

Kashir Ahmed vs State Of Himachal Pradesh on 4 May, 2018

Author: Sandeep Sharma

Bench: Sandeep Sharma

IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Cr. MP (M) No. 468 of 2018

Decided on May 4, 2018

Kashir Ahmed

Versus

State of Himachal Pradesh

...petitioner

...respondent

Coram:

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

Whether approved for reporting?1 Yes.

For the petitioner : Mr. Nareshwar Singh Chandel, Advocate.

For the respondent

r :

Mr. Dinesh Thakur, Additional Advocate
General with Mr. Vikrant Chandel, Deputy
Advocate General.

S.I. Vinod Kumar, PS Sunder Nagar, District

Mandi, Himachal Pradesh.

Sandeep Sharma, J. (Oral)

Bail petitioner namely Kashir Ahmad, who is behind the bars since 03.09.2016, has approached this

Court in the instant proceedings, filed under Section 439 Cr. P.C., praying therein for grant of regular bail in connection with FIR No. 187/16, dated 23.7.2016, under Sections 363,366, 376 IPC and Section 4 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act), registered at Police Station Sunder Nagar, District Mandi, Himachal Pradesh.

2. Sequel to order dated 20th April, 2018, S.I. Vinod Kumar has come present with record. Mr. Vikrant Chandel, learned Deputy Advocate Whether reports of Local Papers may be allowed to see the judgment?

General has also placed on record status report, prepared on the basis of investigation carried out by the investigating Agency. Record perused and .

returned.

3. Perusal of record/status report reveals that complainant Yakub Mohmmad made a complaint to the police on 23rd July, 2016 that her minor daughter (hereinafter referred to as victim-prosecutrix), who was studying in class plus two at Klam Azad Public School Deenak, has been kidnapped by the bail petitioner. Complainant also alleged in the complaint that bail petitioner enticed his minor daughter and eloped with her on the pretext of marriage. On the basis of aforesaid complaint having been made by the complainant Yakub Mohmmad, formal FIR, as detailed above came to be lodged against the present bail petitioner. On 31st October, 2016, Special Investigating Team recovered victim-prosecutrix from Gulm Dibba at Andhra Pradesh, where she was allegedly kept in illegal custody by the bail petitioner. Victim-prosecutrix in her statement given to Magistrate under Section 164 Cr. P.C., stated that she studies in class plus two at Klam Azad Public School Deenak, where bail petitioner is also working as a teacher. She further stated that for the last two months, bail petitioner had been compelling her to solemnize marriage with him, but when she refused, he extended threats to her. In September, 2016, when school was closed on account of vacation, bail petitioner came to house of the victim-prosecutrix and thereafter kidnapped her after administering her some intoxicant/medicine. She further stated before the .

Magistrate that when she regained consciousness, she found herself at Joginder Nagar in a room of a hotel. Bail petitioner kept victim-prosecutrix at Joginder Nagar in a hotel for three nights, where he sexually assaulted her against her wishes. She further stated that from Joginder Nagar, she was taken to Nurpur and Dalhousie, where they stayed for a couple of days.

Bail petitioner also took victim-prosecutrix to Sharanpur, where bail petitioner allegedly raped her for three days and threatened to do away with her life. Perusal of the statement made under Section 164 of Cr. P.C. further suggests that victim-prosecutrix was also taken to Delhi, wherefrom bail petitioner took her to Gulm Dibba at Andhra Pradesh by train. As per version narrated to Judicial Magistrate by victim-prosecutrix, bail petitioner sexually assaulted her for almost 15 times against her wishes, whereafter on 31st August, 2016, police recovered victim-prosecutrix from Andhra Pradesh and arrested the bail petitioner.

4. Mr. Nareshwar Singh Chandel, learned counsel representing the bail petitioner while referring to the record/status report adduced on record by the Investigating Agency, strenuously argued that no case, if any, is made out under Sections 363, 367 and 376 of Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 and as such, no purpose would be served by keeping the bail petitioner in jail for an indefinite period, who is already behind the bars for almost one .

year and 10 months. He further stated that bare perusal of statement having been made by the victim-prosecutrix under Section 164 Cr. P.C, clearly suggests that bail petitioner and victim-prosecutrix were known to each other and they were in friendly relationship. He further stated that there is nothing on record suggestive of the fact that during alleged illegal r to detention, efforts, if any, were ever made by the victim-prosecutrix to raise hue and cry or to lodge complaint, if any, against illegal act of bail petitioner. Mr. Chandel, also made available certified copies of statements made by six prosecution witnesses, especially statement of victim-

prosecutrix recorded during the trial, to demonstrate that nothing has emerged against the bail petitioner, rather bare statement of victim-

prosecutrix, falsifies the story put forth by the prosecution and as such, bail petitioner deserves to be enlarged on bail.

5. Mr. Chandel while making this Court to travel through the statements of PW-1 i.e. Prosecutrix, PW-2 Complainant, PW-3 Secretary Gram Panchayat and PW-6 mother of prosecution, made a serious attempt to persuade this Court to agree with his contention that bare conduct of victim-prosecutrix clearly suggests that she with her own volition, joined the company of bail petitioner and at no point of time, she was kidnapped or illegally detained by him. Mr. Chandel further stated that though as per documents adduced on record, efforts have been made by the prosecution .

to prove that victim-prosecutrix was 16 years old at the time of alleged incident, but no authenticate and cogent evidence in this regard has been adduced on record because statement of PW-3, Secretary Gram Panchayat, Dugrain clearly suggests that entry made in the Parivar Register is not of victim-prosecutrix and there is tampering on it. Lastly, Mr. Chandel, contended that since all the material prosecution witnesses, especially victim-prosecutrix, have been examined, no fruitful purpose would be served in case bail petitioner is allowed to incarcerate in jail for an indefinite period, especially when he has already suffered for approximately one year and 10 months. He further stated that remaining witnesses are formal witnesses and statements made by them may not be very relevant to adjudicate the guilt, if any, of the bail petitioner.

6. Mr. Vikrant Chandel, learned Deputy Advocate General, while opposing aforesaid prayer having been made by the learned counsel for the bail petitioner, fairly admitted that six prosecution witnesses have been examined and copies placed on record are correct as per record and contended that keeping in view the gravity of offence allegedly committed by the bail petitioner, he is not entitled to be enlarged on bail. He further contended that it stands duly proved on record that

victim-prosecutrix is/was minor and consent, if any, given by her while joining the company of the bail petitioner, is of no consequence and as such, arguments .

advanced in this regard by the learned counsel representing the bail petitioner, deserve to be rejected outrightly. Mr. Vikrant, further contended that though statements adduced on record till date prove the case of prosecution beyond reasonable doubt, but otherwise also, nine witnesses are yet to be examined and as such, it cannot be concluded that nothing has emerged against bail petitioner and as such, his petition for grant of bail deserves to be rejected outrightly. Lastly, Mr. Vikrant, contended that taking into account the conduct of bail petitioner, who was a teacher in a school, no leniency can be shown to him. Mr. Vikrant, learned Deputy Advocate General further contended that in the event of petitioner's being enlarged on bail, he may influence and tamper with the evidence adduced on record by the prosecution and there is every likelihood of his fleeing from justice as he hails from the State of Haryana.

7. I have heard the learned counsel for the parties and gone through the record carefully.

8. Having perused the statement made by the victim-

prosecutrix under Section 164 of Cr. P.C. before the learned Magistrate, it cannot be accepted that bail petitioner was unknown to the victim-

prosecutrix, rather they were known to each other and bail petitioner wanted to marry her. In her statement under Section 164 Cr.P.C, victim-

prosecutrix has stated that bail petitioner knocked her door and thereafter, .

entered her room, whereas interestingly, in her statement made before learned Court below, she has stated that accused entered her room which was on the first floor, by climbing the pipes. It has also come in her statement that she used to reside in two storeyed building and all the family members reside in one house. It has also come in her statement made before the learned Court below that apart from main door of house, there is iron/main gate put on the boundary of the house which remains locked during night hours. Apart from above, it has also come in the statement of victim-prosecutrix recorded under Section 164 Cr. P.C as well as statement made by her before learned trial Court that she was kept in illegal custody at Joginder Nagar, Nurpur, Dalhousie, Delhi, Sharanpur and Gulm Dibba at Andhra Pradesh. But, if statements made by her are read in its entirety, it clearly suggests that she was not kept under lock in a particular room, rather she used to visit Bazar, Dabha/Restaurant alongwith bail petitioner for having food etc. Interestingly, no explanation has been rendered on record by victim-prosecutrix, who is/was admittedly student of 10+2 class that what prevented her from raising hue and cry while she was outside the room having lunch, dinner with the bail petitioner.

9. Leaving everything aside, it has also come in the statement of victim-prosecutrix that she was taken by the bail petitioner to one .

Moulvi at Andhra Pradesh, who provided bail petitioner with the job of Imam. It has also come in her statement that bail petitioner used to proclaim before people that victim-prosecutrix is his wife, but she never disclosed it to anyone that she has been illegally detained or kept by the bail petitioner. Since, trial is yet to be concluded, the aforesaid aspects of the matter are to be considered and decided by the learned court below on the basis of evidence adduced on record by the prosecution and at this stage, it may not be proper for this Court to critically examine the statement of victim-prosecutrix. Similarly, statements having been made by PW-2 complainant Yakub Mohmmad and PW-6 Shkirabani, who happened to be father and mother of the victim-prosecutrix, create suspicion/doubt with regard to the correctness of story put forth by the prosecution. As far as, age of victim-prosecutrix is concerned, Investigating Agency with a view to prove that victim-prosecutrix is minor, adduced on record date of birth certificate from Secretary, Gram Panchayat, Dugrain, which suggests that the date of birth of victim-prosecutrix is 2nd January, 2000 meaning thereby, she was 16 years old at the time of alleged incident. But if statement of PW-3, Meera Devi, Secretary Gram Panchayat made before the learned trial court is perused and examined, it also creates suspicion /doubt with regard to correctness of that certificate. As has been observed above, trial is pending and nine prosecution witnesses are yet to be .

examined, this Court purposely restrain itself from commenting anything with regard to culpability, if any, of bail petitioner qua the offence alleged to have been committed by him because prosecution with the examination of remaining witnesses may be able to prove the guilt of bail petitioner.

However, at this stage, this Court having perused record, especially statements of victim-prosecutrix and Secretary, Gram Panchayat, sees no reason to let the bail petitioner incarcerate in jail for an indefinite period, especially when he has already suffered approximately for one year and 10 month behind the bars. It is not in dispute that all the material prosecution witnesses have been examined and as such, there appears to be no force in the arguments made by learned Deputy Advocate General that in the event of petitioner's being enlarged on bail, he may influence and tamper with the evidence adduced on record by the prosecution. No doubt, certificate placed on record suggest that victim-prosecutrix in the case at hand is a minor, but taking note of over all conduct of the victim-prosecutrix as is evident from statements having been made by her under Section 164 Cr.P.C., before the learned Magistrate as well trial Court, it cannot be concluded that she is innocent/ignorant, rather she appears to be capable of understanding.

10. Though aforesaid statements having been made by all these witnesses are to be perused, considered and examined by the learned trial .

Court at the time of delivering final verdict, but this Court having perused statements made by PW-1, PW-2, PW-3 and PW-5, who are material prosecution witnesses, is inclined to agree with Mr. N.S. Chandel, learned counsel that nothing strong has emerged against the bail petitioner, rather story putforth by the prosecution is shrouded by suspicion. No doubt, as on date, nine witnesses remain to be examined as per record made available to this Court, but that cannot be a ground to deny the bail to the bail petitioner, when especially statements of all the material prosecution witnesses stand recorded.

11. Hon'ble Apex Court in Ranjitsingh Brahmajeetsing Sharma v.

State of Maharashtra (2005) 5 SCC 294, while dealing with case registered under Maharashtra Control of Organised Crime Act, 1999 (MCOCA), has categorically held that if the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. It has been held as under:

"38. We are furthermore of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Indian Penal Code may debar the Court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. What would further be necessary on the .

part of the Court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The Court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. Every little omission or commission, negligence or dereliction may not lead to a possibility of his having culpability in the matter which is not the sine qua non for attracting the provisions of MCOCA. A person in a given situation may not do that which he ought to have done. The Court may in a situation of this nature keep in mind the broad principles of law that some acts of omission and commission on the part of a public servant may attract disciplinary proceedings but may not attract a penal provision."

12. It is quite apparent from the judgment referred herein above that accused can be enlarged on bail if court having perused material comes to conclusion that probability of conviction is bleak and remote. Another Condition is that petitioner is not likely to commit the offence while on bail. Hon'ble Apex Court in Ranjitsing Brahamajeetsingh Sharma (Supra) has held that satisfaction of the Court as regard likelihood of accused committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence.

13. Guilt, if any, of the bail petitioner is yet to be proved in accordance with law by leading cogent and convincing evidence on record and as such, this Court in the given facts and circumstances of case, deems it fit to consider the prayer having been made by the bail petitioner. 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."

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 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*."

15. Consequently, in view of the above, present bail petition is .

allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing personal bonds in the sum of Rs. 2,00,000/- with two local sureties each in the like amount to the satisfaction of concerned Chief Judicial Magistrate/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 him 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.

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

17. Any observations made hereinabove shall not be construed to be a reflection on the merits of the cases 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

4th May, 2018
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