

THE HIGH COURT OF MADHYA PRADESH
MCRC-49075-2021
Deepak Tomar Vs. State of MP and anr.

Gwalior, Dated: 04-10-2021

Shri Rajiv Shrivastava, Counsel for the applicant.

Shri R.K. Awasthi, Counsel for the State.

Case diary is available.

This first application under Section 439 of CrPC has been filed for grant of bail.

The applicant has been arrested on 06.10.2020 in connection with Crime No.337/2020 registered by Police Station Hazira Distt. Gwalior for offence punishable under Sections 363, 376 of IPC, Section 3/4 of POCSO Act and Section 3(1)(w)(ii) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

It is submitted by the counsel for the applicant that the prosecutrix has turned hostile and she has not supported the prosecution case.

By order dated 26.08.2021 State counsel was directed to obtain the DNA test report and the case was adjourned to 14.09.2021. On 14.09.2021 also, the DNA test report was not available. On 27.09.2021 this criminal appeal was converted into a miscellaneous criminal case in the light of the judgment passed by the Division Bench of this Court in the case of **Pramod Vs. State of MP on 22.04.2021 in Cr.A. No.5189/2020**. Today also, counsel for the State

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submits that DNA test report has not been received and a letter has been received from FSL, Sagar that “consumables and the standard kit” which is used for conducting DNA test report is not available.

It is really unfortunate that the prosecution is not serious towards the criminal trial. It is true that the prosecutrix has turned hostile, but the Supreme Court in the case of **Hemudan Nanbha Gadhvi vs. State of Gujarat**, passed on **28.09.2018** in **Criminal Appeal No.913/2016** has held that even if the prosecutrix has turned hostile, still an accused can be convicted on the basis of scientific / forensic evidence. DNA test report is one of the crucial circumstance which may prove the guilt of an accused. Even otherwise, under Section 53-A of Cr.P.C., DNA test is compulsory. Under these circumstances, it is the primary responsibility of the State to ensure uninterrupted supply of “consumables and standard kit” to the RFSL so that DNA test can be conducted without any difficulty. However, unfortunately RFSL, Sagar is short of “consumables and standard kit” and on account of said shortage, DNA test has come to a halt.

Under these circumstances, the Director General of Police is directed to immediately look into the matter and to ensure uninterrupted supply of “consumables and standard kit” to RFSL, Sagar so that DNA test can be conducted as early as possible.

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Now the only question which remains to be adjudicated is that when the prosecution itself is not in a position to provide DNA test report then whether the accused can be allowed to languish in jail or not. In the present case, complete fault lies with the prosecution. An accused cannot be allowed to languish in jail for the fault of the prosecution.

Since the prosecution itself is unable to provide DNA test report as required in the light of the judgment passed in the case of **Hemudan Nanbha Gadhvi (supra)**, therefore, this Court is left with no other option but to direct for release the applicant on bail.

The Supreme Court by order dated 23-3-2020 passed in the case of **IN RE : CONTAGION OF COVID 19 VIRUS IN PRISONS** in **SUO MOTU W.P. (C) No. 1/2020** has directed all the States to constitute a High Powered Committee to consider the release of prisoners in order to decongest the prisons. The Supreme Court has observed as under :

“The issue of overcrowding of prisons is a matter of serious concern particularly in the present context of the pandemic of Corona Virus (COVID – 19).

Having regard to the provisions of Article 21 of the Constitution of India, it has become imperative to ensure that the spread of the Corona Virus within the prisons is controlled.

We direct that each State/Union Territory shall constitute a High Powered Committee comprising of (i) Chairman of the State Legal

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Services Committee, (ii) the Principal Secretary (Home/Prison) by whatever designation is known as, (ii) Director General of Prison(s), to determine which class of prisoners can be released on parole or an interim bail for such period as may be thought appropriate. For instance, the State/Union Territory could consider the release of prisoners who have been convicted or are undertrial for offences for which prescribed punishment is up to 7 years or less, with or without fine and the prisoner has been convicted for a lesser number of years than the maximum.

It is made clear that we leave it open for the High Powered Committee to determine the category of prisoners who should be released as aforesaid, depending upon the nature of offence, the number of years to which he or she has been sentenced or the severity of the offence with which he/she is charged with and is facing trial or any other relevant factor, which the Committee may consider appropriate.”

Considering the above facts and circumstances as well as considering the fact that in view of second wave of Covid19 pandemic, it is also necessary to decongest the jail, and without commenting on the merits of the case, it is directed that the applicant be released on bail, on furnishing a personal bond in the sum of **Rs.1,00,000/- (Rs. One Lac)** with one surety in the like amount to the satisfaction of the Trial Court or C.J.M. or Remand Magistrate (Whosoever is available). The applicant shall also furnish an undertaking that he shall follow all the instructions which may be issued by the Central Govt./State Govt. or Local Administration

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(General or Specific) from time to time for combating Covid19.

The Supreme Court in the case of **IN RE : CONTAGION OF COVID 19 VIRUS IN PRISONS** by order dated 7-4-2020 has directed as under :

In these circumstances, we consider it appropriate to direct that Union of India shall ensure that all the prisoners having been released by the States/Union Territories are not left stranded and they are provided transportation to reach their homes or given the option to stay in temporary shelter homes for the period of lockdown.

For this purpose, the Union of India may issue appropriate directions under the Disaster Management Act, 2005 or any other law for the time being in force. We further direct that the States/Union Territories shall ensure through Directors General of Police to provide safe transit to the prisoners who have been released so that they may reach their homes. They shall also be given an option for staying in temporary shelter homes during the period of lockdown.

Accordingly, it is directed that before releasing the applicant, the jail authorities shall get the applicant examined by a competent Doctor and if the Doctor is of the opinion that his Corona Virus test is necessary, then the same shall be conducted. If the applicant is not found suspected of Covid19 infection or if his test report is negative, then the concerned local administration shall make necessary arrangements for sending the applicant to his house as per the directions issued by the

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Supreme Court in the case of IN RE : CONTAGION OF COVID 19 VIRUS IN PRISONS (Supra), and if he is found positive then the applicant shall be immediately sent to concerning hospital for his treatment as per medical norms. The applicant is further directed to strictly follow all the instructions which may be issued by the Central Govt./State Govt. or Local Administration for combating Covid19. If it is found that the applicant has violated any of the instructions (whether general or specific) issued by the Central Govt./State Govt. or Local Administration, then this order shall automatically lose its effect, and the Local Administration/Police Authorities shall immediately take him in custody and would send him to the same jail from where he was released. The applicant is further directed to supply a copy of this bail order to the police station having jurisdiction over his place of residence.

The other conditions of Section 437, 439 Cr.P.C. shall remain the same.

This order shall remain in force, till the conclusion of Trial. In case of bail jump, or violation of any of the condition(s) mentioned above, this order shall automatically lose its effect.

In the light of the judgment passed by the Supreme Court in

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the case of **Aparna Bhat and others Vs. State of M.P.** Passed on **18.03.2021** in **Criminal Appeal No. 329/2021**, the intimation regarding grant of bail be sent to the complainant.

With aforesaid observations, this application is **Allowed**.

Let a copy of this order be sent to Director General of Police for necessary information and compliance.

(G.S. Ahluwalia)
Judge

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