

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

**Cr.MP(M) No.1921 of 2019**

**Decided on: 31.10.2019**

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Sh. Paras	Versus	.....Petitioner
State of Himachal Pradesh		.....Respondent

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Coram:

**Hon'ble Mr. Justice Sandeep Sharma, Judge.**

Whether approved for reporting? <sup>1</sup> .

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<b>For the Petitioner</b>	:	Mr. Romesh Verma, Advocate.
<b>For the Respondent</b>	:	Mr. Sudhir Bhatnagar, Additional Advocate General with Mr. Kunal Thakur, Deputy Advocate General.

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**Sandeep Sharma, Judge (oral):**

Bail petitioner, namely Paras, who is behind bars since 21.5.2019, has approached this Court in the instant proceedings filed under Section 439 of Cr.PC, for grant of regular bail in connection with FIR No. 49/19, dated 21.5.2019, under Sections 376 and 452 of IPC and Section 4 of POCSO Act, registered at P.S. Chirgaon, District Shimla, H.P.

**2.** In terms of order dated 22/30.10.2019, ASI Achhar Singh, has come present alongwith records. Mr. Sudhir Bhatnagar, learned Additional Advocate General, has also made available report of SFSL, Junga, in terms of order dated 30.10.2019. Record perused and returned.

**3.** Record/status report made available to this Court reveals that on 21.5.2019, complainant Dinesh Kumar got his statement recorded

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<sup>1</sup> *Whether the reporters of the local papers may be allowed to see the judgment?*

under Section 154 CrPC at PS Chirgaon, Distict Shimla, H.P., alleging therein that his three daughters live at Sandasu with his mother in law. He alleged that on 20.5.2019, his minor daughter-victim-prosecutrix (name withheld), who is 13 years old, came to village Pali, with a view to meet him at 5:00pm. He stated that he had gone to house of Subhash for attending marriage party and came back at 8:00pm. He further stated that when he went to his room to sleep, his minor daughter (victim-prosecutrix) asked for phone as she wanted to speak to her mother. He stated that his minor daughter victim-prosecutrix went away with his phone and he then slept, but after some time, he woke up and did not find his minor daughter in her room. At 12:30 am, when he opened room adjacent to his room, he found his daughter lying naked on bed with the bail petitioner. He stated that when he questioned the bail petitioner, he not only threatened him but also made an attempt to give him beatings. On the basis of aforesaid statement, FIR detailed herein above came to be lodged against the bail petitioner on 21.5.2019 and since then, he is behind Bars. Police after recording the statement of victim-prosecutrix under Section 161 Cr.PC also got her statement recorded under Section 164 Cr.PC before the Judicial Magistrate. Police got the victim-prosecutrix medically examined at CHC Sandashu, wherein medical officer after having examined her though found no external or internal injury on the

person of victim-prosecutrix, but observed that final opinion would be given after the receipt of report of RFSL. Report of SFSL made available to this Court suggests that DNA profiles sent by the police of both the bail petitioners and victim-prosecutrix did not match.

**4.** Learned Additional Advocate General, while fairly admitting the factum that challan stands filed in the competent court of law and nothing remains to be recovered from the bail petitioner, contended that keeping in view the gravity of offence alleged to have been committed by the bail petitioner, his application for grant of bail may be rejected. He further contended that there is ample evidence available on record suggestive of the fact that the bail petitioner, who is 20/21 years old, taking undue advantage of innocence and minority of the victim-prosecutrix, not only threatened her, but also sexually assaulted her twice against her wishes and as such, prayer for grant of bail deserves outright rejection at this stage. Learned Additional Advocate General contended that since statement of victim-prosecutrix is yet to be recorded, it would not be in the interest of justice to release the bail petitioner on bail at this stage because in the event of his being enlarged on bail, there is every possibility of his influencing the victim-prosecutrix and other witnesses associated by the Investigating Agency. Mr. Bhatnagar, contended that though there is no material suggestive of the fact that victim-prosecutrix

of her own consent joined the company of the bail petitioner, but even otherwise keeping in view the age of victim-prosecutrix, consent, if any, of her is immaterial.

**5.** Mr. Romesh Verma, learned counsel representing the bail petitioner while making this Court to peruse the initial statement made by the victim-prosecutrix vis-à-vis complaint lodged by her father and her subsequent statement recorded under Section 164 Cr.C, vehemently argued that bail petitioner has been falsely implicated. Mr. Verma contended that as per own statement of victim-prosecutrix, she knew the bail petitioner for quite considerable time and she herself called the bail petitioner to her room. Mr. Verma, further contended that if statements as referred herein above are read in conjunction, it renders story of the prosecution highly unreliable and improbable and as such, bail petitioner who has suffered for more than six months deserves to be enlarged on bail, especially, when nothing remains to be recovered from him. Lastly, Mr. Verma, contended that the bail petitioner is the local resident of area and shall always remain available for trial as and when called.

**6.** Having heard learned counsel for the parties and perused material available on record, this Court finds that as per initial statement recorded under Section 161 Cr.PC, victim-prosecutrix stated before police that she called the bail petitioner to her house, to whom, she knew for the

last three months. But interestingly, in her statement recorded under Section 164 cr.PC, victim-prosecutrix gave altogether different version. She stated that bail petitioner forcibly entered her room and thereafter sexually assaulted her against her wishes. She further stated that she made hue and cry, but her mouth was gagged. Aforesaid version put forth by the victim-prosecutrix though is contradictory, but otherwise appears to be highly improbable because as per own statement of the complainant, he was sleeping in the adjacent room. If victim-prosecutrix had raised any hue and cry, definitely father of the victim-prosecutrix would have heard the noise. Initial version put forth by the victim-prosecutrix that she called the bail petitioner from her father's phone is fully corroborated with the statement of the complainant, who in his statement recorded under Section 154 CrPC stated that when he came back from the party at 8:00pm, his minor daughter asked for phone with a view to give telephonic call to her mother. Apart from above, complainant nowhere alleged that his minor daughter was ravished by the bail petitioner, rather he in his statement stated that bail petitioner made an attempt to sexually assault his daughter. To the contrary, victim-prosecutrix in her statement recorded under Section 164 Cr.PC alleged that bail petitioner sexually assaulted her against her wishes twice. Leaving everything aside, medical evidence adduced on record,

nowhere supports the case of the victim-prosecutrix as has been noticed above, medical officer who had the opportunity to examine the victim-prosecutrix at the first instance categorically observed that no internal/external injury is seen on the person of the prosecutrix and on the top of it, in the SFSL report, it has been specifically concluded that DNA profiles of both the bail petitioner and victim-prosecutrix did not match. No doubt, victim-prosecutrix is minor, but having noticed her conduct, which duly reflects in her statements recorded under Sections 161 and 164 CrPC coupled with the medical evidence available on record, this Court is of the view that she is/was fully capable of understanding the consequences of her being in the company of the bail petitioner.

**7.** Though aforesaid aspects of the matter are to be considered and decided by the court below on the basis of totality of evidence collected on record by the Investigating Agency, but having noticed aforesaid glaring aspects of the matter, this Court, sees no reason to let the bail petitioner incarcerate in jail for an indefinite period. Leaving everything aside, guilt if any of the bail petitioner is yet to be established on record by the Investigating Agency by leading cogent and convincing evidence and as such, his freedom cannot be curtailed for an indefinite period, especially when he has already suffered for more than six months. Moreover, challan stands filed in the competent court of law and nothing

remains to be recovered from the bail petitioner and there is no material placed on record to infer that in the event of grant of bail to the bail petitioner, he would flee from justice and as such, this Court is of the view that bail petitioner being local resident of the area shall always remain available for investigation/trial as and when required by the Investigating Agency.

8. 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 has 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.***

9. 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.

10. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)<sup>1</sup> 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."*

11. In **Manoranjana Sinh 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 ad 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."*

12. 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.**

**13.** 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. 2,00,000/- each with two local sureties 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.**

**14.** 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.

**15.** 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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**31<sup>st</sup> October, 2019**  
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**(Sandeep Sharma),**  
**Judge**