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IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.MP(M) No.1487 of 2021
 Reserved on: 04.08.2021
 Date of Decision: 05.08.2021

Ajay Kumar

Versus

State of H.P.

...Petitioner

...Respondent

Coram:

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

Whether approved for reporting?¹ Yes

For the petitioner: **Mr. B.C. Negi, Senior Advocate, with Mr. Nitin Thakur, Advocate.**

For the respondent: **Mr. Nand Lal Thakur, Addl. Advocate General, with Mr. Kunal Thakur, Deputy Advocate General & Mr. Ram Lal Thakur, Mr. Sunny Dhatwalia, Assistant Advocates General and Mr. Rajat Chauhan, Law Officer.**

THROUGH VIDEO CONFERENCE

FIR No.	Dated	Police Station	Sections
13/2021	30.01.2021	Majra, District Sirmour, H.P.	363, 366A, 376, 370A of IPC, Section 4 POCSO Act and Sections 5 and 7 of Immoral Traffic (Prevention) Act, 1956.

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.

2. Earlier, the petitioner filed the following petitions:

1

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

a.) Bail Application No.42/22 of 2021, filed by the petitioner was dismissed by learned Special Judge, Sirmour at Nahan vide order dated 23.03.2021.

b.) Cr.MP(M) No.882 of 2021, filed by the petitioner was also dismissed by this Court vide judgment dated 15.06.2021.

3. The petition and status report reveal no criminal history.

4. A perusal of the police file reveals the following evidence:

a) On 30th January, 2021, victim's mother informed the SHO of Police Station Majra, District Sirmour, HP., that her daughter, aged around 16 years, had left home on 28th January, 2021 without informing anyone. Despite frantic searches in the houses of the relatives and other places, they could not find her. She requested the Police to search for her daughter. Based on such information the police registered FIR mentioned above for the offences of kidnapping.

b) On 31st January, 2021 the victim alongwith her mother, visited the Police Station Majra. After recording her statement under 161 Cr.P.C., the Investigator got her medical examination conducted in Civil Hospital Paonta Sahib. A female doctor examined her. In the history narrated by the victim to the Doctor, she told her about sexual assaults from 28th to 30th January, 2021. She further informed the Doctor that at the time of her examination, she was wearing the same underwear which she was wearing on the dates of assault. After medical examination, Doctor also collected swabs from her private parts and took her clothes, including the underwear. Later on, the Police sent the scientific evidence for examination by the Forensic Science Laboratory. A partial report has already come, but the report about the underwear does not form part of the Police file and must be awaited.

c) On 1st April, 2021, Investigator produced the victim before Judicial Magistrate, who recorded her statement under Section 164 Cr.P.C. She stated that on 26th January, 2021 she had left her home because of a boy named Ajay. A month before that, when she had gone to her sister's house, Ajay had met her. When she had gone out of the room for washroom during the night, Ajay, petitioner herein, intercepted and

forced himself upon her. He promised to marry her and warned her not to reveal the incident to anyone, and if she did so, then the video he has made of the act would make it public.

d) Ajay handed over a mobile set to the victim and told her to talk with him through this phone. She took the phone and did not tell anyone about it. On 25th January, 2021, when she was cutting grass along with her brother, the phone fell from her pocket. Her brother inquired about this phone, and then she revealed to him that Ajay had given this phone to her. On this, her brother told the victim that she would marry Ajay, and to this, she replied in the affirmative. Her brother told her to tell Ajay to visit their home and his parents and initiate the talks of marriage and do the engagement. After that, on the asking of her brother, she called Ajay and told him everything and called him to his home. Ajay told her that he, along with his parents, would visit her home the next day. However, he did not visit. She kept on waiting till 28th January, and on that day she left her home. Although she was afraid that her brother would scold her, he did not say anything to her.

e) She left home and went to Paonta Sahib, where she sat in a park. After some time, she started crying and then a lady approached her and tried to console her. She revealed her name as Shalu and told the victim that she is very lonely and offered to stay with her. Believing that Shalu would help her out, the victim agreed to accompany her to her home. However, Shalu was indulging in forcing girls into flesh trade and was, in fact, a debauch.

f) At home, Shalu asked the victim to change clothes which she did. After that, she did her makeup and took her to a hotel, where two boys came. Shalu took money from them and sent her along with one boy to the hotel's room, where he raped her. After fifteen minutes, he left the room, and at that time, the second boy entered the room, and he also raped her. On 29th January, 2021 Shalu again did her makeup and took her to a different hotel. In the said hotel, a boy came, and Shalu took money from him and locked the victim and the boy in the room, where he raped her.

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- g) On 30th January, the victim's uncle came to know that she is in an escort company. Shalu also came to know that the victim's uncle is aware of her location.
- h) Shalu asked the victim to leave the place for 3-4 days and, after that, to come again. Shalu refused to return her AADHAR card, but she took it back from her and left her home.
- i) The narration of her supplementary statements recorded under section 161 Cr.P.C reveals that she identified the rooms and told the Investigator that during her stay with Shalu, a person named Banty would make frequent visits. She further narrated that Shalu had addressed one of the rapists as Arun. The Investigator showed the pictures of the accused on a mobile app, and on seeing those photographs, she identified Jaswinder Singh, Hukam Singh.
- j) The Investigator arrested the accused and collected scientific evidence. After completion of the investigation, the Officer in Charge of the Police Station filed the police report under Section 173(2) CrPC, seeking prosecution of Shallu (A-1), Ajay Kumar (A-2), petitioner herein, Baldev Raj Goel alias Banty (A-3), Hotel Manager Arun Thakur (A-4), Jaswinder Singh (A-5), and Hukam Singh (A-6).
- k) Based on this evidence, the State has launched prosecution against these accused persons.

5. Ld. Counsel for the petitioner contend that the investigation is complete, the custody is unwarranted, and incarceration before the proof of guilt would cause grave injustice to the petitioner and family.

6. On the contrary, Mr. Nand Lal Thakur, Ld. Additional Advocate General, has opposed the bail on the role of the accused in forcing a vulnerable minor girl into flesh trade.

7. The possibility of the accused person 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. Proviso to Section 437 Cr.P.C states that even when the offences are punishable with imprisonment of death or life, still the Court may release a sick person on bail.

9. Earlier, Ajay Kumar, petitioner herein, had come up before this Court by filing Cr.MP(M) No.882 of 2021. At that time, this Court had dismissed the bail petition on merits.

10. Now, the petitioner has again come up before this Court on the ground of mental illness, which is pleaded in para-12 of the petition, and the same is reproduced as under:-

"12. That the final report has been present in the Court. Further the trial of the case is likely to take time and there is nothing to be recovered from the Petitioner. It is submitted that the Petitioner who has attained majority recently was having some mental health issues and even during custody has been taken to the Hospital at Nahan for check up, report of the same has not been disclosed to the Family members of the Petitioner. It is, therefore, the Petitioner through his father is approaching this Hon'ble Court by filing the present petition. It is submitted that the Petitioner who is young and not even remotely involved in the heinous crime as alleged will be made to suffer if he is behind bars for a crime which is yet to be proved against him. By keeping the Petitioner inside Jail with hardcore criminal the Petitioner will be one of them as such this Hon'ble Court may consider this fact and enlarge the petitioner on bail during trial. As such, due to this changed circumstance, the bail application is being moved."

11. The State has filed status report, in which, the State does not deny the mental illness, rather, specifically stated that the petitioner is undergoing treatment from PGI Chandigarh from the Department of Psychiatric. The State has also annexed medical status and other record of the accused.

12. The fact that the accused is being given treatment in PGI Chandigarh, which is renowned institution, itself, shows the seriousness of his illness. Furthermore, there is a tendency amongst the people and the society not to treat mental problem as illness and, thus, either ignore it or go for religious remedies. The petitioner, who is suffering from serious mental illness, cannot be left in this stage in the prison. More

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so, when his family has undertaken to give treatment on this own. On this ground, the petitioner is entitled for bail.

13. Given the above reasoning, this 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.

14. 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.

15. 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 two sureties of **Rs. Twenty-five thousand (INR 25,000/-) each**, 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.

16. **In the alternative, the petitioner may furnish a personal bond of Rs. Ten thousand (INR 10,000/-), and 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.

17. 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.

18. 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.

19. 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

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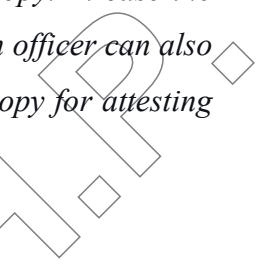
accused to incapacitate, influence, or to cause any discomfort to the victim. Reference be made to *Vikram Singh v Central Bureau of Investigation*, 2018 All SCR (Crl.) 458; and *Aparna Bhatt v. State of Madhya Pradesh*, 2021 SCC Online SC 230.

- 20.** 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.
- 21.** 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.
- 22.** 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.
- 23.** This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency from further investigation per law.
- 24.** 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.
- 25.** In return for the protection from incarceration, the Court believes that the accused shall also reciprocate through desirable behavior.
- 26.** 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.
- 27.** *There would be no need for a certified copy of this order for furnishing bonds.*

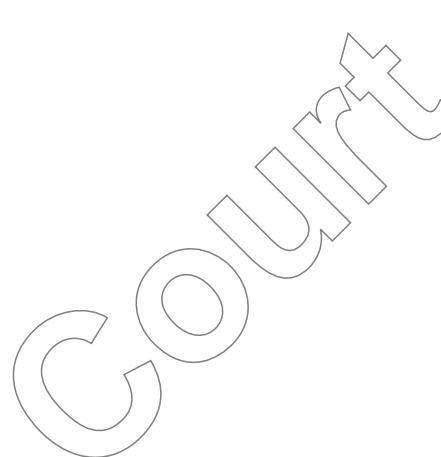
Any Advocate for the petitioner can download this order along with the case status from the official web page of this Court and attest it to be a true copy. In case the attesting officer or the Court wants to verify the authenticity, such an officer can also verify its authenticity and may download and use the downloaded copy for attesting bonds.

The petition is closed in the terms mentioned above.

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Anoop Chitkara,
Judge

August 5, 2021
(R. Atal)


High Court