

Vijay Kumar Vs State Of Himachal Pradesh

Court: High Court Of Himachal Pradesh

Date of Decision: July 13, 2020

Acts Referred: Constitution Of India, 1950 " Article 21

Indian Penal Code, 1860 " Section 363, 376

Protection Of Children From Sexual Offences Act, 2012 " Section 6

Code Of Criminal Procedure, 1973 " Section 164, 436, 436A

Hon'ble Judges: Sandeep Sharma, J

Bench: Single Bench

Advocate: Ashwani Kaundal, Ashok Sharma, Sudhir Bhatnagar, Arvind Sharma, Kunal Thakur

Final Decision: Disposed Of

Judgement

Sandeep Sharma, J

1. Bail petitioner namely Vijay Kumar, who is behind the bars since 28.1.2020, has approached this Court in the instant proceedings for grant of

regular bail in case FIR No. 445 of 2019 dated 31.12.2019, under Sections 363 and 376 of IPC and Section 6 of POCSO Act, registered at P.S. Una,

District Una, H.P.

2. Record/status report made available to this Court reveals that on 31.12.2019, complainant Tara Chand lodged a complaint at PS Una, District Una,

H.P., alleging therein that his minor daughter i.e. victim-prosecutrix (name withheld), aged 17 years, has gone missing and he has apprehension that

some unknown person has made her to elope with him and as such, appropriate action may be taken. Investigating Agency on the basis of call detail

report and tower location of mobile phone recovered victim-prosecutrix from a place called Ghaneli, Moradabad, U.P. During investigation, victim-

prosecutrix disclosed to the police that present bail petitioner Vijay Kumar had taken her to Moradabad, where co-accused Ravinder Kumar sexually

assaulted her against her wishes. Police after getting the statement of victim-prosecutrix recorded under Section 164 Cr.PC also got her medically

examined and thereafter, FIR detailed herein above came to be lodged against the present bail petitioner and the other co-accused. After completion

of investigation, police has filed challan in the competent court of law.

3. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly admitting factum with regard to filing of challan, contends 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 the bail

petitioner, his application for grant of bail deserves to be rejected outrightly.

4. Having heard learned counsel for the parties and perused material available on record, this Court finds that victim-prosecutrix of her own volition

had gone to Moradabad with the present bail petitioner, where she was allegedly sexually assaulted against her wishes by co- accused Ravinder

Kumar. If the statement of victim-prosecutrix recorded under Section 164 Cr.PC is perused, it clearly reveals that she was in constant touch with the

bail petitioner and they both used to like each other. It has come in the statement of victim-prosecutrix that she herself asked the bail petitioner to run

away, whereafter they both went to Moradabad and stayed in the room of co-accused Ravinder Kumar. Ravinder Kumar allegedly sent Vijay Kumar

back to Himachal Pradesh and thereafter, sexually assaulted victim- prosecutrix against her wishes. It has specifically come in the statement of

victim-prosecutrix that no offence much less under Section 376 IPC was committed against her by the bail petitioner. It has also come in the

statement of victim-prosecutrix that she wanted to solemnize marriage with person namely Anil, but since she was minor, proposal for marriage could

not materialize.

5. Having heard learned counsel for the parties and perused material available on record, this Court finds that no case much less under Section 376 of

IPC is made out against the present bail petitioner Vijay Kumar. Otherwise also, it clearly emerges from the record that victim-prosecutrix, who at the

time of the alleged incident was 17 years old, of her own volition had gone with Vijay Kumar to Moradabad. Though aforesaid aspects of the matter

are to be considered and decided by the court below on the basis of totality of evidence collected on record by the Investigating Agency, but having

noticed aforesaid glaring aspects of the matter, this Court, sees no reason to let the bail petitioner incarcerate in jail for an indefinite period, especially

when nothing remains to be recovered from him. No doubt at the time of alleged commission of offence, victim-prosecutrix was minor, but having

noticed her conduct, which is apparent from her statements given to the police as well as Judicial Magistrate, this Court is unable to accept the

contention of learned Additional Advocate General that she was incapable of understanding the consequences of her joining the company of the bail

petitioner.

6. Hon'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 of his/her

is not proved in accordance with law. In the case at hand, guilt if any of the bail petitioner is yet to be established on record by the Investigating

Agency by leading cogent and convincing evidence and as such, his freedom cannot be curtailed for an indefinite period during trial.

7. 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 has 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*.

8. 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.

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 purpose of giving him a taste of imprisonment as a lesson.

10. 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.

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. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioner has carved out a case for grant of bail,

accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the

sum of Rs. 1,00,000/- each with one local surety in the like amount to the satisfaction of concerned Chief Judicial Magistrate/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 him/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 the 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 petition stands accordingly disposed of.

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