IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.
Cr.MP(M) No.1944 of 2020
Decided on: 24.12.2020

Sanjay 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. Satyen Vaidya, Senior Advocate, with Mr. Vivek Sharma, Advocate, through Video Conferencing.
For the Respondent	**:**	Mr. Sudhir Bhatnagar, Additional Advocate General.

Sandeep Sharma, Judge (oral):

Bail petitioner namely Sanjay Kumar, who is behind the bars since 10.9.2020, has approached this Court in the instant proceedings filed under Section 439 of Cr.PC., for grant of regular bail in case FIR No. 103 of 2020 dated 9.9.2020, under Sections 363, 366 and 376 of IPC and Section 6 of POCSO Act, registered at P.S. Nirmand, District Kullu, H.P.

2. Record/status filed by the respondent-State in terms of order dated 3.11.2020, reveals that on 9.9.2020, complainant namely Ganesh Dutt, lodged a complaint at PS Nirmand, District Kullu, H.P., alleging therein that his minor daughter victim-prosecutrix (named withheld) has gone missing. Complainant disclosed to the police that at 7:30 pm, some

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

villagers from his village informed him that his daughter has gone somewhere without informing anybody. Complainant stated to the police that he has made best efforts to locate his minor daughter in near relations, but she is not traceable and as such, appropriate action may be taken to trace her. On 10.9.2020, victim-prosecutrix came to be apprehended with the bail petitioner near village Joa. Police after recording the statement of victim-prosecutrix under Section 161 Cr.PC., lodged FIR detailed herein above, against the bail petitioner under Sections 363, and 376 of the IPC and Section 6 of the POCSO Act and since then, he is behind bars.

3. Victim-prosecutrix in her statement recorded before the JMIC, Anni, District Kullu under Section 164 Cr.PC, stated that she of her own volition and without there being external pressure had gone with the bail petitioner and they both wanted to solemnize marriage. Record reveals that though initially, victim-prosecutrix refused to undergo medical test, but subsequently, she was medically examined by the medical officer, CH Nirmand, District Kullu, who after having examined victim-prosecutrix at CH Nirmand opined as under *"After examining the victim, my opinion about there are neither genital or physical injuries present suggestive of no use of force however sexual assault cannot be ruled out. But final opinion reserved till receipt of*

sample report from RFSL". Subsequently, aforesaid medical officer on the basis of RFSL report No. 1506 opined as under "*(1) Semen and blood were not detected in exhibit-1a (pubic hair), exhibit 1b (vaginal swabs), exhibits 1d (vulval swab), exhibit 1e (shirt), exhibit 1f (Salwar), exhibit 1y (vest) and exhibits 1h (underwear) of victim (8) human semen was detected in exhibits 1C (vaginal slides) but blood was not detected on it. So I am of the opinion that she was undergone sexual intercourse*." After completion of the investigation, challan stands filed in the competent court of law but till date, charge has not been framed.

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly acknowledging 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 offence alleged to have been committed by the bail petitioner, his application for grant of bail deserves to be rejected outrightly. Mr. Bhatnagar, submits that though there is overwhelming evidence adduced on record by the Investigating Agency suggestive of the fact that bail petitioner taking undue advantage of innocence of the victim-prosecutrix not only kidnapped her, but sexually assaulted her against her wishes, but even otherwise, consent, if any, of victim-prosecutrix, who is minor, is irrelevant and as such, prayer made on behalf of the petitioner for grant

of bail deserves outright rejection, who in the event of being enlarged on bail, may not only flee from justice, rather may create undue pressure upon the victim-prosecutrix, to not to depose against him in the competent court of law and as such, it would not be in the interest of justice to enlarge him on bail at this stage.

5. Having heard learned counsel for the parties and perused material available on record, especially statement of victim-prosecutrix recorded under Section 164 Cr.PC before the learned JMIC Anni, this Court finds that victim-prosecutrix and bail petitioner were known to each other for quite considerable time and they had been meeting each other frequently. Victim-prosecutrix in her aforesaid statement recorded under Section 164 Cr.PC has categorically stated that she frequently used to talk to the bail petitioner on the mobile and for doing so, she was also given beatings by her father. It also emerges from the statement of victim-prosecutrix recorded under Section 164 Cr.PC that she of her own volition and without there being any external pressure joined the company of the bail petitioner. Though as per investigating agency, victim-prosecutrix was subjected to forcible sexual intercourse by the bail petitioner, but medical evidence adduced on record does not support the case of the prosecution. Medical Officer after having examined victim-prosecutrix at CH Nirmand, categorically opined that there are no genital or physical

injuries and there appears to be no use of force. However, in his final opinion, on the basis of RFSL report, he opined that semen and blood were not detected, but he is of the opinion that victim-prosecutrix had undergone sexual intercourse. Medical opinion rendered by the medical expert is silent about the duration and time. No doubt, in the case at hand, victim-prosecutrix was 16.5 years old at the time of the alleged incident, but after having seen her conduct, which clearly reflects from her statement recorded under Section 164 Cr.PC, this Court is unable to agree with learned Additional Advocate General that victim-prosecutrix was incapable of understanding the consequences of her being in the company of the bail petitioner, rather this court finds from the record that victim-prosecutrix had prior acquaintance with the bail petitioner and they both wanted to solemnize marriage. Even on the alleged date of incident, victim-prosecutrix with her own volition went with the bail petitioner.

6. Though aforesaid aspects of the matter are to be considered and decided by the court below on the basis of totality of evidence collected on record by the Investigating Agency, but having noticed aforesaid glaring aspects of the matter coupled with the fact that challan stands filed in the competent court of law and nothing remains to be recovered from the bail petitioner, there appears to be no justification

to let the bail petitioner incarcerate in jail for an indefinite period during trial. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly held that one is deemed to be innocent till the time, guilt of his/her is not proved in accordance with law. In the case at hand, guilt if any of the bail petitioner is yet to be established on record by the Investigating Agency by leading cogent and convincing evidence and as such, his freedom cannot be curtailed for an indefinite period during trial. Moreover, trial of the accused is likely to be further delayed on account of COVID-19 and as such, this Court sees no justification to keep the petitioner in jail for an indefinite period during trial. Apprehension expressed by the learned Additional Advocate General that in the event of petitioner's being enlarged on bail, he may flee from justice, can be best met by putting the bail petitioner to stringent conditions as has been fairly stated by the learned counsel for the petitioner.

7. 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 has 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.***
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> ***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.***
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> ***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.***

8. 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.

9. 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."***

10. 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."***

11. 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.***

12. 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/- each 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.

13. 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.

14. 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.

Copy **dasti**.

24th December, 2020 **(Sandeep Sharma),**
manjit **Judge**