
vs State Of Himachal Pradesh on 9 July, 2019

Author: Sandeep Sharma

Bench: Sandeep Sharma

IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA

Cr. MP(M) No. 1179 of 2019

Date of Decision: 9th July, 2019

Naresh Kumar

..... Petitioner

State of Himachal Pradesh

Versus
.....Respondent.

Coram:

Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting? 1 Yes.

For the Petitioner:

Mr. Sandeep Datta, Advocate.

For the Respondent: Mr. Sudhir Bhatnagar & Mr. Sanjeev
Sood, Additional Advocate Generals,
with Mr. Kunal Thakur, Deputy

Advocate General.

Sandeep Sharma, Judge (oral):

Bail petitioner namely, Naresh Kumar, who is behind the bars since 23.5.2019, has approached this Court in the instant proceedings filed under Section 439 of the Code of Criminal Procedure, praying

therein for grant of regular bail in case FIR No.22 of 2019, dated 18.5.2019, under Sections 363, 366, 376, 354-D, 343 & 420 of IPC and Section 6 of the Protection of Children from Sexual Offences Act, registered at police Station, Sunni, District Shimla, Himachal Pradesh.

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

2. Sequel to order dated 24.6.2019, ASI Dilu Ram, has come present alongwith the record. Mr. Sanjeev Sood, .

learned Additional Advocate General, has also placed on record status report, prepared on the basis of the investigation carried out by the Investigating Agency. Record perused and returned.

3. Close scrutiny of the record/status report, reveals that on 18.5.2019 complainant namely, Ramesh Chand lodged a complaint at police Post, Dhami, District Shimla, H.P., alleging therein that her minor daughter (hereinafter referred to as the 'prosecutrix'), who had gone to computer centre on 17.5.2019, has not returned. He alleged that despite his best efforts, he could not find out the whereabouts of her minor daughter and he has suspicion that person namely, Naresh Kumar i.e. present bail petitioner has kidnapped her minor daughter. Since jurisdiction of the case was found to be of police Station, Sunni, complaint, as referred hereinabove, came to be transferred to police Station, Sunni, District Shimla, H.P. On the basis of aforesaid complaint having been made by the complainant, a case under section 363 of IPC came to be registered against the bail petitioner. On 23.5.2019, police recovered the prosecutrix from Totu, who in her .

statement made under Sections 161 Cr.P.C as well as 164 Cr.P.C., alleged that though she knew bail petitioner for the last six months, but he on the pretext of marriage allured her and subsequently eloped with her. She alleged that bail petitioner took her to Solan and sexually assaulted her against her wishes. She stated before the Magistrate that bail petitioner took a room on rent at Solan and thereafter kept her in illegal confinement for 4-5 days. On the basis of aforesaid statement having been made by the prosecutrix, a case under Sections 366, 376, 354-D, 343 & 420 of IPC and Section 6 of POCSO Act, also came to be registered against the bail petitioner.

4. Mr. Sanjeev Sood, learned Additional Advocate General while fairly acknowledging the factum with regard to completion of the investigation, contended 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 the bail petitioner, prayer having been made by him for grant of bail, may be rejected. Mr. Sood, learned Additional Advocate General further stated that though investigation .

conducted so far reveals that the prosecutrix had prior proximity with the bail petitioner, but keeping in view her age, consent, if any, is of no consequence and as such, present bail petitioner does not deserve any leniency.

5. Having heard learned counsel representing the parties and perused the material available on record, especially statement of prosecutrix made under Section 164 Cr.P.C., this Court finds that the prosecutrix was known to the bail petitioner for the last six months. It has specifically come in the

statement of the prosecutrix that bail petitioner had provided him mobile phone and she was in constant touch with him. Careful perusal of the statement made by the prosecutrix under Section 164 Cr.P.C, nowhere compel this Court to infer that bail petitioner kidnapped the prosecutrix, rather it is quite apparent that the prosecutrix of her own volition and without there being any external pressure joined the company of the bail petitioner. It has specifically come in the statement of the prosecutrix that while taking room on rent at Solan, both bail petitioner and the prosecutrix had introduced themselves as husband and wife to the owner/landlord.

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Though, prosecutrix has alleged that she was sexually assaulted against her wishes, but there is nothing on record suggestive of the fact that efforts, if any, ever came to be made by the prosecutrix to raise alarm. No doubt, age of the prosecutrix as per record is 17 years 9 months, but having noticed the conduct of the prosecutrix, this Court has no hesitation to conclude that she was capable of understanding the consequences of her being in the company of the bail petitioner.

6. Though, aforesaid aspects of the matter are to be considered and decided by the learned trial Court on the basis of totality of evidence to be collected on record by the prosecution, but having noticed the aforesaid glaring aspects, this Court sees no reason to allow the bail petitioner to incarcerate in jail for an indefinite period, especially when guilt, if any, of him is yet to be proved, in accordance with law.

7. It has been repeatedly held by Hon'ble Apex Court as well as this Court that one is deemed to be innocent till the time his /her guilt is not proved, in accordance with law.

Investigation in the case is complete and there is no material .

placed on record by the investigating Agency suggestive of the fact that in the event of petitioner's being enlarged on bail, he may flee from justice and as such, prayer made on behalf of the bail petitioner deserves to be considered.

8. 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 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*

9. 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."

10. 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.

11. The Hon'ble Apex Court in Prasanta Kumar Sarkar v. 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.

12. Consequently, in view of the above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing personal bond in the sum of Rs.

1,00,000/□(Rs. one lakh) with one surety in the like amount each, to the satisfaction of the learned trial Court, with 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 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.

13. It is clarified that if the petitioner misuses his 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.

14. 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 bail petition stands disposed of accordingly.

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(Sandeep Sharma), Judge 9th July, 2019 (shankar)