



**IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA**

Cr.MP(M) No. 1039 of 2021

Reserved on: July 7, 2021

Date of Decision: July 9, 2021

Amit Chaudhary

...Petitioner.

Versus

State of H.P.

...Respondent.

Coram:

The Hon'ble Mr. Justice Anoop Chitkara, Judge.

Whether approved for reporting?¹ *NO*

For the petitioner: Mr. Peeyush Verma, Advocate.

**For the respondent: Mr. Nand Lal Thakur Additional Advocate General,
Mr. Ram Lal Thakur, Assistant Advocate General and
Mr. Rajat Chauhan Law Officer, for the State.**

THROUGH VIDEO CONFERENCE

FIR No.	Dated	Police Station	Sections
259/2020	28.12.2020	West (Boileauganj), Shimla	363. 354, 376 of IPC, 4, 6 & 8 of POCSO Act.

Anoop Chitkara, Judge

The petitioner, incarcerated upon his arrest for alluring and raping a minor girl, has come up before this Court seeking regular bail on the grounds of false implication and further that the victim had earlier levelled similar allegations on two occasions, and in one such case, in her statement recorded on oath during the trial, she resiled from allegations and in her cross-examination also stated that she was more than 18 years of age, and that in her statement under S. 164 CrPC both the victims stated that they do not want to proceed with the case any further.

¹ **Whether reporters of Local Papers may be allowed to see the judgment?**

2. Earlier, the petitioner had filed the following bail petitions:
 - (a) Cr.MP(M) No.80 of 2021, in this Court, decided on 4th February, 2021.
 - (b) Cr.MP(M) No. 387 of 2021, in this Court, decided on May 11, 2021.
3. The bail petition is silent about criminal history, however, Mr. Peeyush Verma, Ld. Counsel for the bail petitioner states on instructions that the petitioner has no criminal past relating to the offences prescribing sentence of seven years and more. Ld. Counsel further submits that in the earlier bail petition CrMPM No. 80 of 2021, in its Para 7 the petitioner had specifically stated that he had no criminal history. The status report also does not mention any criminal past of the accused.
4. Briefly, the allegations against the petitioner are that:
 - a) On 28.12.2020, on noticing the missing two minor girls, 'S' aged 14 years and 'Y' aged 16 years, from Child Care Institute Mashobra at Tutikandi, the Officer-in-charge (Superintendent) immediately informed the police of Police Station West (Boileauganj), Shimla.
 - b) The victims took a lift in a car from the Child Care Institute, and the car driver dropped them at the old Bus Stand, Shimla. Then, they took a phone of someone and called one Lovely, a friend of 'Y,' and asked him to take them from Shimla. Lovely refused to do so, but he sent them Rs.500/- on the Google pay account of the person, to which they called. The person who has Google pay account on the said mobile gave Rs.500/- to them.
 - c) After that, both the victims reached the old bus stand, Shimla, and inquired about the bus to Una from a Lady named Kamla. Since it was night time, no bus was available to Una, and the victims spent the night of 28.12.2020 in the house of Kamla. On the morning of 29.12.2020, Kamla gave Rs.300/- to the victims and the victims left her home at around 9-10 a.m. Later, they took a bus to Bilaspur.
 - d) While the victims were traveling on the bus, Ankush started talking with 'Y' and later gave her his mobile number and asked her to meet him in Bilaspur. After that, both the minor victims took another bus from Brahampukhar to Bilaspur, and while traveling on the said bus, another boy named Amit (present bail petitioner) met them. They went to Laxmi Narayan Temple in Bilaspur. Later in the day, Amit arranged for a hotel room for the

girls and himself. All of them spent the night in the same room where Amit raped 'S' aged 14 years.

e) On 30.12.2020, they checked out from the hotel, and 'Y' called Ankush from the mobile of Amit, and he came to Bilaspur. After that, they all went for a stroll on the bank of the river, where Ankush molested 'Y.' Later in the day, Amit left, and Ankush arranged for a room in the same hotel for the night of 30.12.2020. After that, he left the hotel, telling the victims that he would get some food but did not return. 'Y' tried to call him through someone's phone, but he did not pick up.

f) On 31.12.2020, 'Y' again called him in the morning when Ankush said that he would not come back. Both the victims asked for Rs.500/- from hotel staff to pay for the room's rent. Then, both of them took a bus from Bilaspur to Chandigarh. On reaching Chandigarh, 'S' called one Vicky and asked him to come to Chandigarh, to which he asked the victims to go to Ambala. On reaching Ambala, the victims informed Vicky, who came there to pick them up with another boy named Tonny. They picked them up on two different motorcycles. Vicky picked up 'S' and Tonny 'Y.' They took them to the room and raped them.

g) On 1.1.2021, Vicky and Tonny left the girls in a bus stand for Chandigarh. On reaching Chandigarh 'S' called Vicky, but he did not pick up the call. Then, both the girls left for Baddi to the friend Kanchan. They called Kanchan, but she did not pick up, and then the victim returned to Chandigarh. 'S' called Vicky from Chandigarh and told him that they do not have any money. Then, Vicky sent 'S' Rs.500/- on the Google Pay account of the person she was calling. After that, on the night of 1.1.2021, both the victims took a bus from Chandigarh to Dharampur and then reached at about 1.30 a.m., at the native village of 'Y' at District Solan H.P.

h) On 2.1.2021, the I.O. took the victims for their medical examination at IGMC, Shimla, where the doctors conducted their medico-legal examination. After medical examination, the doctors collected swabs from their privates and handed them over to the investigator, who sent the same to the Laboratory for analysis.

i) Based on these allegations, the Police registered the FIR mentioned above.

j) Per the report of the FSL Junga, the DNA profile obtained from the underwear of 'S', three DNA profiles were identified, and one such DNA profile matched with the DNA profile obtained from the blood sample on FTA card of Amit Kumar, (the petitioner, herein).

5. Mr. Peeyush Verma, Ld. Counsel for the petitioner, contends that immediately after this incident, the victim 'S' at whose instance one trial was commencing at Nahan, and she had appeared as a witness, she stated on oath that she was above eighteen years of age. Ld. Counsel states that, with conceding or admitting, given the fact that the victim had voluntarily accompanied the petitioner in a hotel, and she did not utter a single word of forceful action, but just stated that in the hotel, the petitioner had established sexual relations with her, it points towards consent. Ld. Counsel submits that the incarceration before the proof of guilt would cause grave injustice to the petitioner and family.

6. On the contrary, the contention on behalf of the State is that the victim was a minor, and a victim of gang rape, and as such it is not the case of bail. Mr. Nand Lal Thakur, Ld. Additional Advocate General further insists that if this Court is inclined to grant bail, then such a bond must be subject to very stringent conditions.

7. The possibility of the accused influencing the investigation, tampering with evidence, intimidating witnesses, and the likelihood of fleeing justice, can be taken care of by imposing elaborative and stringent conditions. In **Sushila Aggarwal**, (2020) 5 SCC 1, Para 92, the Constitutional Bench held that unusually, subject to the evidence produced, the Courts can impose restrictive conditions.

REASONING:

8. Petitioner has annexed the copy of FIR No.36 of 2019, dated 15-11-2019, registered in the file of Woman Police Station Nahan, District Sirmour, HP, on the allegations made by the victim 'S' against Sahil Khan. The petitioner has also annexed a copy of the statement of PW-10, the mother of victim 'S,' as well as the copy of the statement of the victim 'S,' who testified as PW-11, in the trial No. 2-ST/7 of 2020, in the Court of Special Judge, Sirmour, at Nahan, going on against accused Sahil Khan. A perusal of these statements reveals that both mother and the victim had turned hostile. The victim even mentioned her age to be over 18 years as

of 15-11-2019, the date of the incident. Apart from the above, the petitioner has also annexed a copy of FIR No. 54 of 2020, dated 6-7-2020, registered in the Police Station, Nahan, District Sirmaur, HP, on the allegations made by the mother of the victim 'S'.

9. The proposition of law that whether the statements of a victim recorded in another trial can be read in evidence in another trial, without allowing her to explain the circumstances under which these were made? Or whether resort to S. 145 of the Indian Evidence Act, 1872, is necessary before the Courts can look into the previous statements made in another case? The trial commenced from the FIR No. 36 of 2019, registered in the Women Police Station Nahan, District Sirmaur, HP, the victim testified in the said trial No. 2-ST/7 of 2020, State of HP v. Sahil Khan. The petitioner has annexed the copy of her statement. Thus, given the COVID-19 pandemic, coupled with the fact that the petitioner is in jail for more than six months, this Court, without settling down any law on the propositions mentioned above, and without this order being treated as a precedent, is looking at the statements to form a prima facie opinion only for the purpose of bail.

10. The victim "S" testified the above mentioned trial and stated that accused Sahil in the said case has not committed any sexual assault upon her. After that, she was declared hostile and leading questions were put to her by learned Public Prosecutor. She stated it to be incorrect that in the year 2019, her age was 13 years and stated on her own that her parents might have wrongly recorded her age. In the cross-examination by defence, she stated that in November, 2019, she was above 18 years of age.

11. The mother of the victim also appeared in the said trial as PW-10. She also did not support the case of the prosecution and was declared hostile. In her cross-examination by the defence, she stated that the victim was born at home in the year 2000. She further stated that she could not recollect the date, but it was Guru Parav of Guru Nanakji, in the year 2000. She also stated that she was never interested in studies and did not go to school for 4-5 years. Even after re-admission, she was not regular in her studies. Her mother further stated that the child victim "S" had fled away from home many times and even she fled from Balika Ashram. She further stated that on the date of statement i.e. 12.1.2021, the victim had attained the age of 20 years and in November, 2019, she was more than 18 years of age.

12. A perusal of the bail petition reveals that the petitioner did not file the copy of statements of the victims, recorded under Sections 161 and 164 CrPC. Without reading the statements of both the victims 'S' and 'Y,' it was not proper to assume that the petitioner had coitus with the victim 'S' and not with the victim 'Y,' against whom there are no allegations of false implications in the past. Given this, the Court had asked the State to produce the copies of the statements of both the victims recorded under S. 164 CrPC. The Court had also told the State to produce the DNA report.

13. Now, the State has produced the copies of the victim's statement recorded under section 164 CrPC. These have not been supplied to the petitioner or his Counsel.

14. The law is no more *Res Integra* that under section 207 CrPC, the accused is entitled to the copy of the statement under section 164 CrPC only after the concerned Court takes cognizance of the offence. Still, there is no restriction or bar on an investigating agency to bring the statements recorded under section 164 CrPC to the notice of the concerned Court by handing over its copies or placing them on record along with the status report; however, despite this, the accused cannot ask for it. In *Miss "A" v. State of Uttar Pradesh*, (Cr. A 659 of 2020, decided on Oct 8, 2020), a three-judge bench of Hon'ble Supreme Court holds,

[15]. ...It is only after taking of the cognizance and issuance of process that the accused is entitled, in terms of Sections 207 and 208 of the Code, to copies of the documents referred to in said provisions. The filing of the charge-sheet by itself, does not entitle an accused to copies of any of the relevant documents including statement under Section 164 of the Code, unless the stages indicated above are undertaken.

[16]. Thus, merely because the charge-sheet was filed by the time the High Court had passed the order in the present matter, did not entitle Respondent No.2 to a copy of the statement under Section 164 of the Code.

[17]. That apart, the reason that weighed with the High Court in placing reliance on the decision of the Division Bench of the High Court rendered in the year 2012 which was before the directions were passed by this Court in *Shivanna [State of Karnataka by Nonavinakere Police v. Shivanna alias Tarkari Shivanna, (2014) 8 SCC 913]* was completely incorrect. As logical extension of the directions passed by this Court, no person is entitled to a copy of statement recorded under Section 164 of the Code till the appropriate orders are passed by the court after the charge-sheet is filed. The right to receive a copy

of such statement will arise only after cognizance is taken and at the stage contemplated by Sections 207 and 208 of the Code and not before.

15. The victim 'S' had made her statement under Section 164 CrPC on Jan 4, 2021. After that in another FIR No. 36 of 2019, registered in the Women Police Station Nahan, District Sirmaur, HP, under sections 376 of IPC and Ss 4 & 8 of POCSO, the victim was 'S', who is also the victim in the FIR of this bail petition.

16. Learned Judicial Magistrate 1st Class, Shimla had recorded the statement of victim "S" on 4.1.2021. After putting primarily questions, learned Magistrate was satisfied that she could be given oath, as she understood its sanctity. After that, she was administered oath and although she stated on oath, her age to be 14 years, but she also stated that when she and other victim "Y" had stayed with the petitioner in the hotel room, then he had established relations with her. She concluded her statement by saying that she was sorry and they were at fault and they do not want the case to continue.

17. On analysis of the above statement reveals two ends. Firstly, that although on 4.1.2021, victim "S" had revealed her age to be 14 years, but as stated above on 12.1.2021, while appearing as a witness in the aforesaid Sessions trial, she and her mother had stated her age to be above 18 years in 2019 and 20 years on 12.1.2021. Even while giving her particulars as PW-11, victim "S" had told her age as 20 years. Similarly, her mother who had testified as PW-10 on 12.1.2021 stated on oath in the aforesaid trial that the victim had attained the age of 20 years as on 12.1.2021.

18. Since there is no allegation by victim "Y" that petitioner Amit Chaudhary had committed any sexual act with her and he had established coitus only with victim "S", as such, there is no point referring in detail about her statement under Section 164 Cr.PC.

19. In the entirety of very strange facts of this case, the possibility that the sexual act of the petitioner with victim "S" would not fall as statutory rape and it might result into miscarriage of justice if he is allowed to incarcerate on such kind of evidence.

20. An additional factor for bail is the very young age of the accused. The limited question before this Court is to grant or bail or not. These observations nowhere suggest the innocence or approval of the petitioner's conduct. Without commenting on the case's merits, given the investigation stage, the period of incarceration already

undergone, and the circumstances peculiar to this case, the petitioner makes a case for release on bail.

21. Given the above reasoning, the Court is granting bail to the petitioner, subject to strict terms and conditions, which shall be over and above and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC, 1973.

22. In **Manish Lal Shrivastava v State of Himachal Pradesh**, CrMPM No. 1734 of 2020, after analysing judicial precedents, this Court observed that any Court granting bail with sureties should give a choice to the accused to either furnish surety bonds or give a fixed deposit, with a further option to switch over to another.

23. The petitioner shall be released on bail in the FIR mentioned above, subject to his furnishing a personal bond of **Rs. Ten thousand (INR 10,000/-)**, and shall furnish one surety for **Rs. Twenty-five thousand (INR 25,000/-)**, to the satisfaction of the Judicial Magistrate having the jurisdiction over the Police Station conducting the investigation, and in case of non-availability, any Ilaqa Magistrate. Before accepting the sureties, the concerned Magistrate must satisfy that in case the accused fails to appear in Court, then such sureties are capable to produce the accused before the Court, keeping in mind the Jurisprudence behind the sureties, which is to secure the presence of the accused.

24. **In the alternative, the petitioner may furnish a personal bond of Rs. Ten thousand (INR 10,000/-), and within ten working days of his release from prison, handover to the concerned Court, a fixed deposit(s) for Rs. Ten thousand only (INR 10,000/-), made in favour of Chief Judicial Magistrate of the concerned district.**

- a) Such Fixed deposits may be made from any of the banks where the stake of the State is more than 50%, or any of the stable private banks, e.g., HDFC Bank, ICICI Bank, Kotak Mahindra Bank, etc., with the clause of automatic renewal of principal, and liberty of the interest reverting to the linked account.
- b) Such a fixed deposit need not necessarily be made from the account of the petitioner and need not be a single fixed deposit.
- c) If such a fixed deposit is made in physical form, i.e., on paper, then the original receipt shall be handed over to the concerned Court.
- d) If made online, then its printout, attested by any Advocate, and if possible, countersigned by the accused, shall be filed, and the depositor shall

get the online liquidation disabled.

e) The petitioner or his Advocate shall inform at the earliest to the concerned branch of the bank, that it has been tendered as surety. Such information be sent either by e-mail or by post/courier, about the fixed deposit, whether made on paper or in any other mode, along with its number as well as FIR number.

f) After that, the petitioner shall hand over such proof along with endorsement to the concerned Court.

g) It shall be total discretion of the petitioner to choose between surety bonds and fixed deposits. It shall also be open for the petitioner to apply for substitution of fixed deposit with surety bonds and vice-versa.

h) Subject to the proceedings under S. 446 CrPC, if any, the entire amount of fixed deposit along with interest credited, if any, shall be endorsed/returned to the depositor(s). Such Court shall have a lien over the deposits up to the expiry of the period mentioned under S. 437-A CrPC, 1973, or until discharged by substitution as the case may be.

25. The furnishing of the personal bonds shall be deemed acceptance of the following and all other stipulations, terms, and conditions of this bail order:

a) The petitioner to execute a bond for attendance to the concerned Court(s). Once the trial begins, the petitioner shall not, in any manner, try to delay the proceedings, and undertakes to appear before the concerned Court and to attend the trial on each date, unless exempted. In case of an appeal, on this very bond, the petitioner also promises to appear before the higher Court in terms of Section 437-A CrPC.

b) The attesting officer shall, on the reverse page of personal bonds, mention the permanent address of the petitioner along with the phone number(s), WhatsApp number (if any), e-mail (if any), and details of personal bank account(s) (if available), and in case of any change, the petitioner shall immediately and not later than 30 days from such modification, intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, to the Police Station of this FIR to the concerned Court.

c) 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.

d) The petitioner shall join the investigation as and when called by the Investigating Officer or any Superior Officer; and shall cooperate with the investigation at all further stages as may be required. In the event of failure to do so, it will be open for the prosecution to seek cancellation of the bail. Whenever the investigation occurs within the police premises, the petitioner shall not be called before 8 AM and shall be let off before 5 PM, and shall not be subjected to third-degree, indecent language, inhuman treatment, etc.

e) In addition to standard modes of processing service of summons, the concerned Court may serve or inform the accused about the issuance of summons, bailable and non-bailable warrants the accused through E-Mail (if any), and any instant messaging service such as WhatsApp, etc. (if any). [Hon'ble Supreme Court of India in Re Cognizance for Extension of Limitation, Suo Moto Writ Petition (C) No. 3/2020, I.A. No. 48461/2020- July 10, 2020];

i. At the first instance, the Court shall issue the summons.

ii. In case the petitioner fails to appear before the Court on the specified date, in that eventuality, the concerned Court may issue bailable warrants.

iii. Finally, if the petitioner still fails to put in an appearance, in that eventuality, the concerned Court may issue Non-Bailable Warrants to procure the petitioner's presence and may send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper to achieve the purpose.

26. Given the gravity of accusations and the heinous nature of the offence, the petitioner shall surrender all weapons, firearms, ammunition, if any, along with the arms license to the concerned authority within 30 days from today and inform the Investigator about the compliance. However, subject to the Indian Arms Act, 1959, the petitioner shall be entitled to renew and take it back in case of acquittal in this case.

27. 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.

28. **The petitioner should stay far away from the place of occurrence while on bail. Thus, the petitioner shall not enter within a radius of one kilometre from her house.** This Court is imposing this condition to rule out any attempt by the accused to incapacitate, influence, or to cause any discomfort to the victim. Reference be made to Vikram Singh v Central Bureau of Investigation, 2018 All SCR (CrI.) 458); and Aparna Bhatt v. State of Madhya Pradesh, 2021 SCC Online SC 230.

29. During the trial's pendency, if the petitioner **repeats** or commits any offence where the sentence prescribed is more than seven years or violates any condition as stipulated in this order, it shall always be permissible to the respondent to apply for cancellation of this bail. It shall further be open for any investigating agency to bring it to the notice of the Court seized of the subsequent application that the accused was earlier cautioned not to indulge in criminal activities. Otherwise, the bail bonds shall continue to remain in force throughout the trial and after that in terms of Section 437-A of the CrPC.

30. Any Advocate for the petitioner and the Officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order, in vernacular and if not feasible, in Hindi.

31. 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 to 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.

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

33. 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.

34. In return for the protection from incarceration, the Court believes that the accused shall also reciprocate through desirable behavior.

35. The SHO of the concerned Police Station or the Investigating Officer shall arrange to send a copy of this order, preferably a soft copy, to the victim, at the earliest, and not later than two days. In case the victim notices any objectionable behavior or violation of any terms or conditions of this order, the victim may inform the SHO of the concerned Police Station or the Trial Court or even to this Court.

36. *There would be no need for a certified copy of this order for furnishing bonds. Any Advocate for the petitioner can download this order along with the case status from the official web page of this Court and attest it to be a true copy. In case the attesting officer or the Court wants to verify the authenticity, such an officer can also verify its authenticity and may download and use the downloaded copy for attesting bonds.*

In the facts and circumstances peculiar to this case, the petition is allowed in the terms mentioned above.

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July 9, 2021 (ks).

**Anoop Chitkara,
Judge.**

High Court