

(2021) 03 SHI CK 0174

In the High Court Of Himachal Pradesh

Case No : Criminal Miscellaneous Petition (M) No. 404 Of 2021

Veer Bhadur @ Vishal

APPELLANT

Vs

State Of Himachal Pradesh

RESPONDENT

Date of Decision : 24-03-2021

Acts Referred:

Constitution Of India, 1950 — Article 21
Code Of Criminal Procedure, 1973 — Section 154, 164, 436, 436A, 439
Indian Penal Code, 1860 — Section 342, 363, 366A, 376
Protection Of Children From Sexual Offences Act, 2012 — Section 4

Citation : (2021) 03 SHI CK 0174

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : Yashveer Singh Rathore, Ajit Sharma, Prashant Sharma, Sudhir Bhatnagar, Arvind Sharma, Kunal Thakur, Svaneel Jaswal

Final Decision : Disposed Of

Judgement

Sandeep Sharma, J

1. Bail petitioner namely, Veer Bhadur @ Vishal, who is behind the bars since 30.3.2019, 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. 36 of 2019, dated 30.3.2019, under Sections 363, 366-A, 376, 342 of IPC and Section 4 of the POCSO Act, registered at police Station, Rohru District Shimla, Himachal Pradesh.

2. Sequel to order dated 3.3.2021, ASI Ram Swaroop, has come present alongwith the record. Mr Kunal Thakur, learned Deputy Advocate 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. Careful perusal of status report/record made available to this Court reveals that on 30.3.2019, victim/ prosecutrix, aged 15 years (name withheld to protect

her identity), got her statement recorded under Section 154 Cr.P.C at police Station, Rohru, District Shimla, Himachal Pradesh, alleging therein that on 22.2.2019, at about 4-5 PM, present bail petitioner came to her Dera and asked her to accompanying him to his Uncle's house. She alleged that till, Mahendali bail petitioner took her on foot, whereafter they both went to Jubbal in a car. Victim/prosecutrix alleged that the bail petitioner took her to a room, where already three Nepalis were present. She alleged that during night bail petitioner sexually assaulted her against her wishes. Though, on the next day victim/prosecutrix asked the bail petitioner to go out, but he refused and again sexually assaulted her against her wishes. She alleged that next day, her parents came to the room of the bail petitioner alongwith the police and they both were taken to police Station, Rohru on 24.2.2019. Since, victim/prosecutrix did not level any allegation of sexual harassment against the present bail petitioner and refused to undergo medical examination, no FIR came to be registered on 24.2.2019. After 36 days of alleged incident i.e. on 30th March, 2019, victim/ prosecutrix got her statement recorded under Section 154 Cr.P.C., alleging therein that bail petitioner sexually assaulted her against her wishes on two occasions. On the basis of the aforesaid statement, FIR, as detailed hereinabove, came to be lodged against the present bail petitioner and since then he is behind the bars. Challan stands filed in the competent court of law and nothing remains to be recovered from the bail petitioner. Since medical evidence adduced on record has not indicated towards complicity of the bail petitioner in the alleged offence, he has approached this Court in the instant proceedings under changed circumstances.

4. Mr. Kunal Thakur, learned Deputy Advocate General, while fairly admitting the factum with regard to filing of the Challan in the competent court of law, contends that keeping in view the gravity of offence alleged to have been committed by bail petitioner, he does not deserve any leniency and as such, prayer made on his behalf for grant of bail may be rejected. Learned Deputy Advocate General submits that though there is delay of 36 days in filing the FIR, but this Court cannot lose the sight of the fact that victim/prosecutrix being minor was under Trauma and as such, failed to disclose the true facts to the police at the time of her recovery from the room of the bail petitioner and as such, delay, if any, in filing the FIR cannot be made a ground to enlarge the bail petitioner on bail. Learned Deputy Advocate General further submits that the medical evidence, especially, DNA Profile report cannot be made basis to rule out the complicity, if any, of bail petitioner in the alleged offence, especially when victim/prosecutrix in her statement has categorically alleged that she was subjected to forcible sexual intercourse on two occasions.

5. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that as per the own statement of the victim/ prosecutrix, she went alongwith the bail petitioner on 22.2.2019 and thereafter remained in his company till 24.2.2019. There is nothing on record suggestive of the fact that during aforesaid two days parents of the victim/prosecutrix made any attempt to know/ascertain whereabouts of the victim/

prosecutrix. Moreover, victim/ prosecutrix after her alleged recovery from the room of the bail petitioner did not lodge any report against the bail petitioner and refused to undergo medical examination, rather at that time she disclosed to the police that the bail petitioner did not commit any wrong act with her. After 36 days of alleged incident victim/prosecutrix got her statement recorded under Section 154 Cr.P.C and alleged that bail petitioner on two occasions sexually assaulted her against her wishes. It is not understood that once police had allegedly recovered the victim/prosecutrix from the room of the bail petitioner on 24.2.2019, why statement of the victim/prosecutrix was not recorded under section 164 Cr.P.C at that time. Otherwise also, it is not understood that on what basis police raided the room of the bail petitioner, especially when there is nothing suggestive of the fact that after 22.2.2019, father and mother of the victim/prosecutrix had lodged any complaint with police Station, Rohru. Leaving everything aside, medical evidence adduced on record does not support the case of the prosecution. Doctor attending upon the victim/prosecutrix has categorically concluded that there is no penetration of penis into the vagina. Moreover, DNA profile adduced on record clearly reveals that DNA of the accused and the victim/ prosecutrix have not matched. Statement recorded under Section 154 Cr.P.C of the victim/prosecutrix, if perused in its entirety, clearly reveals that victim/prosecutrix of her own volition and without there being any external pressure joined the company of the bail petitioner and thereafter remained with him for two days. Though, after 36 days of the alleged incident she leveled allegation of sexual assault, but as has been taken note hereinabove, such allegation of sexual assault is not supported by the medical evidence adduced on record. Having taken note of the fact that no plausible explanation, if any, is available on record qua the delay of 36 days in lodging the FIR, coupled with the fact that medical evidence adduced on record does not support the case of the prosecution, there appears to be no justification to let bail petitioner incarcerate in jail for indefinite period during the trial.

6. True, it is that victim/prosecutrix in the case at hand was minor at the time of alleged incident and as such, bail petitioner has been booked under Section 4 of the POCSO Act alongwith other provisions of IPC, but mere charging of an individual under the POCSO Act, which contains stringent provisions, may not be a ground to deny the bail to a person whose complicity otherwise in the alleged commission of offence is doubtful. Under the stringent provisions of Protection of Children from Sexual Offences Act, gravity of sentence and stringency of provisions call for heightened scrutiny of evidence for establishing foundational facts. Special Acts like Protection of Children from Sexual Offences Act, contain provision of presumption of guilt. However, such presumption can be raised when certain foundational facts are established by the prosecution. Statutory presumption would operate only, if prosecution has proved the foundational facts. Delay in lodging the FIR and medical evidence available on record creates suspicion with regard to correctness and genuineness of the story put forth by the prosecution and as such, this Court sees no reason to let bail petitioner

remain behind the bars for indefinite period during the trial.

7. 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 investigating agency, but having noticed aforesaid glaring aspect of the matter, this Court sees reason to allow the bail petition having been filed by the bail petitioner, especially when he has already suffered for more than two years. Apprehension expressed by learned Deputy Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice or may again indulge in such activities, can be best met by putting bail petitioner to stringent conditions.

8. 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.

9. 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*

10. 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."

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.