

**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA****CrMP(M) No. : 2409 of 2023****Reserved on : 27.09.2023****Decided on : 28.09.2023**

Naveen Thapa

...Applicant

Versus

State of Himachal Pradesh

...Respondent

*Coram***The Hon'ble Mr. Justice Virender Singh, Judge.***Whether approved for reporting?¹*

For the applicant : Mr. Ganesh Barowalia, Advocate.

For the respondent : Mr. Mohinder Zharaick, Additional Advocate General, assisted by ASI Krishan Chand, Women Police Station, Kullu, H.P.

Virender Singh, Judge.

Applicant-Naveen Thapa has filed the present application, under Section 439 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC'), seeking, his release on bail, during the pendency of trial, in case FIR No. 4 of 2023, dated 30th January, 2023, registered with Women Police Station Kullu, District Kullu, H.P., under Sections 363, 376 of the Indian Penal Code (hereinafter

¹ *Whether Reporters of local papers may be allowed to see the judgment? Yes.*

referred to as 'IPC') and Sections 4 and 6 of the Protection of Children from Sexual Offences Act (hereinafter referred to as 'POCSO Act').

2. According to the applicant, he has falsely been implicated and arrested, in this case, as, he is innocent and has nothing to do with the offences.

3. Asserting the fact that the allegations levelled against him are vague, it is the case of the applicant that he has not committed the offences.

4. The applicant has asserted that he is a law abiding citizen and there is no likelihood that he may not be available for the trial, in case, ordered to be released on bail.

5. The investigation, in the present case, is stated to be complete and the case is now stated to have been fixed for recording the statements of the prosecution witnesses.

6. In order to buttress this contention, Mr. Ganesh Barowalia, learned counsel appearing for the applicant, has placed on record, the statements of the mother of the child victim (complainant), as well as, the child victim,

recorded by the learned Special Judge, before, whom, the trial of the case is pending adjudication.

7. The learned counsel for the applicant has pointed out that in the trial, the child victim, as well as, her mother, have not supported the case of the prosecution and both of them have resiled from their earlier statements, given to the police and as such, on the request of the learned Public Prosecutor, the learned Special Judge has declared them hostile. These facts have been put forward by the learned counsel for the applicant with a view to point out that the case of the prosecution is too weak against the applicant.

8. In addition to this, the tender age of the applicant has also been put forward for seeking the relief, as claimed in the application.

9. Another ground, which has been put forward, by the learned counsel appearing for the applicant, for releasing the applicant, on bail, is that the chances of the conclusion of the trial, in near future, are not so bright, as such, the applicant cannot be kept in judicial custody, that

too, in the company of hardened criminals, for indefinite period.

10. Apart from this, Mr. Ganesh Barowalia, learned counsel appearing for the applicant, has given certain undertakings, on behalf of the applicant, for which, the applicant is ready to abide by, in case, he is ordered to be released on bail, during the pendency of the trial.

11. The applicant has earlier tried his luck by moving the bail application, before the learned Special Judge-I, Kullu, District Kullu, H.P., however, the same has been dismissed, vide order, dated 20th April, 2023.

12. The applicant has also moved bail application before this Court and the same has been dismissed as withdrawn, on 15th June, 2023.

13. On the basis of the above facts, a prayer has been made to allow the bail application.

14. When put to notice, the police has filed the status report, disclosing therein, that the mother of the child victim moved a complaint, before the police of Women Police Station, Kullu, on 30th January, 2023, disclosing therein, that she is residing at Village 'X' (name withheld).

She has been blessed with two children, one boy, aged about 16 years and another girl (child victim). The child victim is stated to be studying 9th standard, in Government Senior Secondary School 'Y' (name withheld).

14.1. As per the complainant, on 26th January, 2023, the child victim had gone to the school to participate in the Republic Day Function, but, did not turn back. Efforts were made to search her, but, she was not found. According to her, the child victim is having mobile phone No. XXX (details withheld). It was apprehended by the complainant, in the complaint, that the child victim has been enticed away by some one and a prayer was made to take action.

14.2. On the basis of this fact, police registered a case, under Section 363 IPC, and, the investigation was entrusted to HC Padma Devi. Thereafter, the CDR of the mobile number, mentioned by the complainant, in the complaint, was obtained and it was found that there were frequent calls from this mobile number to mobile No. 98163 58389. Both these phone numbers were found to be switched off, as such, the Consumer Application Form

of mobile No. 98163 58389 was obtained. The said number was found to be in the name of Naveen Thapa (applicant).

14.3. During the investigation, it was found that applicant-Naveen Thapa was using Sim No. 70187 91237, in the said mobile phone and the location of the same was found to be at Kotkhai. On the basis of this fact, the child victim was found at Kotkhai.

14.4. During further investigation, on 8th February, 2023, the child victim has made the statement, under Section 161 CrPC, in the presence of her mother, disclosing therein, that she is residing with her uncle. Since the child victim was found after the gap of about 18 days, from Kotkhai, as such, she was sent for medico-legal examination at Regional Hospital, Kullu.

14.5. Before the Medical Officer, the child victim has refused for her medico-legal examination. The Medical Officer has mentioned the following brief history, in the MLC of the child victim:

“According to VICTIM, she has been in contact with a person named Naveen, 22 year old via facebook for the last 4-5 months. They used to talk on phone for the same period. On

26.01.2023 she (for the first time) went to meet the guy, Jindour (Kullu). The guy come to meet her from Shimla. She went along with him to Shimla. She went to his room (Kotkhai, Shimla) on 26/01/2023 and stayed with him for 11 days. Sexual contact happened between the two. Her parents requested FIR against the person Naveen. And the girl come back with Police to her home (Jindour) Kullu past day i.e. 07/02/2023 but the girl doesn't want the medical examination to be done."

14.6. Thereafter, the child victim was produced before learned Chief Judicial Magistrate, Lahaul & Spiti, for recording her statement, under Section 164 CrPC. In the said statement, she has alleged against applicant-Naveen Thapa, by saying that he had ravished her, upon which, the provisions of Section 376 IPC and Sections 4 and 6 of the POCSO Act were added.

14.7. On 10th February, 2023, supplementary statement of the child victim was got recorded, in which, she has alleged that she had refused for her medico-legal examination, at the instance of applicant-Naveen. Applicant-Naveen was arrested on 10th February, 2023.

14.8. After completion of the investigation, the police filed the report, under Section 173 (2) CrPC. The cognizance has been taken by the Court and the case is now fixed on 14th December, 2023, and 23rd December,

2023, for recording the statements of the prosecution witnesses. The statement of the child victim is stated to have been recorded on 15th September, 2023.

14.9. On the basis of the above facts, it has been apprehended, in the status report, that the applicant has committed a heinous offence. He is permanent resident of Nepal and in case, he is ordered to be released on bail, he may not be available for trial.

14.10. Apart from this, it has also been apprehended that in case, bail is granted to the applicant, he may coerce the witnesses or allure them to depose in his favour.

15. On the basis of the above facts, a prayer has been made to dismiss the application.

16. The applicant, in this case, has annexed the statements of the child victim, as well as, her mother (complainant), who have been examined as PW-2 and PW-1, respectively, before the learned trial Court. Perusal of the said statement shows that both of them have not supported the case of the prosecution.

17. The statements of the hostile witnesses do not efface from the record and the evidentiary value of the

same has to be considered by the learned trial Court. The statements of the hostile witnesses, to the extent, the same corroborate the case of the prosecution, can be taken into consideration. As such, the said fact is not liable to be considered, at this stage. But, from the said statements, it can safely be inferred that the material witnesses, in this case, have already been examined.

18. The case has now been fixed for recording the statement of the other prosecution witnesses in December, 2023. Meaning thereby, the chances of conclusion of the trial, against the applicant, in near future, are not so bright. As such, no useful purpose would be served by keeping the applicant in judicial custody, for indefinite period.

19. No other criminal history of the applicant has either been mentioned in the status report, or, argued by the learned Additional Advocate General.

20. The bail application cannot be rejected as a matter of punishment, as, the accused is presumed to be innocent, till the conclusion of the trial. The dismissal of the bail application is nothing, but, punishing the

applicant before the conclusion of the trial, which is prohibited under the law.

21. At the time of deciding the bail application, the detailed discussion of the evidence, so collected and produced by the prosecution, should be avoided, as, it may cause prejudice either to the case of the prosecution or to the case of the accused (applicant).

22. However, it can be considered, at this stage, that the star witnesses of the prosecution have already been examined, as such, the apprehension of the allurements of the witnesses can be said to be unfounded, at this stage. Even otherwise, for those apprehensions, reasonable conditions can be imposed on the applicant, in case, he is ordered to be released on bail.

23. Considering all these facts, this Court is of the view that the bail application is liable to be allowed and is accordingly allowed.

24. Consequently, the applicant is ordered to be released on bail in case FIR No. 4 of 2023, dated 30th January, 2023, registered with Women Police Station Kullu, District Kullu, H.P., under Sections 363, 376 IPC

and Sections 4 and 6 of the POCSO Act, on his furnishing bail bonds, in the sum of ₹ 50,000/-, with two sureties of the like amount, out of which, one should be local, to the satisfaction of the learned CJM Kullu/trial Court. This order, however, shall be subject to the following conditions:

a) The applicant 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) The applicant shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

c) The applicant shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade them from disclosing such facts to the Court or the Police Officer; and

d) The applicant shall not leave the territory of India without the prior permission of the Court.

25. Any of the observations, made hereinabove, shall not be taken as an expression of opinion, on the merits of the case, as these observations, are confined, only, to the disposal of the present bail application.

26. It is made clear that the respondent-State is at liberty to move an appropriate application, in case, any of the bail conditions, is found to be violated by the applicant.

27. The Registry is directed to forward a soft copy of the bail order to the Superintendent of Jail concerned through e-mail, with a direction to enter the date of grant of bail in the e-prison software.

28. In case, the applicant is not released within a period of seven days from the date of grant of bail, the Superintendent of Jail concerned is directed to inform this fact to the Secretary, DLSA concerned. The Superintendent of Jail concerned is further directed that if the applicant fails to furnish the bail bonds, as per the order passed by this Court, within a period of one month from today, then, the said fact be submitted to this Court.

29. Before parting with the order, this Court must record its concern about the manner, in which, the mandatory provisions of Section 33 (7) of the POCSO Act are being violated, with impunity.

30. In the status report, which has been filed, in this case, the Investigating Officer has mentioned the entire details of the mother of the child victim. Not only this, in the status report, the name of the School, where the child victim was studying, has also been mentioned.

The learned trial Court has also mentioned the complete details of the mother of the child victim, at the time of recording her statement on 15th September, 2023, when, she appeared as PW-1. When, the child victim appeared before the learned trial Court, the name of her School has duly been mentioned, in her examination-in-chief.

31. The provisions of Section 33 (7) of the POCSO Act, are reproduced, as under:

“33. Procedure and powers of Special Court. -

xxx xxx xxx

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation. - For the purposes of this subsection, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.”

32. A Division Bench of this Court in a case, titled as **State of Himachal Pradesh versus Shiv Lal @ Champi**, reported in **2022 (4) Shim. LC 1862**, has

directed to adhere to the provisions of the POCSO Act, in letter and spirit.

33. Considering the violation of Section 33 (7) of the POCSO Act, it is the high time for this Court to take steps, in this regard. Consequently, the Director General of Police, Himachal Pradesh, through, the Principal Secretary (Home) to the Government of Himachal Pradesh, is directed to issue necessary instructions to all the Investigating Officers, in the State, to adhere to the provisions of Section 33 (7) of the POCSO Act.

34. Similar type of directions are required to be issued to the Judicial Officers, dealing with the cases, under the POCSO Act, in the State of Himachal Pradesh.

Ordered accordingly.

(Virender Singh)
Judge

September 28, 2023
(rajni)