

Himachal Pradesh High Court

Shyab Abassi vs State Of Himachal Pradesh on 2 January, 2021

Bench: Sandeep Sharma

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA .

Cr.MP(M) No.2170 of 2020

Decided on: 02.01.2021

| | | |
|---------------------------|--------|-----------------|
| Shyab Abassi | |Petitioner |
| | Versus | |
| State of Himachal Pradesh | |Respondent |

Coram:
Hon'ble Mr. Justice Sandeep Sharma, Judge.
Whether approved for reporting? 1

For the Petitioner : Mr. Vinod Chauhan, Advocate.

For the Respondent :
Mr. Arvind Sharma, Additional Advocate
General.

Sandeep Sharma, Judge (oral):

Through Video Conferencing Bail petitioner namely Shyab Abassi, who is behind the bars since 11th September, 2020, has approached this Court in the instant proceedings filed under Section 439 Cr.PC, for grant of regular bail in FIR No. 123/2020, dated 11.09.2020, under Sections 366, 376, 506 & 120-B of IPC and under Section 4 of Protection of Children from Sexual Offences Act, registered at Police Station Puruwala, District Sirmaur, Himachal Pradesh.

2. Respondent-State has filed status report, in terms of order dated 11.12.2020. ASI Ravinder Singh has come present with record.

1 Whether the reporters of the local papers may be allowed to see the judgment?

Close scrutiny of record/status report reveals that on 11.9.2020, complainant, ,i.e. mother of victim-prosecutrix (name withheld) lodged a .

complaint with Sub Divisional Police Officer, Paonta Sahib, District Sirmaur, alleging therein that bail petitioner, namely Shyab Abassi, came in the contact of her family at Vikasnagar during marriage of her sister and thereafter, he expressed his desire to solemnize marriage with her minor daughter, i.e. victim-prosecutrix, aged 17 years. She disclosed to the police that bail petitioner was made to understand that since victim-

prosecutrix is minor at this juncture, proposal of marriage given by him would be considered at an appropriate time. However, since, despite aforesaid, bail petitioner did not stop teasing and threatening the victim-

prosecutrix, complainant allegedly made complaint to his father, but he also reiterated that his son wants to solemnize marriage with victim-

prosecutrix. In her complaint given to police, complainant alleged that on 16th June, 2020, bail petitioner had come to her house on account of birthday of victim-prosecutrix, but in the night of aforesaid date, bail petitioner on the pretext of marriage, maintained physical relations with her minor daughter. She alleged that on 20 th June, 2020, bail petitioner called the victim-prosecutrix to Vishwa Karma Chowk, from where he made her elope with him on the pretext of marriage. Complaint filed on behalf of the complainant reveals that bail petitioner took victim-

prosecutrix to Delhi, Ghaziabad and repeatedly sexually assaulted her against her wishes. She alleged that victim-prosecutrix informed her .

over telephone that she has been forcibly kept in a room at Ghaziabad and is being maltreated by bail petitioner and his family members.

Complainant alleged that the family of the bail petitioner including bail petitioner gave her beatings and kept her in illegal confinement against her wishes. She alleged that after some time, bail petitioner dropped her minor daughter at her uncle's place in Ghaziabad from where she was brought back to home by her. In the aforesaid background, complainant prayed to the police to take appropriate action in accordance with law against the bail petitioner and other family members. On 11 th September, 2020, police got victim-prosecutrix medically examined and obtained MLC from the Medical Officer concerned. After getting statement of victim-prosecutrix recorded under Section 164 Cr.P.C before the Court of learned Addl. Chief Judicial Magistrate, Paonta Sahib, police besides naming bail petitioner in the FIR detailed hereinabove, also named other family members, namely, Bashir Ahmad, Fatima, and Aasu. Co-accused namely, Bashir Ahmad, Fatima, and Aasu already

stand enlarged on bail, whereas, present bail petitioner is behind the bars since 11 th September, 2020. Investigation in the case is complete and challan stands filed in the competent court of law.

3. Mr. Arvind Sharma, learned Additional Advocate General while admitting the factum with regard to filing of challan in the competent .

court of law, contends that keeping in view the gravity of the offence alleged to have been committed by bail petitioner, he does not deserve any leniency and as such, prayer having been made on his behalf for grant of bail may be rejected. Mr. Sharma, while making this Court to peruse the status report, states that there is overwhelming evidence collected on record by the Investigating Agency, suggestive of the fact that bail petitioner in connivance with other family members, firstly made the victim-prosecutrix elope with him on the pretext of marriage and thereafter subjected her to maltreatment and mental harassment. Mr. Sharma, further contends that though evidence collected on record clearly suggests that bail petitioner taking undue advantage of minority and innocence of victim/prosecutrix made her elope with him, on the pretext of marriage and thereafter sexually assaulted her against her wishes, but even otherwise, consent, if any of victim-prosecutrix is immaterial on account of her age and as such, the bail petition having been filed by bail petitioner may kindly be rejected.

4. Having heard learned counsel for the parties and perused the material available on record, especially, statement of victim recorded under Section 164 Cr.P.C., this Court finds that victim/prosecutrix had prior acquaintance with the bail petitioner, who prior to alleged incident had been coming to her house frequently. Though, victim-prosecutrix in her .

aforesaid statement has stated that she had no prior intimacy with bail petitioner, but if her statement made under Section 164 Cr.P.C, is read in its entirety, juxtaposing statement of complainant recorded under Section 154 Cr.P.C, it can be safely inferred that families of bail petitioner and of the complainant had close relations and as such, bail petitioner had been visiting the house of the victim-prosecutrix; and he had also expressed his desire to solemnize marriage with her. Proposal of marriage given by bail petitioner or his family was not declined, rather same was deferred till the time victim-prosecutrix attains the majority.

5. Leaving everything aside, this Court finds that as per own statement of complainant, victim-prosecutrix after having received telephone call from bail petitioner on 28 th June, 2020, went missing, but surprisingly, no missing report, if any, ever came to be lodged at the behest of complainant on 20 th June, 2020 or thereafter till 11th September, 2020, when FIR detailed hereinabove, came to be lodged against the bail petitioner and other family members. Aforesaid delay of three months in lodging FIR further suggests that complainant had knowledge about the whereabouts of her daughter, but she chose not to file any complaint till the time her daughter allegedly gave her telephone call in the month of September, whereafter, FIR came to be lodged against the bail petitioner and his other family members. No plausible explanation has been .

rendered on record qua the delay of three months in lodging FIR. It can be safely inferred from the statement of victim-prosecutrix recorded under Section 164 Cr.P.C that she of her own volition and

without there being any external pressure after having received telephone call from bail petitioner went to Delhi, Ghaziaband with the bail petitioner and stayed there for approximately three months. There is nothing on record suggestive of the fact that during the aforesaid period of three months, victim-prosecutrix made any effort to lodge complaint or reveal her whereabouts to police or her mother. Aforesaid omission on the part of victim-prosecutrix or complainant, i.e. her mother, gains significance in view of the fact that one of the uncle of victim-prosecutrix was residing at Ghaziabad. No doubt that in the case at hand, record reveals that on the date of alleged incident, victim-prosecutrix was seventeen and half years old, but having noticed her conduct, which clearly reflects from her statements given to the Judicial Magistrate and Police, it cannot be said that she was incapable of understanding the consequences of her having eloped with bail petitioner, rather material available on record clearly suggests that she wanted to solemnize marriage with bail petitioner and they both with intention to solemnize marriage eloped. Though, aforesaid aspects of the matter are to be considered and decided by the court below in the totality of evidence collected on record by the Investigating Agency, .

but having taken note of aforesaid aspects of the matter, this Court sees no reason to let bail petitioner incarcerate in jail for an indefinite period during trial, especially, when nothing remains to be recovered from him and all the co-accused already stand enlarged on bail. Medical evidence adduced on record, if perused in its entirety, does not support the case of the prosecution and as such, there appears to be no justification to curtail the freedom of the bail petitioner during trial. Apprehension expressed by learned Additional Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice, can be best met by putting him to stringent conditions.

6. 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.

7. 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."

8. 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."

9. 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.

2. 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).

10. 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*.

11. 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. 50,000/- 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.

(e) He shall handover passport to the Investigating Agency.

12. 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.

13. 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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(Sandeep Sharma) Judge 2nd January, 2021 (reena)