
vs State Of Himachal Pradesh on 26 February, 2018

Author: Sandeep Sharma

Bench: Sandeep Sharma

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.MP(M) No.50 of 2018

Date of Decision No.26.02.2018

Pinku Singh

..... Petitioner

Versus

State of Himachal Pradesh

.....Respondent.

Coram:

Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting? 1 Yes.

For the petitioner:

Mr. Dalip Kumar Sharma, Advocate.

For the respondent:

Mr. Dinesh Thakur, Additional Advocate
General, with Mr. Raju Ram Rahi,

Deputy Advocate General.

Sandeep Sharma, Judge (oral):

Bail petitioner, who is in judicial lockup since 28.1.2015, has approached this Court for grant of regular bail under Section 439 of the Code of Criminal Procedure in case FIR No.10 of 2015, dated 19.01.2015, under Sections 363, 366-A, 376 of the Indian Penal Code and Section 4 of the Protection of Child from Sexual Offence Act, registered at Police Station, Baddi, District Solan, Himachal Pradesh.

2. Sequel to orders dated 17.01.2018 and 2.2.2018, ASI Rajinder Singh, Police Station, Baddi, has come present in Court alongwith the record of the case. Mr. Dinesh Thakur, learned Additional Advocate General, has also placed on record status Whether the reporters of the local papers may be allowed to see the judgment?

report prepared on the basis of the investigation carried out by the investigating agency, perusal whereof suggest that FIR, detailed hereinabove, came to be registered against the bail petitioner at .

the behest of the complainant, namely Sh. Santosh Kumar, who alleged that bail petitioner kidnapped her minor daughter and thereafter kept her in illegal custody. As per complainant, her daughter had gone to school on 29.12.2014, but since she did not return, he made certain inquiries and he has apprehension that bail petitioner enticed her. On the basis of aforesaid complaint, police conducted investigation and on 28.1.2015 recovered daughter of the complainant from the house of the bail petitioner at village Kudrani. Police after having recovered minor girl from the house of the bail petitioner also arrested him on 28.1.2015 and since then he is in custody.

3. Mr. Dalip Kumar Sharma, learned counsel representing the bail petitioner, while praying for grant of bail, contended that bare perusal of the record/status report, clearly suggest that victim had joined the company of the bail petitioner of her own volition and at no point of time she was compelled by the bail petitioner to accompany him. While referring to the statement of victim recorded under Section 164 of the Code of Criminal Procedure, Mr. Sharma, contended that bail petitioner and victim were known to each other for quite considerable time and both of them had agreed for marriage inter se them. Mr. Sharma, further contended that no definite evidence has been collected on record by the investigating agency suggestive of the fact that at the time of alleged incident, victim was minor, rather report of FSL clearly .

suggests that victim was 17 years of age at the time of alleged incident. Mr. Sharma, further contended that FIR came to be lodged against the bail petitioner after 22 days of alleged incident and no explanation, if any, has been rendered on record by the investigating agency for delay in lodging the FIR. Mr. Sharma, further contended that for the last three years, bail petitioner is in custody for no fault of him and as such, he deserves to be enlarged on bail.

4. Mr. Dinesh Thakur, learned Additional Advocate General, while referring to the record/status report, vehemently argued that it has come in the investigation that daughter of the complainant was minor at that relevant time and the bail petitioner taking undue advantage of her innocence forcibly took her to his house, where he repeatedly sexually assaulted her against her wishes. Mr. Thakur, further contended that it is quite apparent from the documents procured by the investigating agency, especially report of FSL that daughter of the complainant was minor at the

time of alleged incident and as such, consent, if any, has no relevance in the present case. While praying for dismissal of the bail petition preferred on behalf of the petitioner, learned Additional Advocate General, contended that challan stands already filed in the competent Court of law and matter is fixed for evidence and as such, enlargement of bail petitioner on bail, at this stage, may not be in the interest of justice. Lastly, Mr. .

Thakur, learned Additional Advocate General, contended that since the bail petitioner hails from the State of Uttar Pradesh, it may be difficult to procure his presence during the trial in the event of petitioner's being enlarged on bail.

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

6. After having carefully perused the record/status report, especially statement of the victim recorded under Section 164 of Code of Criminal Procedure, there appears to be considerable force in the arguments of learned counsel representing the bail petitioner that bail petitioner and the victim were known to each other and the victim herself voluntarily joined the company of bail petitioner on the date of alleged incident. As per the statement of the victim recorded under Section 164 of Code of Criminal Procedure, it is quite apparent that victim solemnized marriage with the bail petitioner and thereafter she lived with him at his village. Similarly, there appears to be no definite evidence/proof, if any, collected by the investigating agency that age of the victim was 15 years at the time of alleged incident. Though, investigating agency has placed on record "School Leaving Certificate" issued by the Principal, Government Senior Secondary School, Gullerwala, perusal whereof suggests that date of birth of the victim is 12.01.2000, but that may not be sufficient to conclude the correct age of the victim. Perusal of .

status report further suggest that the investigating agency on the directions issued by this Court also approached Gram Panchayat concerned for verification of date of birth of the victim, but no record was found.

7. To the contrary, report submitted by the FSL, clearly suggests that at the time of alleged incident, age of the victim was 17 years. Though, aforesaid aspects of the matter are to be considered and decided by the court below on the basis of the evidence collected on record by the investigating agency, but this Court after having carefully perused the material adduced on record by the investigating agency, sees no reason to let the bail petitioner incarcerate in jail for indefinite period, especially when he has already suffered for more than three years. It also emerge from the report submitted by the investigating agency that bail petitioner had approached this Court by way of bail petition (Cr.MP(M) No.1477 of 2015), which came to be disposed of on 30.11.2015 with the direction to the learned trial Court to conclude the trial within a period of four months, but fact remains that till date only two prosecution witnesses have been examined.

8. Leaving everything aside, this Court cannot loose the sight of the fact that freedom of individual cannot be curtailed for indefinite period, especially when guilt is yet to be proved, in accordance with law. No material, if any, has been placed on record by the investigating agency suggestive of the

fact that in the .

event of petitioner's being enlarged on bail, he may influence/tamper with the evidence adduced/collected on record by the investigating agency. Another apprehension expressed by learned Additional Advocate General with regard to possibility of petitioner's absconding from the trial can be met by putting the bail petitioner to stringent conditions, as has been fairly submitted by the learned counsel representing the bail petitioner.

9. 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)¹ 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.

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

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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;

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(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)

12. In *Sundeep Kumar Bafna versus State of Maharashtra & another* (2014)¹⁶ 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 severally 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."

13. 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."

14. 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 freedom of an

individual is of utmost importance and same cannot be curtailed merely on the basis of suspicion. Hon'ble Apex Court has further held that till the time guilt of accused is not proved in accordance with law, he is deemed to be innocent. The relevant paras No.2 to 5 of the 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*.

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 two local sureties in the like amount to the satisfaction of concerned Judicial Magistrate, 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 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) ,
Judge

26th February, 2018

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