

(2020) 08 SHI CK 0363

In the High Court Of Himachal Pradesh

Case No : Criminal Miscellaneous Petition (M) No. 2158 Of 2019

Zubair Ahmed

APPELLANT

Vs

State Of Himachal Pradesh

RESPONDENT

Date of Decision : 27-08-2020

Acts Referred:

Constitution Of India, 1950 — Article 21
Code Of Criminal Procedure, 1973 — Section 437A, 437(3), 438, 438(2), 446, 446A
Indian Penal Code, 1860 — Section 354C, 376, 506
Information Technology Act, 2000 — Section 67A
Scheduled Caste And Scheduled Tribe (Prevention Of Atrocities) Act, 1989 — Section 3(1)W(i)(ii)

Citation : (2020) 08 SHI CK 0363

Hon'ble Judges : Anoop Chitkara, J

Bench : Single Bench

Advocate : Karan Singh Kanwar, Nand Lal Thakur, Ashwani Sharma, Divya Sood, Rajat Chauhan

Final Decision : Allowed

Judgement

Anoop Chitkara, J

1. On the allegations of an unmarried girl aged 23 years, for alluring and committing sexual intercourse with her and making video recording of the intimate acts, leading to a complaint by the victim, and thus the petitioner, who is also unmarried and aged around 27 years, is now apprehending imminent arrest on being arraigned as accused has come up under section 438 CrPC, seeking anticipatory bail.

2. Based on the complaint of Manisha Devi, the police registered FIR No. 35 of 2019, dated 15.11.2019, under Section 354C, 376, 506 of Indian Penal Code, 1860, (IPC), Section 67A of the Information and Technology Act (IT Act) and Section 3(1)W(i)(ii) of The Scheduled Caste and Schedule Tribe (Prevention of Atrocities) Act, 1989, in Women Police Station, Nahan, District Sirmaur, Himachal

Pradesh, disclosing cognizable and non-bailable offences.

3. I have read the status report(s) and heard counsel for the parties.

FACTS:

4. Briefly, the allegations against the petitioner are that the victim, aged 23 years, made a complaint to the Officer Incharge of Women Police Station, Nahan to the effect that she was friend with Zubair Ahmed for quite sometime. Now that friendship is over. During the time of friendship, he induced her into drugs and made video recording of intimate acts. Now when the family is trying to engage her for marriage, then the petitioner broke those relations. She further alleged that the petitioner pressed upon her to change her religion. Based on the the aforesaid FIR was registered. The police recovered the Pen-drive and concerned phone records and sent it for testing for FSL. In the investigation, prima facie, the police came to know about the sexual relations between the victim and the petitioner.

PREVIOUS CRIMINAL HISTORY

5. The counsel for the petitioner states that the accused has no criminal history.

SUBMISSIONS:

6. Learned counsel for the bail petitioner submits that the allegations are false and concocted and the petitioner is joining and fully co-operating the investigation.

7. On the contrary, Mr. Nand Lal Thakur, Additional Advocate General, contended that the Investigator has come across sufficient prima facie evidence against the petitioner and opposes the bail. He further submits that if this Court is inclined to grant bail, then such a bond must be subject to very stringent conditions.

8. JUDICIAL PRECEDENTS:

a) In Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2) SCC 565, a Constitutional bench of Supreme Court holds in Para 30, as follows:

"It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail."

b) In Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 (2) SCC 42, a three-member bench of Supreme Court holds:

"18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which

are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so."

c) In *State of Rajasthan, Jaipur v. Balchand*, AIR 1977 SC 2447, Supreme Court holds,

2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court. We do not intend to be exhaustive but only illustrative.

3. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime.

d) In *Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh*, (1978) 1 SCC 240, Supreme Court in Para 16, holds: "The delicate light of the law favours release unless countered by the negative criteria necessitating that course."

e) In *Dataram Singh v. State of Uttar Pradesh*, (2018) 3 SCC 22, Supreme Court holds,

1. 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.

6. However, we should not be understood to mean that bail should be granted in every case. The grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be

exercised judiciously and in a humane manner and compassionately. Also, conditions for the grant of bail ought not to be so strict as to be incapable of compliance, thereby making the grant of bail illusory.

ANALYSIS AND REASONING:

9. Pre-trial incarceration needs justification depending upon the offense's heinous nature, terms of the sentence prescribed in the statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, criminal history of the accused, and doing away with the victim(s) and witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

11. The nature of the allegations does not restrict bail coupled with the age of the victim and also the fact that the accused and the victim both are unmarried. The incarceration of the accused during the period of trial is neither warranted, nor justified, or going to achieve any significant purpose. Without commenting on the merits of the case, coupled with the ongoing situation due to the Covid-

19 pandemic, would make out a case for bail.

12. The possibility of the accused influencing the course of the investigation, tampering with evidence, intimidating witnesses, and the likelihood of fleeing justice, can be taken care of by imposing elaborative conditions and stringent conditions.

13. Given the above reasoning, the Court is granting bail to the petitioner, subject to the imposition of following stringent conditions, which shall be over and above, and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC. Consequently, the present petition is allowed. The petitioner shall be released on bail in the present case, connected with the FIR mentioned above, on his furnishing a personal bond of INR 10,000/, (INR Ten thousand only), with one surety for INR 5,000 (INR Five thousand only), to the satisfaction of the Investigator/ SHO of the concerned Police Station. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

a) The Attesting officer shall mention on the reverse page of personal bonds, the permanent address of the petitioner along with the phone number(s), WhatsApp number (if any), email (if any), and details of personal bank account(s) (if available).

b) The petitioner shall join investigation as and when called by the Investigating officer or any superior officer. Whenever the investigation takes place within the boundaries of the Police Station or the Police Post, then the petitioner shall not be called before 8 AM and shall be let off before 5 PM. The petitioner shall not be subjected to third-degree methods, indecent language, inhuman treatment, etc.

c) The petitioner shall join and cooperate in the investigation, and failure to do so

shall entitle the prosecution to seek cancellation of the anticipatory bail granted by the present order. (Kala Ram v. State of Punjab, 2018 (11) SCC 350).

d) The petitioner shall not influence, browbeat, pressurize, make any inducement, threat, or promise, directly or indirectly, to the witnesses, the Police officials, or any other person acquainted with the facts of the case, to dissuade them from disclosing such facts to the Police, or the Court, or to tamper with the evidence.

e) Once the trial begins, the petitioner shall not, in any manner, try to delay the trial. The petitioner undertakes to appear before the concerned Court, on the issuance of summons/warrants by such Court. The petitioner shall attend the trial on each date, unless exempted.

f) There shall be a presumption of proper service to the petitioner about the date of hearing in the concerned Court, even if it takes place through SMS/WhatsApp message/E-Mail/or any other similar medium, by the Court.

g) In the first instance, the Court shall issue summons and may inform the Petitioner about such summons through SMS/ WhatsApp message/ E-Mail.

h) In case the petitioner fails to appear before the Court on the specified date, then the concerned Court may issueailable warrants, and to enable the accused to know the date, the Court may, if it so desires, also inform the petitioner about suchailable warrants through SMS/ WhatsApp message/ E-Mail.

i) Finally, if the petitioner still fails to put in an appearance, then the concerned Court may issue Non-ailable warrants to procure the petitioner's presence and send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper.

j) In case of Non-appearance, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, and also subject to the provisions of Sections 446 & 446-A of CrPC. The petitioner's failure to reimburse the State shall entitle the trial Court to order the transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be spent to trace the petitioner and it relates to the exercise undertaken solely to arrest the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

k) The petitioner shall intimate about the change of residential address and change of phone numbers, WhatsApp number, e -mail accounts, within thirty days from such modification, to the police station of this FIR, and the concerned Court, if such stage arises.

l) The petitioner shall abstain from all criminal activities. If done, then while

considering bail in the fresh FIR, the Court shall take into account that even earlier, the Court had cautioned the accused not to do so.

m) The petitioner shall neither stare, stalk, make any gestures, remarks, call, contact, message the victim, either physically, or through phone call or any other social media, nor roam around the victim's home. The petitioner shall not contact the victim.

n) The petitioner shall surrender all firearms along with ammunitions, if any, along with the arms license to the concerned authority within 30 days from today. However, subject to the provisions of the Indian Arms Act, 1959, the petitioner shall be entitled to renew and take it back, in case of acquittal in this case.

o) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may apply for cancellation of bail of the petitioner. Otherwise, the bail bonds shall continue to remain in force throughout the trial and also after that in terms of Section 437-A of the CrPC.

p) During the trial's pendency, if the petitioner repeats the offence or commits any offence where the sentence prescribed is seven years or more, then the State may move an appropriate application for cancellation of this bail.

14. The learned Counsel representing the accused and the Officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order to the petitioner, in vernacular and if not feasible, in Hindi or English.

15. In case the petitioner finds the bail condition(s) as violating fundamental, human, or other rights, or causing difficulty due to any situation, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, even before the Court taking cognizance or the trial Court, as the case may be, and such Court shall also be competent to modify or delete any condition.

16. In *In Sushila Aggarwal versus State (NCT of Delhi) & Another*, (2018) 7 SCC, 731, the Constitutional bench concluded by holding as follows:

(2) As regards the second question referred to this court, it is held that the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

(3) Nothing in Section 438 Cr. PC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature

of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified - and ought to impose conditions spelt out in Section 437 (3), Cr. PC [by virtue of Section 438 (2)]. The need to impose other restrictive conditions, would have to be judged on a case by case basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

17. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation, in accordance with law.

18. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in any other case(s) registered against the petitioner.

19. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

20. The Investigating Officer attesting the bonds shall not insist upon the certified copy of this order and shall download the same from the website of this Court, or accept a copy attested by an Advocate, which shall be sufficient for the record. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner and the Learned Advocate General if they ask for the same.

21. The SHO of the concerned Police Station or the Investigating Officer shall send a copy of this order, preferably a soft copy, to the victim, at the earliest.

22. In return of the protection from incarceration for breaking the law, the Court believes that the accused shall also reciprocate through desirable behavior.

The petition stands allowed in the terms mentioned above.