

## **Anil Kumar vs State Of H.P on 29 June, 2020**

**Author: Anoop Chitkara**

**Bench: Anoop Chitkara**

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA .

Cr. MP (M) No. 892 of 2020

Reserved on : 25.06.2020

Date of Decision: 29th June, 2020

Anil Kumar

...Petitioner.

Versus

State of H.P.

...Respondent.

Coram:

The Hon'ble Mr. Justice Anoop Chitkara, Judge.

Whether approved for reporting?<sup>1</sup> YES.

For the petitioner : Mr. Karan Singh Kanwar, Advocate.

For the respondent : Mr. Nand Lal Thakur, Addl. A.G. with Mr. Ram Lal Thakur, Asstt. A.G. & Mr. Rajat Chauhan, Law Officer.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE Anoop Chitkara, Judge  
The petitioner who is under incarceration from June 9, 2019, i.e., for more than a year, for having been arrested along with co-accused, for kidnapping and committing rape with a girl aged 21 years, has come up before this Court, seeking regular bail.

2. Based on a First Information Report (FIR), the police arrested the petitioner, on 9.6.2019 in FIR No.23 of 2019, dated 9.6.2019, registered under Sections 365, 376D, 506, 34 of the Indian Penal

Code, 1860, (IPC), in Women Police Station, Nahan, District Sirmour, Himachal Pradesh, disclosing cognizable and non-bailable offences.

3. Mr. Nand Lal Thakur learned Additional Advocate General had filed the status report through e-mail, printout of which is available on file. He further Whether reporters of Local Papers may be allowed to see the judgment?

submits that he had sent a copy of the status report to learned counsel for the petitioner on WhatsApp number.

4. I have read the status report(s) and heard Mr. Karan Singh .

Kanwar, Advocate for the petitioner, Mr. Nand Lal Thakur, Ld. Additional Advocate General for the State of H.P. FACTS:

5. The allegations in the First Information Report and the gist of the evidence collected by the Investigator are:

a) On 9th June 2019, at around 5.30 a.m., the victim, along with her boyfriend Ankush, visited Police Post, Kacha Tank, Nahan, and told them that yesterday night she was kidnapped and raped by two persons. After that, the officials of the concerned police post immediately took her to Women Police Station, Nahan.

b) On reaching Women Police Station, the victim made her statement under Section 154 CrPC, alleging that on the previous night, she had left her home along with her boyfriend, Ankush Sharma. While Ankush had gone nearby to buy cigarettes from a shop in the bus stand, the victim waited near Hari Om Stationery Shop alone. While she was waiting, two boys in a white Alto car drove up and stopped right in front of her. One of the boys stepped out of the car, grabbed her by her arm, and forced her inside the car, after which they drove the vehicle to Vikram Bagh. One of the boys showed her knife and threatened to kill her. He called the driver of the Alto car by Avinash and asked him to drive at some distance. When the victim tried to scream and fight back, they threatened her with a knife and told her that they would cut her up. They also warned her that if she continues fighting, they will call ten other boys to come and rape her.

c) After that, the accused took her to Bikram Bag and, in an isolated place, stopped the car and asked her to agree to have sex with them;

otherwise, they would cut her into pieces and would also call ten boys to the river. Due to fear, the victim remained quiet. After that, they took her towards a creek near Markanda bridge in the car; both of them raped her.

They undressed her entirely and raped her. Both the accused were under heavy intoxication. While in the vehicle Avinash burnt her arm with the cigarette .

d) After that, the accused took the vehicle towards Subzi Mandi's side and took it in a path, where they again committed coitus with her.

e) The accused kept the victim nude in the car with them all night, and in the morning around 4-5 a.m., returned her clothes and dropped her near Sanskrit College.

f) The victim stated that she had not known the accused before this instance.

g) After being dropped, she called her friend Ankush, who came there. She revealed the entire incident to Ankush, and then they visited the Police Post Kacha Tank, which has led in the registration of the FIR mentioned above.

h) The investigator took the victim to Dr. Y.S. Parmar Government Medical College and Hospital, Nahan, where the doctors examined her. During such examination, the doctors preserved her vaginal swabs and, after sealing, handed the same to the police. The police arrested the accused and seized the vehicle. During the investigation, the police also sent the seat covers of the car for Forensic Examination.

i) The Forensic Science Laboratory detected the human semen from underwear, vaginal slides, vaginal swabs, cervical swabs, seat covers, one piece of cloth, and underwear of Anil Kumar, the bail petitioner. The examiner also detected human blood on the pants of the victim.

j) The Forensic Science Laboratory also conducted a test to match the DNA Profile of samples taken from the accused with the semen recovered from victim and seat covers. The samples obtained from the underwear of the victim and piece of cloth recovered from the car completely matched with the DNA profile obtained from Avinash. Similarly, the samples collected from the seat cover wholly matched with the DNA profile of Anil Kumar, the bail petitioner.

k) During the investigation, the police also took the victim to judicial custody for recording her statement under Section 164 CrPC. In her statement recorded under Section 164 CrPC, the victim reiterated her allegations and further stated to the Magistrate that she was threatened that in case she does not cooperate in the coitus, they will do away with her life.

l) She further stated that in the morning before dropping her at Sanskrit .

College, they had stopped the Alto Car near Gas Agency, where the accused Anil @ Chand alighted from the vehicle and went home and got his wallet. He told the victim that they would leave her only when she agrees to become their friend. They further advised her to meet them again in the night. After that, both the accused entered their mobile numbers in her mobile and also made a phone call from the mobile of the victim on their phone number. She further stated that Anil Kumar had taken her phone number immediately after pushing her in the car. She further mentioned that Avinash

had also taken photographs with her.

m) During investigation, the police recorded supplementary statement of victim, in which she stated that she is a friend of Ankush for last 3-4 years and want to marry him. She further stated that she had deleted the photographs taken by Avinash from her phone. She further stated that when she dropped at Sanskrit College, she had made an Internet call to her boyfriend Ankush. The Police associated Ankush and recorded his statement under Section 161 CrPC. He stated that after purchasing cigarette, when he returned back then he did not find the victim present there. He further stated that he made a phone call to victim but her phone was switched off. He thought that the victim has got annoyed with him and after that he searched her at various places, but did not find her. He assumed that she had returned to her home and consequently, he also returned to his home.

#### PREVIOUS CRIMINAL HISTORY

6. As per the Police report, the accused involved himself in the following case:

- 1). Case FIR No.93/2019 dated 21.8.2018, under Sections 341, 323, 506, 325, 34 of the Indian Penal Code, registered in Police Station, Sadar Nahan, District Sirmour, H.P. SUBMISSIONS:

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7. The learned counsel for the bail petitioner submits that the allegations are false and concocted.

8. On the contrary, Mr. Nand Lal Thakur, Additional Advocate General, contended that the victim reiterated her allegations on oath in her statement under Section 164 CrPC, which is a sufficient prima facie evidence. He further submits that if this Court is inclined to grant bail, then such a bond must be subject to very stringent conditions.

#### ANALYSIS AND REASONING:

9. Pre-trial incarceration needs justification depending upon the heinous nature of the offence, terms of the sentence prescribed in the statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, and doing away with the victim(s) and witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

10. In Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2) SCC 565, a Constitutional bench of Supreme Court holds in Para 30, as follows:

"It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity

or as necessarily justifying the grant or refusal of bail."

11. In *Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh*, (1978) 1 SCC 240, Supreme Court in Para 16, holds:

"The delicate light of the law favours release unless countered by the negative criteria necessitating that course."

12. In *Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav*, 2005 (2) SCC 42, a three-member bench of Supreme Court holds:

"18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also .

contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law.

Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a *prima facie* case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of *prima facie* case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so."

13. The difference in the order of bail and final judgment is similar to a sketch and a painting. However, some sketches would be detailed and paintings with a few strokes.

14. In the present case, a perusal of evidence collected so far, and as placed in the Police report filed under section 173(2) CrPC, leads to the following inference:

a) The age of the victim is 21 years, and at that particular time, she admittedly was with her boyfriend Ankush, who was also an adult male aged 28 years.

b) Doctors examined the victim within around 15 hours of her abduction and noticed the following injuries:

- i) 19 linear scar marks;
- ii) 4 healed circular scars of diameter 1 centimeter on her body;
- iii) Circular burn marks;
- iv) Some circular marks showing parched skin and some showing blisters;
- v) While giving history to the medical officer, she told that the accused had subjected her to four times penetrative sexual assault without using condoms (two times by each accused). She further told the doctors that on 4.6.2019, she had a consensual coitus with .

her boyfriend.

c) A combined reading of medico-legal certificate and Forensic Science Report, including a DNA Report, establishes that the accused had sexual intercourse with the victim.

d) The victim disclosed her age to be 21 years, was thus capable of consenting. At the time of the bail petition, the accused neither pleaded consent nor are they supposed to reveal their defence at the stage of bail.

e) According to the victim, the accused kidnapped her at around 11.15 p.m. In her statements under Sections 154, 164 as well as 161 CrPC, the victim is silent about her phone, being taken away by the accused or was with her and only stated that in the morning before the accused dropped her, Avinash took photographs with her and accused had fed their phone numbers in her phone and had also made a call from her phone to their phone. She further stated that she had deleted the photographs from her phone. In the statement under Section 161 CrPC of her friend Ankush, he said that when he found the victim missing, he tried to call her, but her phone was switched off. In the report under Section 173 CrPC, the Investigator has taken on record the call details of the mobile of the victim. On 9.6.2019 at 00:24:02 hours i.e., 12.24 midnight, there is an incoming call from phone number 80917-38993. The duration of this call is 22 seconds. Mr. Nand Lal Thakur learned Additional Advocate General, on instructions received from the Investigator, states that this phone number 80917-38993 belongs to Ankush. The victim states in her statement under Section 164 CrPC that both the accused were under heavy intoxication being drunken. She is silent that who attended this incoming phone call of 22 seconds. The investigation is also silent about who attended this phone call; was it victim or the accused. Even the suspect is quiet in his statement under Section 161 CrPC.

f) Ankush finding her young female friend whom he wanted to marry, missing at midnight, what he would have at least done was to ensure that she had reached home. All this appears to be shady.

g) According to the victim, the accused Avinash had put cigarette burn on her arm; however, she did not speak even a single word about how did she receive so many other injuries like 19 linear scars, 4

healed .

circular scars, and some scars marked with parched skin and some blisters. She did not attribute to these accused.

h) It is also somewhat suspicious that why the accused, who, according to the victim, were not previously known to her, would feed their numbers in her mobile and also make a call to ensure that the victim identifies them.

i) In the site plan, the area is ultimately thickly habituated. It is common knowledge that from the spot where the accused allegedly kidnapped the victim, the police post is in the vicinity of the bus stand.

j) It seems highly improbable that any accused would feed his phone number into the victim's phone after committing rape upon her.

15. Thus, deciphering from the allegations of the victim and other evidence collected by the investigator, coupled with the victim's truthfulness and credibility, make out a case for bail. While deciding bail, this Court cannot discuss the evidence threadbare.

16. The petitioner is a permanent resident of House No.243/13, Balmiki Basti, Nahan, District Sirmour, H.P., therefore, his presence can always be secured.

17. Further incarceration of the accused during the period of trial is neither warranted, nor justified, or going to achieve any significant purpose.

18. Without commenting on the merits of the evidence collected so far, considering all the reasons mentioned above, the victim's credibility makes out a case of bail for the present petitioner. Given above, coupled with the fact that the accused is in judicial custody for more than one year, the petition is allowed.

19. The report under Section 173(2) CrPC does not restrict the police's powers to investigate further by following the law. Needless to say, that the Prosecution has all the rights of further investigation under S. 173(8) CrPC, following the law. It is still open for the Investigator to recover the deleted photographs from the mobile through Forensic expert and to investigate that who had answered the call at midnight by making an appropriate application before the concerned Court following the law, if she thinks appropriate.

20. To ensure that he does not get an opportunity to intimidate or stalk .

the victim, while on bail and the Court is putting the stringent conditions and this bail shall be subject to the strict terms.

21. Given the above reasoning, the Court is granting bail to the petitioner, subject to the imposition of following stringent conditions, which shall be over and above, and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC. Consequently, the present petition is allowed. The petitioner shall be released on bail in the present case, connected with the FIR mentioned above, on his furnishing a personal bond of INR 10,000/, (INR Ten thousand only), to the satisfaction of the Trial Court. The petitioner shall also furnish one surety for INR 5000 (INR Five thousand only), to the satisfaction of the Sessions Court/Special Court/ Chief Judicial Magistrate/Ilaqua Magistrate/Duty Magistrate/the Court, which is exercising jurisdiction over the concerned Police Station where FIR is registered. Trial Court. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

a) The petitioner to give security to the concerned Court(s)/ Investigating Officer, for attendance on every date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

b) The Attesting officer shall mention on the reverse page of personal bonds, the permanent address of the petitioner along with the phone number(s), WhatsApp number (if any), email (if any), and details of personal bank account(s) (if available).

c) The petitioner shall join investigation as and when called by the Investigating officer or any superior officer. Whenever the investigation takes place within the boundaries of the Police Station or the Police Post, then the petitioner shall not be called before 8 AM and shall be let off before 5 PM. The petitioner shall not be subjected to third-degree treatment, indecent language etc.

d) The petitioner shall not influence, threaten, browbeat, or pressurize the witnesses and the Police officials.

e) The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person .

acquainted with the facts of the case, to dissuade them from disclosing such facts to the Police, or the Court, or to tamper with the evidence.

f) Once the trial begins, the appellant shall not in any manner try to delay the trial. The petitioner undertakes to appear before the concerned Court, on the issuance of summons/warrants by such Court. The petitioner shall attend the trial on each date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

g) There shall be a presumption of proper service to the petitioner about the date of hearing in the concerned Court, even if it takes place through SMS/ WhatsApp message/ E-Mail/ or any other similar medium, by the Court.



h) In the first instance, the Court shall issue summons and may inform the Petitioner about such summons through SMS/ WhatsApp message/ E-Mail.

i) In case the petitioner fails to appear before the Court on the specified date, then the concerned Court may issue bailable warrants, and to enable the accused to know the date, the Court may, if it so desires, also inform the petitioner about such Bailable warrants through SMS/ WhatsApp message/ E-Mail.

j) Finally, if the petitioner still fails to put in an appearance, then the concerned Court may issue Non-Bailable warrants to procure the petitioner's presence and send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper.

k) In case of non-appearance, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, and also subject to the provisions of Sections 446 & 446-A of CrPC. The petitioner's failure to reimburse the State shall entitle the trial Court to order the transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be spent to .

trace the petitioner and it relates to the exercise undertaken solely to arrest the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

l) The petitioner shall abstain from all criminal activities. If done, then while considering bail in the fresh FIR, the Court shall take into account that even earlier, the Court had cautioned the accused not to do so.

m) The petitioner shall intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, within 10 days from such modification, to the police station of this FIR, and also to the concerned Court.

n) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may apply for cancellation of bail of the petitioner, and even the concerned trial Court shall be competent to cancel the bail. Otherwise, the bail bonds shall continue to remain in force throughout the trial and also after that in terms of Section 437-A of the CrPC.

o) The learned counsel for the petitioner, as well as the attesting officer, shall explain the conditions of this bail to the petitioner.

p) The petitioner shall neither stare, stalk, make any gestures, remarks, call, contact, message the victim, either physically, or through phone call or any other social media, nor roam around the victim's home. The petitioner shall not contact the victim.

q) The petitioner shall surrender all firearms along with ammunitions, if any, along with the arms license to the concerned authority within 30 days from today. However, subject to the provisions of the Indian Arms Act, 1959, the petitioner shall be entitled to renew and take it back, in case of acquittal in this case.

22. In case the petitioner finds the bail condition(s) as violating fundamental, human, or other rights, or causing difficulty due to any situation, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, even before the Court taking cognizance or the trial Court, as the case may be, and such Court shall also be competent to modify or delete any condition.

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23. The officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order to the petitioner, in vernacular.

24. The petitioner undertakes to comply with all the directions given in this order. Furnishing of bail bonds by the petitioner is the acceptance of all such conditions.

25. On the reverse page of the personal bonds, the officer attesting the personal bonds shall ascertain the identity of the bail-petitioner, through these documents.

26. Consequently, the petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on her/his furnishing bail bonds in the terms described above.

27. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation in accordance with law.

28. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in any other case(s) registered against the petitioner.

29. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

30. The Court Master shall handover this order to the concerned branch of the Registry of this Court, and the said official shall immediately send a copy of this order to the District and Sessions Judge, concerned, by e-mail. The Court attesting the bonds shall not insist upon the certified copy of this order and shall download the same from the website of this Court, or accept a copy attested by an Advocate, which shall be sufficient for the record. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner and the Learned Advocate General if they ask for the same.

31. The SHO of the concerned Police Station or the Investigating .

Officer shall send a copy of this order, preferably a soft copy, to the victim, at the earliest.

32. In return for the freedom curtailed for breaking the law, the Court believes that the accused shall also reciprocate through desirable behavior.

The petition stands allowed in the terms mentioned above.

June 29, 2020 (PS/ks)

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to

(Anoop Chitkara),  
Judge.