

(2019) 09 SHI CK 0038

In the High Court Of Himachal Pradesh

Case No : Criminal Miscellaneous Petition (M) No. 1516 Of 2019

Ahsaan Mohammad @ Mushtak

APPELLANT

Vs

State Of Himachal Pradesh

RESPONDENT

Date of Decision : 19-09-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 154, 436, 436A, 439
Indian Penal Code, 1860 — Section 34, 107, 302, 323, 341

Citation : (2019) 09 SHI CK 0038

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : Kulbhushan Khajuria, Sudhir Bhatnagar, Sumesh Raj, Sanjeev Sood, Kunal Thakur

Final Decision : Disposed Of

Judgement

Sandeep Sharma, J

1. Bail petitioner namely, ahsaan mohammad @ mushtak, who is behind the bars since 5.6.2018, has approached this court in the instant proceedings filed under section 439 of the code of criminal procedure, praying therein for grant of regular bail in case fir no.58 of 2018, dated 27.5.2018, under sections 341, 302, 323, 107 read with section 34 of ipc, registered at police station, tissa, district chamba, himachal pradesh.

2. Pursuant to order dated 9.9.2019, asi pradeep kumar, has come present alongwith the record. Mr. Sudhir bhatnagar, learned additional general has also placed on record status report, prepared on the basis of the investigation carried out by the investigating agency. Record perused and returned.

3. Record/status report made available to this court reveals that complainant namely, smt. Bano widow of sh. Peer mohammad, in her statement recorded under section 154 cr.p.c., alleged that on 27.5.2018, she alongwith her husband, daughter and sons namely, miss bhagu, matlub and imran, respectively, had

gone to the fields to sow the crop of maize and when they were coming back to their house, bail petitioner alongwith other co-accused namely, bassa and bashir, obstructed their way and gave them beatings with sharp edged weapon. Complainant, named hereinabove, specifically alleged that co-accused namely, bassa stopped their way and instigated her son bashir to kill them. Co-accused bashir after being instigated by the above named accused bassa gave beatings to the complainant as well as her husband peer mohammad, as a consequence of which, they suffered injuries. Record reveals that medical officer at chc tissa, termed injuries allegedly suffered by the complainant in the alleged incident, to be simple in nature, whereas deceased peer mohammad was referred to medical college, chamba. Police after completion of necessary codal formalities, registered the case against the bail petitioner and other co-accused, named hereinabove, under sections 341, 323 and 34 ipc, but subsequently on 5.6.2018, police after having received information with regard to death of peer mohammad, inserted sections 302 and 107 ipc in the aforesaid fir. Record further reveals that on account of the injuries suffered by peer mohammad, he was referred to dr. Rajender prasad government medical college, tanda and thereafter to pgi, chandigarh, where he remained admitted for 5 to 6 days. On 5.6.2018 peer mohammad expired. Medical officer at pgi chandigarh opined that "deceased died due to craniocerebral damage consequent to injury no.1, which is sufficient to cause death in an ordinary course of nature". Challan stands filed in the competent court of law. Statement of the complainant has also been recorded in the trial court, copy whereof has been placed on record.

4. Mr. Sudhir bhatnagar, learned additional advocate general, on the instructions of the investigating officer, fairly acknowledged that statement of the complainant stands recorded in the trial court, however he while opposing the prayer made on behalf of the bail petitioner, contended that keeping in view the gravity of offence alleged to have been committed by him, he does not deserve any leniency. Learned additional advocate general further contended that though initial complaint as well as statement made by the complainant before the learned court below, reveal that injury on the head of deceased peer mohammad was caused on account of blow of shovel given by co-accused bashir, but since there is ample evidence to the effect that all the accused including bail petitioner had come to the spot with premeditated mind to attack the complainant and other family members, present bail petitioner is also liable to be convicted under section 302 of ipc. Lastly, learned additional advocate general contended that since statement of material prosecution witnesses are yet to be recorded, it would not be in the interest of justice to enlarge the bail petitioner at this stage, who in the event of his enlargement on bail, may not only flee from justice, but may also tamper with the evidence.

5. Having heard learned counsel representing the parties and perused the material available on record, this court finds that complainant bano in her initial statement recorded under section 154 cr.p.c. as well as subsequent statement given to the court during trial has categorically stated that co-accused bassa

obstructed their passage while they were going back to their house. She nowhere stated that present bail petitioner gave beatings, if any, to her husband peer mohammad, rather her specific allegation is that co-accused bashir on being instigated by her mother bassa gave blow of shovel on the left ear of her husband peer mohammad. She has further stated that present bail petitioner gave blow of fists as well as shovel on her arm, but definitely she has not stated that her husband peer mohammad suffered injuries on account of the blow, if any, given by the present bail petitioner. Complainant has been very specific and candid in stating that deceased peer mohammad fell on the ground after being hit by co-accused bashir. Medical evidence adduced on record further reveals that injury suffered by the complainant on account of being hit by the present bail petitioner was simple in nature. No doubt, deceased peer mohammad, who happened to be the husband of complainant, lost his life in the alleged incident, but evidence collected on record nowhere suggest that bail petitioner caused injury on the person of deceased peer mohammad, as a consequence of which, he subsequently expired. Though, petitioner alongwith other co-accused has been booked under sections 302, 341, 323, 107 and 34 of ipc, but it is apparent from the statement of complainant, who was the sole eye witnesses of the incident that deceased peer mohammad was never given any beatings by the present bail petitioner, rather he gave beatings, if any, to the complainant. Mere incorporation of section 34 of ipc in the fir is not sufficient to conclude at this stage, guilt, if any, of the bail petitioner because it is yet to be established on record by the prosecution that all the co-accused including the present petitioner had caused injury, if any, to the complainant as well as her deceased husband with premeditated mind.

6. 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 prosecution, but having noticed aforesaid glaring aspect of the matter, especially candid/specific statement given by the complainant, this court sees no reason to let the bail petitioner incarcerate in jail for indefinite period, especially when he has already suffered for more than one year. It is also not in dispute that bail petitioner is a first offender and he being local resident of the area shall always remain present for trial.

7. 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 petitioner is yet to be proved, in accordance with law by the prosecution by leading cogent and convincing evidence.

8. 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

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. 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.

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. Consequently, in view of the above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing personal bond in the sum of rs. 1,00,000/- (rs. One lac) with one local surety in the like amount, to the satisfaction of the learned 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 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 his 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 bail petition stands disposed of accordingly.