

Crmp(M) No. 24722019 vs State Of Himachal Pradesh on 6 January, 2020

Author: Sandeep Sharma

Bench: Sandeep Sharma

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cr. MP (M)'s Nos. 2472 and 2473 of 2019
Decided on January 6, 2020

1. CrMP(M) No. 24722019
Parkash Chand

...Petitioner

Versus

State of Himachal Pradesh
2. CrMP(M) No. 2473 of 2019
Khimi Devi alias Shalu

...Respo

Versus

State of Himachal Pradesh

...Respondent

Coram:

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

Whether approved for reporting?1

For the petitioners
For the respondent

Mr. Ashok K. Tyagi, Advocate.
Mr. Arvind Sharma and Mr. Anil
Jaswal, Additional Advocates

General with Mr. Kunal Thakur,

Deputy Advocate General.
ASI Jawala Singh, I/C PP Bali
Chowki, Police Station Aut,
District Mandi, Himachal Pradesh.

Sandeep Sharma, J. (Oral)

Since both the petitions arise out of same FIR, both were taken up together for disposal by this common judgment.

2. By way of petitions captioned above, which have been filed under S.439 CPC, prayer has been made on behalf of the bail petitioners for grant of regular bail in FIR No. 139, dated 15.10.2019, under Ss. 363, 343, 370, 376(2), 120B pc and Ss. 6 and 17 of the Protection of Children from Sexual Offences Act Whether reporters of the local papers may be allowed to see the judgment?

registered at Police Station, Aut, District Mandi, Himachal Pradesh.

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3. Sequel to orders dated 28.12.2019, ASI Jawala Singh has come present with the record. Mr. Kunal Thakur, learned Deputy Advocate General has also placed on record status report prepared by the investigating agency on the basis of investigation carried out by it. Record perused and returned.

4. Report submitted by investigating agency reveals that on 15.10.2019, complainant Fateh Singh lodged a complaint with Police Station Aut, District Mandi, that some unknown person has made his minor daughter elope with him and as such, appropriate action in accordance with law may be taken against him. Record reveals that on 15.10.2019, bail petitioners caused presence of the victim-prosecutrix at Police Station Suni, District Shimla, whereafter, official of Police Station Aut, Mandi, brought victim-prosecutrix as well as bail petitioners to Police Station Aut, where though statement of victim-prosecutrix came to be recorded under S. 154 CrPC, police also got recorded statement of the victim-prosecutrix under S. 164 CrPC before Judicial Magistrate 1st Class, Chachiot at Gohar, Mandi. After completion of all necessary codal formalities, police, while lodging FIR detailed herein above, arrested bail petitioners on 19.10.2019 and since then they are behind the bars.

5. Mr. Kunal Thakur, learned Deputy Advocate General, on instructions of the impugned order, states that though .

Challan stands filed in the competent Court of law and nothing remains to be recovered from the

bail petitioners, but keeping in view the gravity of offence alleged to have been committed by bail petitioners, they do not deserve any leniency rather the bail petitioners need to be dealt with severely as such, petitions may be rejected outrightly. Mr. Thakur, learned Deputy Advocate General further stated that though in the investigation no offence punishable under S.376 IPC has been alleged to have been committed by the bail petitioners but it has come in the evidence that both the petitioners intended to sell the victim-prosecutrix as such, they have committed a heinous crime and prayer as made in these petitions for grant of bail, deserves outright rejection.

6. Having heard learned counsel for the parties and perused the material available on record, especially statement of victim-prosecutrix recorded under S.164 CrPC, this Court finds that the victim-prosecutrix was not kidnapped /abducted by bail petitioners rather she of her own volition went with the co-

accused Nok Singh alias Kalu, within whom she wanted to solemnise the marriage. As per statement of victim-prosecutrix, she had been talking to co-accused, Nok Singh since 2.10.2019 and since then they have been both talking to each other. On 12.10.2019, co-accused Nok Singh alias Kalu made victim-

prosecutrix elope with him under the pretext of marriage .

whereafter allegedly victim-prosecutrix was repeatedly sexually assaulted against her wishes by the co-accused Nok Singh alias Kalu at Bilaspur.

7. On 15.10.2019, allegedly the co-accused Nok Singh alias Kalu disclosed to the victim-prosecutrix that since he is already married and has two children, he cannot marry her and left the victim-prosecutrix in the custody of bail petitioners.

Though statement of victim-prosecutrix under S.164 CrPC reveals that she overheard both the bail petitioners talking about selling her but as per own statement of victim-prosecutrix, on 17.10.2019, both the bail petitioners made her talk to her father on her request. Similarly, it is also not in dispute that the bail petitioners herein themselves on 18.10.2019, brought the victim-

prosecutrix to the Police Station Suni, District Shimla. There is no allegation, if any, against the bail petitioners, with regard to commission of offence under S.376 IPC and allegations whether the bail petitioners intended to sell the victim-prosecutrix, are still to be established on record by investigating agency.

8. Though aforesaid aspects of the matter are to be considered and decided by the learned trial Court in the totality of evidence collected on record by the investigating agency, but having taken note of the statement of victim-

prosecutrix recorded under S.164 CrPC, this Court is convinced and satisfied that at no point of time, bail petitioners herein ever .

kidnapped /abducted the victim-prosecutrix, rather, she of her own volition joined the company of co-accused Nok singh alias Kalu, who otherwise is reported to have expired. Guilt, if any, of the bail petitioner is yet to be determined in the totality of the evidence collected on record by the prosecution as such this Court sees no reason to let the bail petitioners incarcerate in jail for an indefinite period during trial, especially when nothing is to be recovered from them. Apprehension expressed by learned Deputy Advocate General that in the event of bail petitioners being enlarged on bail, they may flee from justice, can be best met by putting them to stringent conditions.

9. 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 held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held 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*."

10. By now it is well settled that gravity alone cannot be a 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; has been held as under:-

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative.

Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of

bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

11. 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 also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

12. In Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

"This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, 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 a 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 that 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."

13. 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;
- (vii) reasonable apprehension of the witnesses being influenced; and
- (viii) danger, of course, of justice being thwarted by grant of bail.

14. In view of above, bail petitioners have carved out a case for themselves. Consequently, present petitions are allowed.

Bail petitioners are ordered to be enlarged on bail, subject furnishing bail bonds in the sum of Rs.2,00,000/- (Rupees Two Lakh) each with one local surety in the like amount, to the .

satisfaction of the Investigating Officer/learned trial Court concerned, besides the following conditions:

- (a) They shall make themselves 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) They shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;
- (c) They 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) They shall not leave the territory of India without the prior permission of the Court.
- (e) They shall surrender passport, if any, held by them.

15. It is clarified that if the petitioners misuse the liberty or violate any of the conditions imposed upon them, the investigating agency shall be free to move this Court for cancellation of the bail.

16. 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 these petitions alone.

The petitions stand accordingly disposed of.

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(Sandeep Sharma) Judge January 6, 2020 (vikrant)