

(2022) 01 SHI CK 0049

In the High Court Of Himachal Pradesh

Case No : Criminal Miscellaneous Petition (Main) No. 73, 74 Of 2022

Kulbhushan And Others

APPELLANT

Vs

State Of Himachal Pradesh

RESPONDENT

Date of Decision : 14-01-2022

Acts Referred:

Constitution Of India, 1950 — Article 21
Code Of Criminal Procedure, 1973 — Section 436, 436A, 439
Indian Penal Code, 1860 — Section 120B, 201, 341, 376(2)(N), 506
Information Technology Act, 2000 — Section 66E, 67

Citation : (2022) 01 SHI CK 0049

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : Sanjeev K. Suri, Arvind Sharma, Narender Thakur, Gaurav Sharma, Sanjeev K. Suri

Final Decision : Disposed Of

Judgement

Sandeep Sharma, J

1. Bail petitioners, namely Kulbhushan and Mukesh Kumar, who are behind the bars since 7.1.2022, have approached this court in the instant

proceedings filed under Section 439 Cr.PC, for grant of regular bail, in case FIR No. 4/22 dated 2.1.2022, registered at Police Station Nurpur, District

Kangra, Himachal Pradesh, under Sections 376 (2) (N), 341, 506, 120-B and 201 of the IPC and Sections 66E and 67 of the IT Act.

2. Pursuant to order dated 11.1.2022, respondent-state has filed the status report. ASI Vijay Katoch, P.S. Nurpur, District Kangra is also present with

the records. Records perused and returned.

3. Close scrutiny of record/status report reveals that on 2.1.2021, victim-prosecutrix (name withheld) lodged a complaint, alleging therein that her

marriage was solemnized on 26.4.2021 and at this juncture, she is five months pregnant. She alleged that in the year, 2015, while she was studying in Dehri College, bail petitioner Mukesh Kumar alias Monna, used to drop her in college. She alleged that above named person used to compel her to make physical relations with him but when she refused, he extended threats and thereafter committed sexual assault upon her against her wishes and made video of the same. Victim-prosecutrix alleged that person named herein above after having made her video, started blackmailing her and thereafter, repeatedly, sexually assaulted her against her wishes. She further alleged that above named person shared her video with the bail petitioner Kulbhushan, who also repeatedly sexually assaulted her against her wishes. In the year 2021, marriage of the victim-prosecutrix was solemnized with some other person, but bail petitioners allegedly uploaded some objectionable photographs of the victim-prosecutrix on the facebook ID of her husband with an intention to defame her. In the aforesaid background, FIR as detailed herein above, came to be lodged against the bail petitioners, who are behind bars since 7.1.2022.

4. Mr. Arvind Sharma, learned Additional Advocate General, while fairly admitting factum with regard to completion of investigation states 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 him, he does not deserve any leniency and as such, prayer made on behalf of the petitioner for grant of bail deserves to be rejected. Mr. Sharma, further submits that there is overwhelming evidence adduced on record by the investigating agency suggestive of the fact that firstly, bail petitioners sexually assaulted her against her wishes by blackmailing her that they would upload the objectionable photographs on the internet and thereafter with a view to defame her and spoil her marriage, sent those photographs on the facebook ID of her husband. Mr. Sharma further submits that though photographs have been sent from the facebook ID of some person namely Rohan, but since petitioners were only in possession of the photographs, they have been rightly booked in the case and till the time, identity of that person is not disclosed, it may not be in the interest of justice to enlarge the petitioners on bail.

5. Having heard learned counsel for the parties and perused material available on

this record, this Court finds that victim-prosecutrix had prior acquaintance with the petitioners. As per own statement of the victim-prosecutrix, one of the bail petitioner namely Mukesh used to drop her in college in his vehicle in the year, 2016. Though as per victim-prosecutrix, both the bail petitioners on the pretext of uploading her objectionable photographs on the internet repeatedly sexually assaulted her against her wishes, but at no point of time, complaint, if any, qua the aforesaid alleged incident ever came to be lodged at the behest of the victim-prosecutrix, rather she remained silent for more than six years and it is only after posting of her objectionable photographs on the facebook ID of her husband, she has lodged FIR, stating therein that she was repeatedly sexually assaulted against her wishes by the petitioners herein. No plausible explanation qua the delay in lodging of FIR ever came to be rendered on record qua the allegation of rape, if any, committed by the petitioners herein. As far as uploading of objectionable photographs is concerned, same has not been done from the ID of the present bail petitioners, rather from the ID of a person namely Rohan. Though claim of the prosecution is that petitioners herein, who were in possession of the obscene photographs of the victim-prosecutrix made fake ID in the name of Rohan and then sent the same on the facebook ID of the husband of the victim-prosecutrix, but such fact is yet to be proved on record, by the investigating agency by leading cogent and convincing evidence. Learned Additional Advocate General while referring to the status report submits that correspondence with regard to URL address as well as IP address of the mobile used by the Plaintiff has been made, but till the time report is not received, it would not be in the interest of justice to enlarge the bail petitioners on bail. However, this court is of the view that once bail petitioners have already handed over their mobile phones to the investigating agency, which have been further sent for examination to FSL, no fruitful purpose would be served by keeping the bail petitioner behind the bars for an indefinite period during trial, especially, when nothing remains to be recovered from them. Since objectionable photos have been sent on the facebook ID of the husband of the victim-prosecutrix by a person namely Rohan, it would be too premature at this stage to conclude the complicity of the bail petitioners. Since investigation is almost complete and bail petitioners are in judicial custody, this court sees no reason to curtail

their freedom for an indefinite period during trial, who otherwise being local residents shall always remain available for investigation. Though cases at hand are to be heard and decided by the court below on the basis of totality of evidence 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 curtail the freedom of the bail petitioners for an indefinite period, especially, when nothing remains to be recovered from them. Honâ??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, if any, of his/her is not proved in accordance with law. In the case at hand also, guilt, if any, of the accused is yet to be proved in accordance with law, by leading cogent and convincing material on record. Apprehension expressed by the learned Additional Advocate General that in the event of petitionersâ?? being enlarged on bail, they may flee from justice, can be best met by putting the bail petitioners to stringent conditions as has been fairly stated by the learned counsel for the petitioners.

6. 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.

7. The Honâ??ble Apex Court in Sanjay Chandra versus Central Bureau of Investigation (2012)¹ Supreme Court Cases 49; held as under:-

â?? 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 purpose of giving him a taste of imprisonment as a lesson.”

8. In *Manoranjana Singh 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

a 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 and 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.â??

9. The Honâ??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.

10. Reliance is placed on judgment passed by the Honâ??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:-

â??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).

11. Honâ??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. Honâ??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. Honâ??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:

â??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*.

12. In view of the aforesaid discussion as well as law laid down by the Honâ??ble Apex Court, petitioners have carved out a case for grant of bail, accordingly, the petitions are allowed and the petitioners are ordered to be enlarged on bail in aforesaid FIR, subject to their furnishing personal bond in the sum of Rs. 1,00,000/- each, with two local sureties in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, 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 him 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.

13. It is clarified that if the petitioners misuse their liberty or violate any of the conditions imposed upon them, the investigating agency shall be free to move this Court for cancellation of the bail.

Â 14. Any observations made hereinabove shall not be construed to be a reflection on the merits of the main case and shall remain confined to the disposal of these applications alone.

The bail petitions stand disposed of accordingly. Copy Dasti.