

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

221

CRM-M-2426-2023

Date of Decision: 27.02.2023

Niksan

...Petitioner

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present:- Ms. Kanika Ahuja, Advocate for the petitioner

Ms. Dimple Jain, AAG, Haryana

JAGMOHAN BANSAL, J. (ORAL)

1. The petitioner, through instant petition under Section 439 of Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') is seeking regular bail in FIR No.55 dated 30.01.2020 under Sections 365 of Indian Penal Code, 1860 (for short 'IPC') (Section 6 of POCSO Act, Sections 328, 343, 366A, 370, 370A, 375, 376, 120-B of IPC and Sections 3, 4, 5, 6, 7 of Immoral Trafficking Act added later on) registered at Police Station Sadar Thanesar, District Kurukshetra.

2. The case of the prosecution is that father of the prosecutrix on 30.01.2020 lodged complaint with the police alleging that his daughter aged 13 years has gone missing from their house on 27.01.2020. The prosecutrix was recovered on 19.05.2020 and thereafter statements of prosecutrix and her father were recorded on 19.05.2020. The police recorded multiple statements of the prosecutrix under Section 161 Cr.P.C. The prosecutrix in her subsequent statements disclosed name

of different persons. The prosecutrix did not disclose name of the petitioner in her first statement, second statement and third statement, however, name of the petitioner was disclosed in the fourth statement dated 06.08.2020 of the prosecutrix. It was disclosed that they put her in the car and took her away to a liquor shop near village Jhirbar. Petitioner-Niksan and co-accused Bintu committed rape with her and thereafter they took her away to Lucky Dhaba. The owner of Lucky Dhaba, namely, Ashok and his servant Bir Kumar telephonically called Kajal. Ashok took her away on motorcycle and dropped near fly over Pipli from where Kajal and Ravi took her away to Makanda Kheri. Kajal and Ravi used to take away her to hotels and used to force her to have sexual intercourse with customers. In the hotel, owner of the hotel and his servant Sandeep committed rape with her. One day she escaped from house of Kajal and reached bus stand where Sonu Khan met her. Sonu Khan took her away to Ganesh Colony and raped her. Sonu Khan thereafter took her away to a rented accommodation where owner of the house asked for Aadhaar Card. She disclosed owner of the house that Sonu had brought her forcefully. The owner of the house called police.

3. Learned counsel for the petitioner, *inter alia* contends that police conducted polygraph test of the petitioner and he was found innocent. Police did not file challan against him, however, petitioner was summoned under Section 319 Cr.P.C. The petitioner preferred anticipatory bail before this Court, which was allowed, however,

Hon'ble Supreme Court vide order dated 06.05.2022 set aside order passed by this Court and cancelled bail granted to the petitioner. The petitioner surrendered before Trial Court and he is in custody since 08.07.2022. Co-accused Manish @ Manoj was also granted concession of anticipatory bail by this Court, however, it was cancelled by Hon'ble Supreme Court vide order dated 06.05.2022. This Court vide order dated 07.12.2022 in CRM-M-29853-2022 has granted regular bail to said co-accused. This Court apart from Manish @ Manoj has granted regular bail to co-accused Dimple Goel, Ravi Parkash, Surinder Singh, Bir Kumar and Dinesh. The petitioner was neither named in the FIR nor named in first three statements of the prosecutrix. The police found the petitioner innocent and did not name the petitioner as an accused in the challan. The prosecutrix initially made allegation against Hari Chand and his son Davinder alias Bittu. The prosecutrix in her subsequent statements exonerated Hari Chand. The petitioner is brother-in-law of son of Hari Chand. The petitioner is not involved in any other offence. The petitioner has been wrongly implicated in the commission of alleged offence. The petitioner is permanent resident of District Kurukshetra. The petitioner has deep roots in the society. There is no possibility of flee from justice.

4. As per custody certificate dated 21.01.2023, the petitioner is in custody since 08.07.2022 and he is not involved in any other offence.

5. Learned State Counsel fairly concedes that police in its investigation did not find the petitioner guilty and accordingly, challan was not presented against him. The Trial Court in exercise of powers conferred by Section 319 Cr.P.C. summoned the petitioner. She further submits that there are 56 prosecution witnesses and till date 18 witnesses have been examined.

6. I have heard the arguments of learned counsels for the parties and perused the record.

7. A two judge Bench of Hon'ble Supreme Court in ***Satender Kumar Antil v. CBI; (2022) 10 SCC 51***, with respect to prevailing conditions of undertrial prisoner in India has observed:

“6. Jails in India are flooded with undertrial prisoners. The statistics placed before us would indicate that more than 2/3rd of the inmates of the prisons constitute undertrial prisoners. Of this category of prisoners, majority may not even be required to be arrested despite registration of a cognizable offence, being charged with offences punishable for seven years or less. They are not only poor and illiterate but also would include women. Thus, there is a culture of offence being inherited by many of them. As observed by this Court, it certainly exhibits the mindset, a vestige of colonial India, on the part of the investigating agency, notwithstanding the fact arrest is a draconian measure resulting in curtailment of liberty, and thus to be used sparingly. In

a democracy, there can never be an impression that it is a police State as both are conceptually opposite to each other.”

8. Intent of arrest and reason of denial of bail is to:

- i) Secure the appearance of the accused at the time of trial;
- ii) allay possibility of repeating of offence & jeopardising own life on account of grim prospect of being convicted; and
- iii) Avoid possibility of tampering of evidence and security of witnesses who may be pressurised or maltreated.

9. A person who seeks to be liberated must take judgment and serve sentence in the event of his conviction. The nature of the crime charged, severity of punishment prescribed, *prime facie* available evidences, history & background of the accused may indicate that any amount of bond and surety is not going to secure presence of accused, at the time of conviction. Detention or arrest not only deprives a person from his fundamental right of personal liberty guaranteed by Article 21 but also freedom guaranteed by Article 19(1) of our Constitution.

10. Like the petitioner, challan was not presented against Manish alias Manoj, however, he was also summoned under Section 319 Cr.P.C. Anticipatory bail was granted to the petitioner as well as

Manish alias Manoj which was later on cancelled by Hon'ble Supreme Court. A Co-ordinate Bench of this Court in CRM-M-29853-2022 vide order dated 07.12.222 has granted concession of regular bail to Manish alias Manoj. The relevant extract of the said order read as under:-

“At the very outset, it may be mentioned here that the parameters for grant of anticipatory bail and regular bail are distinct and different. The anticipatory bail can be granted to an accused in the event extra-ordinary and exceptional circumstances are made out. Even the perusal of the order of the Hon'ble Supreme Court dated May 6, 2022 indicates that the directions were issued to the petitioner to surrender before the trial Court within a period of 10 days and it will be open to him to apply for regular bail before the trial Court and in case, any such application is filed, the same would be considered on its own merits, without being influenced by any observation in the order. It has been further observed that any such application for bail would be decided expeditiously.

It is significant to note that the petitioner has been summoned during the course of trial on an application under Section 319 Cr.P.C. During the course of investigation, he was declared innocent on the basis of polygraphy test and the call details. The name of the petitioner has emerged for the first time in the supplementary statement of the victim and her father that has been recorded on 06.08.2020. However, it has not been specified as to under what circumstances and in what manner, the victim and her father came to know about the name of the petitioner as an assailant/accused. The victim has not specifically named the

petitioner in her initial statement that was recorded in the trial Court before the summoning of the petitioner under Section 319 Cr.P.C. However, the petitioner has been mentioned as friend of Davinder. Even in her statement that has been recorded subsequent to the summoning under Section 319 Cr.P.C., the allegation attributed to the petitioner is to the effect that the petitioner along with co-accused namely Bintu and Nikson pressed her mouth, put her in a car and took her to a liquor shop near village Jhirbar. In the said statement, the allegations of commission of rape have been attributed against Nikson and Bintu. However, no specific instance of commission of rape has been attributed against the petitioner. It may be true that at the time of identification of the accused, the victim has identified the petitioner and further stated that he also committed rape with her but no specific instance has been reflected by her in her statement. The petitioner is in custody for a period of 6 months and 25 days and is not involved in any other case. So far statement of 13 out of 56 witnesses have been recorded. The statement of the victim has also been recorded during the course of trial.

Keeping in view the mitigating circumstances appearing against the petitioner and the fact that the conclusion of trial is likely to take more time, sufficient grounds are made out to extend the concession of bail to the petitioner. Therefore, without making any expression of opinion on the merits of the case, it is ordered that the petitioner be released on regular bail subject to his furnishing fresh bail bonds/surety bonds to the satisfaction of the concerned trial Court/Chief Judicial Magistrate/Duty Magistrate.”

11. In the case in hand, the petitioner was neither named in FIR nor in first three statements of the prosecutrix. The petitioner was found innocent in polygraph test and he was not named in the challan. The co-accused have already been granted bail. The petitioner is not involved in any other offence. The petitioner is in custody since 08.07.2022. There are 56 prosecution witnesses and till date only 18 witnesses have been examined, thus, there is abysmally low possibility of conclusion of trial in near future. The material witness i.e. prosecutrix stands examined. As prosecution has right to arrest, investigate the matter and restrain an accused from manipulating or winning over witnesses, similarly accused in view of Article 21 of the Constitution of India has right to defend himself and put forth his stand which cannot be possible while in custody. The prosecution has not led any convincing/plausible documentary or oral evidence indicating possibility of Petitioner being flee from justice or tempering the evidences or winning over/threatening the witnesses. The petitioner surrendered before the Trial Court as soon as anticipatory bail granted by this Court was cancelled by the Hon'ble Supreme Court which shows that he had never attempted to flee from justice. It is further undisputed fact that during the course of investigation he was always available. Co-accused have already been granted regular bail, thus, on parity petitioner deserves concession of regular bail.

12. In view of afore-stated facts and circumstances, this Court is of the considered opinion that present petition deserves to allowed and accordingly allowed. The petitioner is ordered to be released on bail subject to conditions as may be imposed by Trial Court/Illaqa/Duty Magistrate concerned.

13. Nothing observed hereinabove shall be construed as expression of opinion of this Court on merits of the case and Trial Court shall proceed without being prejudiced by observations of this Court.

(JAGMOHAN BANSAL)
JUDGE

27.02.2023
Mohit Kumar

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>