
Parmesh Kumar And Others Vs State Of Himachal Pradesh

Criminal Miscellaneous Petition (M) No.2262 Of 2020, 2 Of 2021

Court: High Court Of Himachal Pradesh

Date of Decision: Jan. 8, 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, 376, 506#Protection Of Children From Sexual Offences Act, 2012 " Section 4

Hon'ble Judges: Sandeep Sharma, J

Bench: Single Bench

Advocate: Kulbhushan Khajuria, Pushpender Verma, Arvind Sharma, Svaneel Jaswal

Final Decision: Disposed Of

Judgement

Sandeep Sharma, J

Through Video Conferencing.

1. Above named bail petitioners have approached this Court in the instant proceedings, filed under Section 439 Cr.PC, praying therein to grant regular

bail in case FIR No. 155/20, dated 7.11.2020, under Sections, 342, 376 and 506 of IPC and Section 4 of the POCSO Act, registered at P.S. Kihar,

District Chamba, H.P.

2. Mr. Arvind Sharma, learned Additional Advocate General besides filing status report has also made available record in terms of order dated

4.1.2021, passed by this court, perusal whereof reveals that on 7.11.2020, victim-prosecutrix (name withheld) lodged a complaint at PS Kihar, District

Chamba, stating therein that she is 17 years old and at present, studies in class-12. She alleged that in the month of September, bail petitioner namely

Parmesh Kumar sexually assaulted her against her wishes. She alleged that one day, while she was working in her fields, bail petitioner-Parmesh

Kumar having found her alone sexually assaulted her against her wishes and threatened that in case she discloses the aforesaid incident to anybody,

he would take her away. Victim-prosecutrix disclosed in her statement recorded under Section 154 Cr.PC that after aforesaid alleged incident,

Parmesh also gave her one mobile sim and started giving frequent telephonic calls. On 4.11.2020, another bail petitioner Hem Raj, who happened to be

cousin of Parmesh had come to the house of the Parmesh and as such, he called her to his house. She alleged that on the repeated requests of

Parmesh, she went to his house, where bail petitioner Parmesh and his wife Neema left her alone in room with another bail petitioner namely Hem

Raj, who thereafter sexually assaulted her against her wishes. She alleged that after a half an hour, her maternal uncle entered the room by breaking

door and saved her from the clutches of the bail petitioner-Hem Raj . In the aforesaid background, FIR detailed herein above, came to be lodged

against the present bail petitioners and since then, they both are behind bars.

Investigation in the case is complete and challan stands filed in the competent court of law and as such, petitioners have approached this Court in the

instant proceedings for grant of regular bail.

3. Mr. Arvind Sharma, learned Additional Advocate General while fairly admitting factum with regard to completion of investigation contends that

though nothing remains to be recovered from the bail petitioners, but keeping in view the gravity of offence alleged to have been committed by them,

they do not deserve any leniency and as such, prayer made on their behalf for grant of bail may be reject outrightly. Learned Additional Advocate

General while making this court peruse status report/record submits that though there is overwhelming evidence suggestive of the fact that both the

petitioners taking undue advantage of the innocence and minority of the victim-prosecutrix sexually assaulted her against her wishes on 2-3 occasions,

but even otherwise consent, if any, of the victim-prosecutrix is immaterial on account of her minor age and as such, prayer made on behalf of the

petitioners may be rejected, who in the event of enlargement of bail, may not only flee from justice, but may also cause harm to the victim-prosecutrix.

4. Having heard learned counsel representing the parties and perused statements made by the victim-prosecutrix under Sections 154 and 164 CrPC,

this Court finds that victim-prosecutrix, aged 17 years had prior acquaintance with the bail petitioner Parmesh. Otherwise also, if both the statements

recorded under Sections 154 and 164 Cr.PC are read in conjunction, there are material inconsistencies and contradictions. It is not understood that, if

once in the month of September, 2020, bail petitioner Parmesh had ravished victim-prosecutrix against her wishes, where was the occasion for her to

visit his house after a few days that too on his askance. Similarly, it is not understood when victim-prosecutrix went to the house of the bail petitioner

Parmesh, why she did not disclose factum with regard to her having been ravished by Parmesh to his wife Neema, rather as per own statement of

victim-prosecutrix recorded under Section 164 Cr.PC, she on the askance of bail petitioner Parmesh and his wife joined the company of another bail

petitioner Hem Raj. Interestingly, there is nothing on record that during the aforesaid stay of the victim-prosecutrix in the house of the bail petitioner

Parmesh, effort, if any, ever came to be made on behalf of the parents or relatives of the victim-prosecutrix to lodge missing report or they made

effort, if any, to locate her. Aforesaid omission on the part of the parents of the victim-prosecutrix gains significance in view of the fact that

subsequently, maternal uncle of victim-prosecutrix allegedly rescued victim-prosecutrix from the clutches of the bail petitioner Hem Raj. There is

nothing on record that intimation with regard to presence of victim-prosecutrix in the house of the bail petitioner Parmesh was given to maternal uncle

of the prosecutrix by somebody from the family of the bail petitioner Parmesh or parents of the victim-prosecutrix.

5. Leaving everything aside, this Court having noticed conduct of victim-prosecutrix, which duly reflects from her statements given to the police as

well as Judicial magistrate, finds it difficult to conclude that victim-prosecutrix at the time of alleged incident was incapable of understanding

consequences of her being in the company of the bail petitioner, rather there is overwhelming evidence on record suggestive of the fact that victim-

prosecutrix on account of her prior acquaintance with the bail petitioner had been meeting him as well as Hem Raj frequently prior to the alleged

incident. Medical Officer attending upon the victim-prosecutrix has not specifically concluded in his report that possibility of sexual assault cannot be

ruled out, rather he /she, simply after having recorded the version of victim-prosecutrix, has just given details of medical examination only. No

external/internal injury ever came to be noticed by the medical officer attending upon the victim-prosecutrix. Similarly, FSL report placed on record

also does not support case of the prosecution.

6. Though aforesaid aspects of the matter are to be considered and decided by the courts below in totality of evidence collected on record by the

Investigating Agency, but keeping in view the aforesaid glaring aspect of the matter, this Court sees no reason to let the bail petitioner incarcerate in

jail for an indefinite period during trial, especially when challan stands filed in the competent court of law and nothing remains to be recovered from the

bail petitioner. Apprehension expressed by the learned Additional Advocate General that in the event of petitioners 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. Hon'ble Apex Court as well as this Court in catena of judgments have held that one is deemed to be innocent till the time his guilt is

not proved in accordance with law and as such, prayer made on behalf of the petitioners deserves consideration.

7. 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.

8. 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.”

9. 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

to 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.

10. 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.

11. Reliance is placed on judgment passed by the Hon'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:-

"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).

12. 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.

13. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, the 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 bonds in the sum of Rs. 1,00,000/- each with one local surety each 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.

e. They shall handover the passports to the Investigating Agency within a period of ten days from their release on bail.

14. 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.

15. Any observations made hereinabove shall not be construed to be a reflection on the merits of the cases and shall remain confined to the disposal of

these applications alone. The bail petitions stand disposed of accordingly.

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