

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

**Cr. MP(M) No. 1682 of 2020
Reserved on: 25th September, 2020
Date of Decision: 26th October, 2020**

Mahender Kumar

...Petitioner.

Versus

State of Himachal Pradesh

...Respondent.

Coram:

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

Whether approved for reporting?¹ **YES.**

For the petitioner: Ms. Abhilasha Kaundal, Advocate.

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

Amicus Curiae: Mr. Ashok Tyagi Advocate

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge.

On the allegations made by a girl, aged 15 years, against the petitioner of having coitus with her in the end of May 2013, by entering her home, and also raping her in forest on 30th June 2013, when she was returning from school, the police registered FIR No. 82 of 2013, dated 19.07.2013, under Sections 376, 506 of Indian Penal Code, 1860, (IPC), and 4 of Protection of Children from Sexual Offences Act, 2012, in Police Station Gohar, District Mandi, Himachal Pradesh, disclosing cognizable and non-bailable offences.

2. The Police conducted the investigation, took the victim for her medical examination, got her statement recorded under S. 164 CrPC, but failed to nab the accused. Subsequently, the Police filed a charge sheet without arresting the accused. After taking cognizance of the offence, the Court issued Non-bailable Warrants, and upon its non-execution, allowed the application of the prosecution and proceeded

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

against the accused under Section 82 CrPC, and thus, vide order dated 24.12.2013, declared the petitioner as a proclaimed offender. Per Paragraph 7 of the bail petition, after that Learned Additional Sessions Judge (Fast Tract Court), proceeded under Section 299 CrPC and recorded evidence including statement of the victim.

3. The petitioner's criminal history relating to the offences prescribing sentence of greater than seven years of imprisonment or when on conviction, the sentence imposed was more than three years: The contents of the petition and the status report do not reveal any criminal history.

4. Briefly, the allegations against the petitioner are that on 19.7.2013, the victim, accompanied by her father, visited the Police Station, Gohar, and complained to the Police that she was a student of 10+1. On 22.6.2013, she had gone to stay with her mother's brother, from where her school was approachable. On 30.6.2013, when she returned from her school and was going towards her Mama's place, then accused started chasing her. When she reached near a temple, then below the forest, he caught hold of her, torn her clothes, made her lie, opened the string of her salwar, and forcibly committed rape upon her. After that, he warned her that if she revealed this incident to anyone, then he would do away with her life and ran away from that place. The victim further alleged that even earlier, at the end of May, when she was alone in her home and studying in the corridor of her house, the accused came there and asked her that he had some work with her and asked her to accompany him to her room. Upon that, she followed him, and the moment she entered the room, he caught hold of her and committed rape upon her on the bed. From that day onwards, he would threaten her that if she revealed this incident to anyone, he would do away with her life. Because of the threat, she could not tell the ordeal to her parents. She further stated that it was due to this fear that she had shifted to her maternal uncle's place. She also alleged that Mahender Kumar would even write letters asking her to reply with warnings that failure to respond would lead to unimaginable consequences. She further stated to the Police that because of fear of the accused, on 15.7.2013 she had run away from her maternal uncle's house and gone to the forest and stayed in a cave alone for three days. On 17.7.2013, when she was returning from the forest and walking to her home, then on the way, one Jyoti Parkash met her and brought her home. Based upon the above allegations, the Police registered the FIR.

5. Ms. Abhilasha Kaundal, Learned Counsel for the petitioner contends that incarceration before the proof of guilt would cause grave injustice to the petitioner and family. She further argued that upon being declared a proclaimed offender, the petitioner voluntarily approached this Court by filing a petition for anticipatory bail. Accused explains that he and the victim were in love, and to make out an exceptional case, further states that on noticing that the girl had an affair with one Jyoti Prakash, it broke his heart, and feeling ignominious; he became melancholic and on June 20, 2013, left for a distant place, far away from her. Accused further contends that due to the Lockdown of the COVID-19 pandemic, he was forced to return home and got information that his girlfriend had lodged an FIR against him, and he is a proclaimed offender, hence bail.

6. While opposing the bail, Mr. Nand Lal Thakur, Learned Additional Advocate General contended that an absconder whom the Court has declared as a proclaimed offender has no legal rights to file an application under Section 438 CrPC.

7. Mr. Ashok Tyagi, Learned Amicus Curiae carved out a distinction in the pronouncements of Hon'ble Supreme Court and states that this Court has the jurisdiction to grant anticipatory, in peculiar facts, even to a proclaimed offender.

8. In **Lavesh v. State (NCT of Delhi)**, (2012) 8 SCC 730, (Para 10), Hon'ble Supreme Court holds,

10. ... Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code is not entitled the relief of anticipatory bail.

9. In **State of Madhya Pradesh v. Pradeep Sharma**, (2014) 2 SCC 171, Para 10, Supreme Court placing reliance upon *Lavesh v. State*, held that it is clear from the above decision that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail.

10. In **Balveer Singh Bundela v. The State of Madhya Pradesh**, 12 May 2020, M.Cr.C.No.5621/2020, single bench of Madhya Pradesh High Court observed,

29. In other words if chance of fleeing from justice exists then application under Section 438 of Cr.P.C. can be rejected and when a person is declared as proclaimed offender as per Section 82 of Cr.P.C. it means that factor (iii) of Section 438 (1) of Cr.P.C. manifested in reality or in other words possibility of applicant to flee from justice converted into reality. To put it differently, Section 82 of Cr.P.C. is manifestation of "Apprehension" as contained in Section 438 (1) factor (iii) of Cr.P.C. The judgments pronounced by the Apex Court in the case of Lवेश and Pradeep Sharma (supra) nowhere bar the maintainability of the application under Section 438 of Cr.P.C. in wake of person being declared as absconder under Sections 82 and 83 of Cr.P.C. and understandably so because this would not have been in consonance with letter and spirit of Constitution Bench judgment of Apex Court pronounced in the case of Gurbaksh Singh Sibbia etc. (supra) and Sushila Aggarwal and others (supra) as well as two Judge Bench of Apex Court in the case of Bharat Chaudhary and another (supra) as well as Ravindra Saxena (supra) because these judgments categorically held that anticipatory bail is maintainable even after filing of charge-sheet and till the person is not arrested.

33. Therefore, in the considered opinion of this Court, even if the police authority has declared award or prepared Farari Panchnama even then anticipatory bail application is maintainable, however, it is to be seen on merits that whether that application deserves to be considered and allowed as per the factors enumerated in Section 438 of Cr.P.C. itself and if any of those factors are not satisfied then the Court certainly has discretion to reject it. The said discretion has been given by Constitutional Bench decision of Hon'ble Apex Court in the case of Gurbaksh Singh Sibbia etc.

11. Section 82 of CrPC neither creates any riders nor imposes any restrictions in the filing of anticipatory bails by the proclaimed offenders. Even in Lवेश's case (supra), while laying down the law on anticipatory bails to absconders, Hon'ble Supreme Court structured the pronouncement by the words, "Normally." An analysis of entire allegations creates a possibility of the accused smitten by love, became melancholic, and left the area on June 20, 2013, i.e., before the registration of FIR dated July 19, 2013. After that, compelled by the lockdown, and fear created by the pandemic of COVID-19, returned home, where, for the first time, he came to know about the FIR and already declared as a proclaimed offender cannot be ruled out. Resultantly, the facts and circumstances are not normal. The legal maxim *Domus sua cuique est tutissimum refugium*, aptly describes the plight of the accused, which means every man's house is

his safest refuge. Thus, the circumstances can not be termed as normal for the accused, and he makes out a special case for bail. A balanced approach would work as an incentive, a catalyst for proclaimed offenders to surrender to the Court of Law, speeding up the process, and bringing the guilty to Justice and Justice to the guilty.

12. In **Gurbaksh Singh Sibbia and others v. State of Punjab**, 1980 (2) SCC 565, (Para 30), a Constitutional bench of Supreme Court held that the bail decision must enter the cumulative effect of the variety of circumstances justifying the grant or refusal of bail. In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav**, 2005 (2) SCC 42, (Para 18) a three-member bench of Supreme Court held that the persons accused of non-bailable offences are entitled to bail, if the Court concerned concludes that the prosecution has failed to establish a prima facie case against him, or despite the existence of a prima facie case, the Court records reasons for its satisfaction for the need to release such persons on bail, in the given fact situations. The rejection of bail does not preclude filing a subsequent application, and the Courts can release on bail, provided the circumstances then prevailing requires, and a change in the fact situation. In **State of Rajasthan, Jaipur v. Balchand**, AIR 1977 SC 2447, (Para 2 & 3), Supreme Court noticeably illustrated that 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. 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. In **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh**, (1978) 1 SCC 240, (Para 16), Supreme Court in Para 16, held that the delicate light of the law favours release unless countered by the negative criteria necessitating that course. In **Dataram Singh v. State of Uttar Pradesh**, (2018) 3 SCC 22, (Para 6), Supreme Court held that 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.

13. 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. However, while deciding bail applications, the Courts should discuss evidence relevant only for determining bail. The difference in the order of bail and final judgment is similar to a sketch and a painting. However, some sketches are in detail and paintings with a few strokes.

14. The conduct of the victim of accompanying the accused to her bedroom without any resistance, and subsequently without any reasons running away to the forest from the safe custody of her maternal uncle, and staying alone in a cave for three days, at least makes out a case for bail to the petitioner. An analysis of the evidence does not justify further incarceration of the accused, nor is it going to achieve any significant purpose, making out a case for bail.

15. 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. In **Sushila Aggarwal** versus **State (NCT of Delhi) & Another, (2020) 5 SCC 1**, the Constitutional Bench held that unusually, subject to the evidence produced, the Courts can impose restrictive conditions.

16. 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, and in the event of arrest the petitioner shall be released on bail in the FIR mentioned above, on his furnishing a personal bond of INR 1,00,000/, (INR One Lac only), with two sureties for INR 50,000 (INR Fifty 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) 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 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.**

m) 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.

n) 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.

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 following the mandate of the Constitutional Bench in **Sushila Aggarwal's** case, wherein the Constitutional bench held that anticipatory bail can continue until the end of the trial; however, the Courts can limit the bail period's tenure if unique or peculiar features require.

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

18. 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.

19. 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.

20. 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.

21. 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.

22. 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. In case the victim notices stalking or any violation of this order, she may either inform the SHO of the concerned Police Station or the Trial Court or even to this Court.

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

24. I express my gratitude to Mr. Ashok Tyagi Advocate, learned Amicus Curiae for outstanding assistance, and also to Ms. Abhilasha Kaundal Advocate and Mr. Nand Lal Thakur, Learned Additional Advocate General, Mr. Ram Lal Thakur, Deputy AG, and Mr. Rajat Chauhan, Law Officer for excellent assistance.

The petition stands allowed in the terms mentioned above.

**(Anoop Chitkara),
Judge.**

October 26, 2020 (ps)