

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

Cr.MPM No. 2705 of 2023

Reserved on: 06.11.2023

Date of Decision: 0⁹th November, 2023**Sushil Kumar**

....Petitioner

Versus

State of Himachal Pradesh

....Respondent

Coram**Hon'ble Mr Justice Rakesh Kainthla, Judge.****Whether approved for reporting? Yes****For the Petitioner : Mr. Devender K Sharma, Advocate.****For the Respondent : Mr. R.P.Singh, Deputy Advocate General with ASI Veena Devi I.O Women Police Station, Hamirpur, H.P.****Rakesh Kainthla, Judge**

The petitioner has filed the present petition for seeking pre-arrest bail. It has been asserted that F.I.R. No. 146/2023, dated 27.08.2023, was registered for the commission of offences punishable under Sections 376, 506 of IPC, Sections 6 and 21 of the Protection of Children from Sexual Offences Act (POCSO Act) and Section 67 of the Information Technology Act in Police Station Bhoranj, District Hamirpur, H.P. The petitioner was

Whether reporters of the local papers may be allowed to see the judgment? Yes

not made accused initially in the F.I.R. but, subsequently, he was made an accused for the commission of an offence punishable under Section 21 of the POCSO Act. The name of the petitioner appeared during the investigation. As per the prosecution, the main accused had committed the crime in the hotel managed by the petitioner. The petitioner cooperated with the Investigating Agency and provided all the information and documents. The petitioner was implicated in the present FIR on the ground that he had failed to report the commission of the offence. The petitioner was not aware of the commission of the offence. The petitioner is ready and willing to join the investigation and will abide by all the terms and conditions, which may be imposed by the Court upon him. Therefore, it was prayed that the present petition be allowed and the petitioner be released on bail.

2. The petition was opposed by filing a status report. It was asserted that the victim was studying in 10+2 standard. In September 2022, there was a tournament in the school where, the main accused administered some substance to the victim and took her to the hotel, where he prepared an indecent video and raped her. He threatened the victim to make her video viral in case of reporting the incident to any person. The main accused

subsequently uploaded the Video on the Facebook. The police registered the F.I.R. and conducted the investigation. The victim was found to be a minor. The main accused had raped the victim in September 2022, November 2022, December 2022, January 2023, and 15th February 2023, when he was a minor but he had attained the majority in April 2023 at the time of the commission of offence. The main accused was arrested. It was found during the investigation that the incident had taken place in Hotel River View. The victim had visited the hotel four times in school dress. The Manager and owner of the hotel knew that the victim was in school dress and she was a minor but they failed to report the matter to the police. Hence, the offence punishable under Section 21 of the POCSO Act was made out against the petitioner.

3. I have heard Mr. Davinder K. Sharma, learned counsel for the petitioner and Mr. R.P. Singh, learned Deputy Advocate General for the respondent-State.

4. Mr. Davinder K. Sharma, learned counsel for the petitioner submitted that the offence punishable under Section 21 of the POCSO Act is bailable and the petitioner is entitled to the bail as a matter of right. There is no evidence that the petitioner was aware of the commission of a crime and the offence

punishable under Section 21 of the POCSO Act was not made out against him. Hence, he prayed that the present petition be allowed and the petitioner be released on pre-arrest bail.

5 Mr. R.P. Singh, learned Deputy Advocate General for the State submitted that the petitioner was involved in the commission of a heinous offence; therefore, he prayed that the petition be dismissed.

6. I have given considerable thought to the rival submissions at the bar and have gone through the records carefully.

7. Section 21 of the POCSO Act reads as under: -

'S.21. Punishment for failure to report or record a case.-(1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions of sub-section (1) shall not apply to a child under this Act.'

8. A perusal of the Section shows that it provides imprisonment of six months/one year or/and a fine. It does not mention whether the offence is bailable or not.

9. Section 31 of the POCSO Act, provides that the provisions of Code of Criminal Procedure, 1973 will apply to the proceedings before a Special Court including the provisions as to the bail. Thus, the provisions of the Code of Criminal Procedure has to be seen to determine whether the offence is bailable or not. Part II of the First Schedule of Cr.PC. deals with the classification of offences under other laws and reads as under:-

II. CLASSIFICATION OF OFFENCES AGAINST OTHER LAWS

Offence	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
If punishable with death, imprisonment for life, or imprisonment for more than 7 years	Cognizable.	Non-bailable.	Court of Session.
If punishable with imprisonment for 3 years, and upwards but not more than 7 years	Ditto	Ditto	Magistrate of the first class.
If punishable with imprisonment for less than 3 years or with a fine only.	Noncognizable.	Bailable.	Any Magistrate

10. Since the POCSO Act does not provide the nature of the offence; hence, it has to be determined with reference to the Code of Criminal Procedure. The classification of the offences under the Code of Criminal Procedure clearly shows that if the offences are punishable with imprisonment for less than three years, the offences are bailable and non-cognizable. Section 21 of the POCSO Act provides a punishable of six months/1 year; therefore, the same will be a bailable offence as per the Code of Criminal Procedure.

11. A similar view was taken in *M.H. Gangamaregowdavs State of Karnataka, Criminal Petition No. 8758/2019, decided on 06.01.2020 (Karnataka) and XXX XXX and other vs State of Kerala, bail application No. 7673 of 2023, decided on 24.11.2022 (Kerala)*.

12. No other precedent to the contrary was brought to the notice of the Court. Therefore, the plea that the offence punishable under Section 21 is bailable is upheld. Section 438 of the Code of Criminal Procedure reads as under:

438. Direction for grant of bail to person apprehending arrest.—(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that

Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail

13. The bare perusal of the Section shows that it applies to the non-bailable offence. The reason is that a person accused of a bailable offence is entitled to bail as a matter of right. Therefore, the present petition is not maintainable and the same is dismissed. ◇

14. The observations made hereinabove are regarding the disposal of this petition and will have no bearing, whatsoever, on the merits of the case.

(Rakesh Kainthla)
Judge

09th November, 2023
(Ravinder)

High Court