereafter they both proceeded towards Parwanoo. As per the record/status report, bail petitioner as well as prosecutrix while going towards Parwanoo had their dinner in one Dhaba at Dharampur, whereafter they stayed at one Hotel, near petrol pump, Parwanoo.

Complainant/ prosecutrix further alleged that bail petitioner on the pretext of marriage, sexually assaulted her and thereafter on the next day dropped her at her village. Complainant/prosecutrix has also alleged that now bail petitioner is refusing to marry her and as such, appropriate action may be taken against him, in .

accordance with law.

4. Mr. Navlesh Verma, learned counsel representing the bail petitioner, while inviting attention of this Court to the record/ status report, vehemently argued that no case, if any, is made out under Section 376 and 504 of Indian Penal Code against the bail petitioner. Mr. Verma, further contended that it is quite apparent/evident from the status report that complainant/ prosecutrix joined the company of the bail petitioner of her own volition without there being any external pressure and as such, it cannot be said that bail petitioner kidnapped her and thereafter sexually assaulted her. Mr. Verma, further contended that bail petitioner is 24 years old and at present studying and as such, great prejudice shall be caused to the bail petitioner, in case he is allowed to incarcerate in jail for indefinite period.

5. Learned counsel representing the petitioner further contended that bail petitioner is a local resident of the area and he shall always remain available for the investigation as well as trial and as such, he may be ordered to be enlarged on bail. Lastly, Mr. Verma, invited attention of this Court to the medical evidence adduced on record by the investigating agency to suggest that no definite conclusion has been drawn by the medical agency vis-à-

vis alleged act of sexual assault, if any, committed by the bail petitioner.

6. Mr. Rajat Chauhan, learned Law Officer, while .

refuting aforesaid submission having been made by the learned counsel representing the petitioner, contended that keeping in view the alleged offences committed by the bail petitioner, he does not deserve any leniency, rather needs to be dealt with severely.

Mr. Chauhan, further contended that it has come in the investigation that the bail petitioner by showing knife to the complainant forcibly took her in his car towards Parwanoo, whereafter he allegedly sexually assaulted her twice. While refuting the aforesaid contention put forth by learned counsel representing the petitioner that nothing has come in the medical evidence against the bail petitioner, Mr. Chauhan, learned Law Officer, contended that bare perusal of the report submitted by the FSL, suggests that bail petitioner sexually assaulted the prosecutrix and as such, he is not entitled to be enlarged on bail.

However, Mr. Chauhan, learned Law Officer, fairly submitted that investigation in the case is complete, save and except one report of DNA, which is yet to be received by the Investigating Agency from FSL.

7. I have heard learned counsel representing the parties and carefully gone through the record made available.

8. Careful perusal of the record/status report, nowhere suggest that the prosecutrix was forcibly made to sit in the car by bail petitioner, rather she after having received telephonic call .

from the bail petitioner came on the road alongwith her cousin namely Usha, who also joined her till one particular point.

Though, complainant has alleged that bail petitioner showing knife to her compelled her to solemnize marriage with him, but it is also apparent from the record that complainant/prosecutrix of her own will proceeded towards Parwanoo and at place Dharampur, both of them had dinner. If the prosecutrix was being taken forcibly by petitioner, she had sufficient time at Dharampur to raise hue and cry, but there is no evidence at all regarding this aspect of the matter, rather prosecutrix silently joined the company of bail petitioner and stayed with her in a Hotel at Parwanoo.

9. Though, aforesaid aspects of the matter are to be considered and decided by the court below on the basis of evidence adduced on record by the prosecution/investigating agency, but, at this stage,

this court after having carefully perused the material available on record, sees no reason to agree with the contention of learned Law Officer that bail petitioner forcibly kidnapped the prosecutrix and thereafter sexually assaulted her.

The bail petitioner as well as prosecutrix are major, as is evident from the record and as such, in view of the discussion made herein above, this Court sees no reason to allow the bail petitioner to incarcerate in jail for indefinite period during the trial and as such, he is entitled to be released on bail. Moreover, nothing has been placed on record by the investigating agency, from where it .

can be inferred that in the event of petitioner's being enlarged on bail, there is likelihood of his fleeing from the justice.

10. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that 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. The Hon'ble Apex Court in Sanjay Chandra versus Central Bureau of Investigation (2012)<sup>1</sup> Supreme Court Cases 49; wherein it has been 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."

11. 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.

12. Law with regard to grant of bail is now well settled.

The apex Court in *Siddharam Satlingappa Mhetre versus State of Maharashtra and others*, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in *Gurbaksh Singh Sibbia vs. State of Punjab*, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

"111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and .

inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in *Sibbia's case* (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

- (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
- (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
- (iii) The possibility of the applicant to flee from justice;
- (iv) The possibility of the accused's likelihood to repeat similar or the other offences.
- (v) Where the accusations have been made .

only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

(Emphasis supplied)

13. In *Sundeeep Kumar Bafna versus State of Maharashtra & another* (2014)<sup>16</sup> Supreme Court Cases 623, wherein it has been held as under:-

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in *Gurcharan Singh vs State (Delhi Admn)* (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts.

The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with *Gurcharan Singh*, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in *State of Haryana vs Bhajan Lal*, 1992 (Supp) 1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or

prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a

vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazoned by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severely curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

14. In *Manoranjana Singh Alias Gupta versus CBI* 2017 (5) SCC 218, The Hon'ble Apex Court has held as under:

" This Court in *Sanjay Chandra v. CBI*, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to

ensure that an accused person would stand his trial when called upon and that 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 found guilty. It was underlined that the object of bail is neither punitive .

nor preventive. This Court sounded a caveat 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 a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

15. 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;
- (viii) reasonable apprehension of the witnesses being influenced; and
- (ix) danger, of course, of justice being thwarted by grant of bail.

16. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is



ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bonds in the sum of Rs 50,000/- with one local surety in the like amount to the satisfaction of concerned Judicial Magistrate, with following conditions:

(a) He shall make herself 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.

17. It is clarified that if the petitioner misuses the liberty or violate any of the conditions imposed upon him, the .

investigating agency shall be free to move this Court for cancellation of the bail.

18. 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.

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(Sandeep Sharma),  
Vacation Judge

19th January, 2018  
(shankar)