**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**Cr. MP(M) No. 558 of 2020 a/w**

**Cr.MP(M) No.567 of 2020**

**Date of Decision: 5.5.2020**

1. Cr.MP(M) No.558 of 2020

Dipanshu Gagat …….. Petitioner

Versus

State of Himachal Pradesh …..Respondent

2. Cr.MP(M) No.567 of 2020

Vijay Kumar …….. Petitioner

Versus

State of Himachal Pradesh …..Respondent.

Coram:
**Hon'ble Mr. Justice Sandeep Sharma, Judge.**
*Whether approved for reporting?* [1]

**For the Petitioners:** Mr. Sudhir Thakur, Senior Advocate with Mr. Karun Negi, Advocate, through video-conferencing.

**For the Respondent:** Mr. Sudhir Bhatnagar, Additional Advocate General, through video-conferencing.

**Sandeep Sharma, Judge** (oral):

By way of above captioned bail petitions, prayer has been made on behalf of the bail petitioners namely, Dipanshu Gagat and Vijay Kumar, who are behind the bars

[1] *Whether the reporters of the local papers may be allowed to see the judgment?*

since 20.3.2020, for grant of regular bail in case FIR No.15/2020, dated 19.3.2020, under Sections 376, 376-D, 354, 511, 34 of IPC, Sections 4 &12 of POCSO Act and Section 66(E) of IT Act, registered at Women Police Station, Solan,District Solan, Himachal Pradesh.

2. Sequel to order dated 27.4.2020, respondent-State has filed status report through *e-mail* ,which is taken on record. Pursuant to order dated 27.4.2020 respondent-State has also made available statement of victim/prosecutrix recorded under Section 164 Cr.P.C., as well as MLC furnished by the medical expert.

3. Perusal of status report made available to this Court reveals that on 19.3.2020, victim/prosecutrix aged 17 years (name withheld), lodged a complaint at Women Police Station, Solan in the presence of Chairperson, Child Welfare Committee, Solan, District Solan, H.P., stating therein that one and half year back she started going to Thodo ground, Solan for sports activities alongwith her friends. She stated to the police that during Shoolini fair, she came in the contact of a person namely, Parveen, who subsequently introduced her to his two other friends. She stated that since it transpired to

her that Parveen takes drugs, she stopped talking to him, but after 4-5 months somebody other than Parveen started calling her from unknown number and in that way she came in the contact of person namely, Sumit. She alleged that 10-15 days thereafter Sumit called her at Thodo ground, but when she reached Thodo ground, Sumit was not there. She alleged that she made telephonic call to Sumit, but some other person, whose voice was similar that of Sumit picked up the call and asked her to come near the main gate. She further alleged that when she sat in the car parked near the main gate of Thodo ground, some other person was found to be sitting in the car. She alleged that the person sitting in the car did not allow her to get down from the car and insisted upon her to go with some other boy, but she refused. She disclosed to the police that name of the person sitting in the car was Dipanshu (Jojo) i.e. petitioner No.1. She disclosed to the police that on the persuasion of above named bail petitioner, she agreed to meet person named by bail petitioner and as such, she alongwith bail petitioner went towards the parking, where person namely Madhur was waiting. She alleged that since Madhur was known to her and she used to treat him like her

Sir, Madhur left the spot, but bail petitioner Dipanshu sexually assaulted her against her wishes in the car. She further alleged that when she requested the bail petitioner Dipanshu to let her go to her home, he called 2-3 boys including other bail petitioner Vijay Kumar, who subsequently made an attempt to outrage her modesty. She alleged that while she was leaving the place, bail petitioner Vijay Kumar(bail petitioner No.2) not only made her video but also claimed before the people present there that this girl has been caught red handed, while indulging in immoral activities. She also disclosed to the police that while leaving the spot of incident, she requested Jojo Bhai(Dipanshu) that she will not disclose the incident of rape to anybody, but he should get video deleted from the phone of bail petitioner Vijay Kumar. She alleged that after the alleged incident, bail petitioner circulated her telephone number to other persons, who started troubling her by making unnecessary calls on her number. She disclosed to the police that in December, 2019 she came in the contact of a person namely, Prashant, who also sexually assaulted her against her wishes and as such, appropriate action, in accordance with law, be taken against all the

accused person. In the aforesaid background, FIR detailed hereinabvoe came to be lodged against the bail petitioners as well as other accused named in the FIR and since 20.3.2020, bail petitioners are behind the bars.

4. Mr. Sudhir Bhatnagar learned Additional Advocate General while representing the respondent-State through video conferencing, contends that though the investigation in the case is complete and nothing remains to be recovered from the bail petitioners, but keeping in view the gravity of offence alleged to have been committed by them, they do not deserve to be enlarged on bail at this stage. Learned Additional Advocate General further contends that the material available on record clearly reveals that the bail petitioners in connivance with other accused not only sexually assaulted the victim/prosecutrix against her wishes but also uploaded her video on the Internet with a view to blackmail her. Mr. Bhatnagar, further submits that though there is ample evidence suggestive of the fact that the bail petitioner sexually assaulted the victim/prosecutrix taking undue advantage of her innocence and minority but otherwise also consent, if

any, of victim/prosecutrix is immaterial on account of her being minor at the time of commission of alleged offence.

5. Mr. Sudhir Thakur, learned Senior Advocate representing the bail petitioners while refuting the aforesaid submission made by learned Additional Advocate General submits before this Court that there is no explanation rendered on record qua the inordinate delay in lodging the FIR. He submits that as per own statement of the victim/prosecutrix, alleged offence punishable under Section 376 of IPC was committed by bail petitioner Dipanshu in the year 2018, but there is no material suggestive of the fact that the victim/prosecutrix lodged complaint, if any, to the police or her parents in the year, 2018 and as such, her version as recorded under Section 164 Cr.P.C as well as under Section 154 Cr.P.C cannot be taken as gospel truth at this stage. Lastly, Mr. Thakur, contends that bare conduct of the victim/prosecutrix clearly reveals that she had been in the habit of making lot of friends and as such, it cannot be said that she was incapable of understanding the consequence of her being in the company of the bail petitioners. While referring to the record, Mr. Thakur, contends that bare

perusal of medical evidence adduced on record nowhere suggests the commission of offence, if any, by the bail petitioners under section 376 of IPC and as such they deserve to be enlarged on bail, especially when nothing remains to be recovered from them.

6. Having heard learned counsel representing the parties and perused the material available on record, especially statements of prosecutrix recorded under Sections 164 and 154 Cr.P.C., this Court finds that allegedly the offence, if any, punishable under Section 376 IPC by bail petitioner Dipanshu Gagat was committed somewhere in the year 2018, but there is no plausible explanation rendered on record by the victim/prosecutrix that why she kept mum for almost two years before lodging of the FIR at hand. Otherwise also, if the statements of the victim/prosecutrix under Sections 164 and 154 Cr.P.C are read in conjunction, there are material contradictions and variations. As per own statement of the prosecutrix, on the date of alleged incident she had gone to Thodo ground after having received telephonic call from a person namely Sumit, but it is not understood that how she came into contact with the bail petitioner, Dipanshu Gagat.

She in her statements made to the police and Judicial Magistrate claimed that on the insistence of bail petitioner Dipanshu Gagat, she had gone to the main gate to meet the person namely, Madhur with whom she had prior acquaintance, but it is not understood that why at that stage she failed to disclose to Madhur, with regard to indecent behaviour,if any, of bail petitioner Dipanshu Gagat. Moreover, as per own statement of the victim/prosecutrix many people were playing in the Thodo ground at the time of alleged incident, but victim/prosecutrix never raised hue and cry, rather after the alleged incident she left the spot asking bail petitioner Dipanshu to get her video deleted from the phone of the bail petitioner Vijay Kumar. Interestingly, aforesaid incident took place somewhere in September-October, 2018 but even thereafter victim/prosecutrix kept on attending the phone calls allegedly made by friends of the bail petitioners. Moreover, incident with regard to uploading of video on the Internet had come to the notice of the victim/prosecutrix in the year 2018-2019, but she took no steps at that stage to file the complaint against the petitioners. Again in December, 2019 victim/prosecutrix was allegedly sexually assaulted by person

namely Prashant, but she remained silent till March, 2020 when FIR at hand came to be lodged against the bail petitioners as well as other co-accused named in the FIR.

7. Medical evidence adduced on record is also of no help to the case of the prosecution because it has been categorically opined in the report that there is no indication of recent sexual intercourse and the hymen of the victim/prosecutrix was found to be normal. No doubt, at the time of alleged commission of offence victim/prosecutrix was 15 years old, but having taken note of her conduct, which is quite apparent from her statements made to the police and Judicial Magistrate respectively, this Court finds it difficult to conclude that the victim/prosecutrix was not capable of understanding the consequences of her being in the company of the bail petitioners and other accused, rather it appears that at the time of commission of alleged offence, victim/prosecutrix of her own volition had been meeting number of of people, including bail petitioners.

8. Though, aforesaid aspects of the matter are to be considered and decided by the learned trial Court on the basis of totality of evidence to be collected on record by the

investigating agency, but having taken note of the aforesaid glaring aspects of the matter, this Court sees no reason to let the bail petitioners incarcerate in jail for indefinite period during trial, especially when nothing remains to be recovered from them

9. It has been repeatedly held by Hon'ble Apex Court as well as this Court in catena of cases that one is deemed to be innocent till the time his /her guilt is not proved, in accordance with law. In the case at hand, the guilt, if any, of the bail petitioners is yet to be proved, in accordance with law.

10. 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.***
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> ***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***

11. 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***
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> ***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."***

12. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

13. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

> ***(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;***
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> ***(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. Consequently, in view of the above, present bail petitions are allowed. Petitioners are ordered to be enlarged on bail subject to their furnishing personal bond in the sum of Rs. 2,00,000/- (Rs. two lac) with one local surety in the like amount each, to the satisfaction of the learned trial Court/ Magistrate available at the station with 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 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.***

15. It is clarified that if the petitioners misuse their liberty or violates 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 application alone.

The bail petitions stand disposed of accordingly.

**(Sandeep Sharma),**
**Judge**

**5th May, 2020**
**(shankar)**