IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA
Cr.MP(M) No.1835 of 2020
Decided on: 31.12.2020

Kishan Kumar ……..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. Jeevan Kumar, Advocate.
For the Respondent	**:**	Mr. Sudhir Bhatnagar, Additional Advocate General.

Sandeep Sharma, Judge (oral):

Through Video Conferencing

Bail petitioner, namely Kishan Kumar, who is behind the bars since October, 2019, has approached this Court in the instant proceedings filed under Section 439 Cr.PC, for grant of regular bail in FIR No. 343/2018, dated 06.12.2018 under Sections 363, 366, 342, 376, 506 of IPC and under Section 4 of POCSO, Act registered at Police Station Poanta Sahib, District Sirmaur, Himachal Pradesh.

2. Status report made available to this Court in terms of orders dated 13.10.2020 and 24.12.2020, reveals that on 6.12.2018, Sh. Sarbat Hussain, who happened to be father of victim/ prosecutrix (name withheld) lodged a complaint at Police Station Poanta Sahib, District Sirmaur that

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

bail petitioner made her minor daughter, whose date of birth is 01.01.2002, elope with him three months back on the pretext of marriage. He also alleged that a sum of Rs. 3 lac which he had collected with great difficulty, has also been taken away by the bail petitioner. He alleged that subsequently, it came to notice of his daughter that bail petitioner is married person, but despite that he sexually assaulted her against her wishes on the pretext of marriage and as such appropriate action in accordance with law be taken against him. Complainant disclosed to the police that since bail petitioner was given beatings at his native place in the State of Bihar by his family members for bringing his minor daughter during subsistence of his early marriage, bail petitioner firstly brought her daughter to Delhi and thereafter to Dehradun. Complainant alleged that in Dehradun, bail petitioner besides sexually assaulting his daughter also made her to work on construction site. Since, wife of bail petitioner subsequently came to Dehradun, daughter of complainant called her mother and brother to Dehradun and they brought her to Poanta Sahib. On the basis of the aforesaid complaint, police lodged FIR detailed hereinabove against the bail petitioner on 6.12.2018, but allegedly, bail petitioner remained absconded till 14.10.2019, when he was arrested in Bihar and since then, he is behind the bars. Challan stands filed in the competent court of law, but till date, charge has not been framed and as

such, bail petitioner has approached this Court in the instant proceedings for grant of regular bail.

3. Mr. Sudhir Bhatnagar, learned Additional Advocate General while admitting the factum with regard to filing of challan in the competent court of law, contends that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of the office alleged to have been committed by him coupled with the fact that he remained absconded for almost one year, prayer made on his behalf for grant of bail, deserves outright rejection. Mr. Bhatnagar, while making this Court to peruse the status report, states that though there is overwhelming evidence adduced on record suggestive of the fact that bail petitioner taking undue advantage of minority and innocence of victim/prosecutrix not only sexually assaulted against her wishes, rather also extorted sum of Rs. 3 lac earned by the complainant with great difficulty, but even otherwise consent, if any, is immaterial on account of the age of the prosecutrix. Lastly, Mr. Bhatnagar, contends that since bail petitioner hails from State of Bihar and he remained absconded in past, there is every likelihood of his fleeing from justice in the event of his being enlarged on bail and as such, prayer made on his behalf for grant of bail may be rejected.

4. Having heard learned counsel for the parties and perused the material available on record, especially, statement of victim recorded under Section 164 Cr.P.C., this Court finds that at the time of alleged incident, victim/prosecutrix was 17 years old and she had prior acquaintance with the bail petitioner. Perusal of statement of victim/prosecutrix recorded under Section 164 Cr.P.C., reveals that for the first time, victim/prosecutrix met bail petitioner somewhere in the month of June, 2018 and since then they had been frequently meeting each other. As per own statement of victim/prosecutrix, bail petitioner provided her one mobile phone. For first time, bail petitioner, allegedly, made physical relationship with victim/prosecutrix at Paonta Sahib and thereafter, victim/prosecutrix of her own on the askance of bail petitioner agreed to elope with him. Statement of victim/prosecutrix recorded under Section 164 Cr.P.C, reveals that she after having taken Rs. 3 lac from her house went to Bihar along with bail petitioner where factum with regard to earlier marriage of bail petitioner came to her knowledge. Victim/prosecutrix who was 17 years old at the time of alleged incident despite having discovered factum with regard to earlier marriage of bail petitioner, made no effort to either lodge report at police station nor she made an effort to contact her parents at Paonta Sahib, rather continued to live with bail petitioner. Record reveals that the victim/prosecutrix went to Delhi along with bail

petitioner and thereafter came to Dehradun and started doing labour work. As per statement of victim/prosecutrix, she on 29th November, 2018, managed to inform her brother and mother through telephone with regard to her location, but it is not understood that why prior to 29th November, 2018, victim/prosecutrix despite there being many opportunities available to her failed to disclose factum with regard to her alleged abduction and kidnapping by the bail petitioner to her parents, rather she kept on travelling with bail petitioner, first to Bihar and then Delhi and Dehradun. It is only after the arrival of wife of bail petitioner at Dehradun, victim/prosecutrix informed her parents at Paonta Sahib on 29th November, 2018. Moreover, this Court finds that victim/prosecutrix who happened to be daughter of complainant had gone missing somewhere in June, 2018, but there is no explanation that why no missing report or FIR was filed by complainant for more than six months. In the case at hand, FIR came to be lodged on 06.12.2018 and as such, this Court has reason to presume/infer that complainant had definite knowledge with regard to whereabouts of his daughter, otherwise he being father would have definitely lodged atleast missing report in the police station concerned. Though, age of victim/prosecutrix, at the relevant time was 17 years, but having noticed her conduct which duly reflects in her statements given to the police as well as JMIC, under Section 164 Cr.PC, this Court has no

hesitation to conclude that victim/prosecutrix was not incapable of understanding the consequences of her joining the company of bail petitioner with whom she of her own volition agreed to elope. Though, aforesaid aspect of the matter are to be considered and decided by the court below in totality of evidence collected on record by the Investigating Agency, but having taken note of the aforesaid aspect of the matter, this Court sees no reason to let the bail petitioner incarcerate in jail for an indefinite period during trial, especially, when he has already suffered for more than one year. True it is that bail petitioner absconded for one year after registration of case, but now since, he is behind the bars for almost one year and till date, charge has not been framed, there appears to be no justification to curtail the freedom of the bail petitioner for indefinite period during the trial. More than 2 years have passed after registration of FIR, but till date, charge has not been framed and there is every likelihood of further delay in conclusion of trial on account of spread of Covid-19 pandemic. Though, in terms of instructions issued by this Court on administrative side, lower Courts have resumed normal working and also started recording the evidence, but in limited number (s) and as such, it can be safely presumed that considerable time would be consumed in the conclusion of the trial of the petitioner and as such, there appears to be no justification to let the bail petitioner incarcerate in jail for an indefinite

period during the trial, especially, when he has already suffered for more than one year. The Hon'ble Apex Court as well as this Court in catena of cases have repeatedly observed/held that one is deemed to be innocent till the time his/her guilt is not proved in accordance with law. Apprehension expressed by learned Additional Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice, can be best met by putting him to stringent conditions.

5. 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.

6. 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."

7. In **Manoranjana Sinh 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 or 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 ad 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."

8. 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;

(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.***

9. Reliance is placed on judgment passed by the Hon'ble Apex Court in case titled ***Umarmia Alias Mamumia v. State of Gujarat***, **(2017) 2 SCC 731**, relevant para whereof has been reproduced herein below:-

> ***"11. This Court has consistently recognised the right of the accused for a speedy trial. Delay in criminal trial has been held to be in violation of the right guaranteed to an accused under Article 21 of the Constitution of India. (See: Supreme Court Legal Aid Committee v. Union of India, (1994) 6 SCC 731; Shaheen Welfare Assn. v. Union of India, (1996) 2 SCC 616) Accused, even in cases under TADA, have been released on bail on the ground that they have been in jail for a long period of time and there was no likelihood of the completion of the trial at the earliest. (See: Paramjit Singh v. State (NCT of Delhi), (1999) 9 SCC 252 and Babba v. State of Maharashtra, (2005) 11 SCC 569).***

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.

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. 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 bond in the sum of Rs. 1,00,000/- with one local surety 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/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.

(e) He shall handover passport to the Investigating Agency.

12. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

13. 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

31st December, 2020
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