

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

Cr.M.P.(M) No.620 of 2021

Reserved on: 05.04.2021

Date of Decision: April 6, 2021

Mohammad Nazim

...Petitioner.

Versus

State of Himachal Pradesh

...Respondent.

Coram:

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting?¹ Yes

For the Petitioner: Mr. Rajesh Kumar Parmar, Advocate.

For the Respondent: Mr. Raju Ram Rahi, Deputy Advocate General.

ASI Nasib Singh, I.O. Police Station Sadar,
Shimla, present alongwith record.

Vivek Singh Thakur, J (Oral)

Petitioner has approached this Court under Section 438 Criminal Procedure Code (in short Cr.P.C.), seeking anticipatory bail apprehending his arrest in case FIR No.34 of 2021, dated 05.03.2021, registered in Police Station Sadar, Shimla, H.P., under Sections 363, 366A, 370(4), 506 and 120B of the Indian Penal Code (in short 'IPC').

2. Status report stands filed, wherein it is stated that on 05.03.2021 victim, aged about 15 years, who is studying in Class

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

9th, had left her home at 9.30 a.m. to attend her school i.e. Sanatan Dharam Senior Secondary School, Ganj Bazaar, Shimla, and when she did not return home in the evening, her father, on inquiry, had received information that on that day students were not called in the school. With aforesaid complaint, father of the victim had approached Police Station Sadar, Shimla, with suspicion that someone had abducted her daughter after alluring and misleading her.

3. As per status report, on complaint of father of the victim, case under Section 363 IPC was registered and investigation was started. During investigation, location of mobile number of victim was found in Haryana leading to the clue to the police that victim was travelling towards Delhi. Whereupon, police party was sent to Delhi in search of victim and it was also found that victim was having too many talks on two mobile numbers (96398-21301 and 62382-27896), therefore, CDRs and location of those two numbers were also requisitioned.

4. Investigating Officer, on 06.03.2021, after reaching in Police Station Badarpur, Delhi, started investigation and found that last location of victim, on 05.03.2021 at about 8.19 p.m., was found at Panipat and thereafter her phone was found switched off. From CDRs of two mobile numbers, Investigating Officer had contacted on some mobile numbers, which were found in contact of these two mobile numbers and during this exercise, one mobile number 95606-42747 was found to be of one Jatin Malik, who in response informed to the Investigating

Officer that he is having a Maruti Car bearing registration No.DL9CAP-3819 and on 05.03.2021 he had gone to Ambala from Delhi to drop a passenger and at Ambala a girl had met him, who had disclosed that she was going to Delhi, whereupon, he had been taking that girl to Delhi alongwith him, but near Panipat mobile phone of that girl was switched off and for that reason that girl had contacted someone through his mobile and the person, with whom she had talked, had disclosed his name to him (Jatin) as Zuber and further that Zuber had told him that one boy will send him location from mobile number 96671-56859 and had asked him (Jatin) to drop the victim on that location and thereafter on receiving location of Badarpur, Delhi from the aforesaid number, he had dropped victim at Badarpur NTPC Chowk at about 10.30 p.m. on 05.03.2021, wherefrom a boy had taken her.

5. During investigation, it was revealed that the boy, who had sent the location, was one Ibrahim residing at Badarpur in a room rented in a building known as 'Akash'. During search for Ibrahim, his room was found locked and it came in notice that he was hiding him in some other house in the room of his friend, wherefrom he was taken to Badarpur Police Station and shown to Jatin, and Jatin had identified him the same boy to whom he had handed over the girl on 05.03.2021.

6. During interrogation, Ibrahim had disclosed that on 05.03.2021 he had received calls from Zuber and Nazim @ Sameer (petitioner), boys belonging to his village, who were

working with him earlier at Delhi, but presently Zuber was at Chennai, whereas, Nazim @ Sameer was in Kerala. He had further revealed that both of them had informed him that one 'X' named girl would come in some vehicle at Badarpur NTPC Gate and asked him to take her to his quarter and further that on request of these two persons he had taken victim from Badarpur NTPC Gate to his room in 'Akash' building and had kept her in his room on 05.03.2021 and 06.03.2021 and on 07.03.2021, he had taken victim to Dhakia (village Sahaspur) and as he was in anticipation of his search by police, he was not sleeping in his room but was staying with his friend. Ibrahim had also disclosed that victim, at the time of investigation, was in Dhakia and his elder brother Istiyaak, who is serving at Delhi and living with him in the same room, had also gone to Village Sahaspur (Dhakia) and on his asking he would come to Badarpur alongwith victim. Ibrahim had also disclosed that Nazim @ Sameer was intending to marry victim and Nazim @ Sameer and Zuber had called victim to Delhi, but Zuber was at that time at Chennai and Nazim @ Sameer was in Kerala and, therefore, victim was housed with him.

7. On 08.03.2021 at about 09.30 a.m. Istiyaak brother of Ibrahim and Naasrin (sister of petitioner), on message, had brought victim to Police Station Badarpur, Delhi, who was identified by her father and thereafter victim had identified the places where she was dropped from the car and also the room of Ibrahim.

8. On 10.03.2021, statement of victim was also recorded under Section 164 Cr.P.C. and considering the circumstances revealed during investigation and statement of victim Sections 366A, 370(4), 506 and 120B IPC were also added in the case. As per record age of victim is 14 years 11 months.

9. During investigation in custody, Ibrahim had identified house where he had handed over victim to Naasrin and her husband Ibad. Naasrin and her husband were directed to join investigation in their area's Police Station at Dhidholi. On 13.03.2021 houses of Zuber and Nazim @ Sameer were searched where they were not found at home. In none of these houses any male was found and Mehsar mother of Zuber and Jafree mother of Nazim @ Sameer had also denied any knowledge regarding whereabouts of their respective sons. Naasrin and her husband did not turn up to the Police Station and on inquiry it was found that they had locked their house and had absconded. Naasrin did not return her home during day and night of 13.03.2021, whereupon Investigating Officer declared that police party is going back to Himachal Pradesh, but, in fact, stayed at a distant place, whereupon, believing that Himachal Police had gone back, Naasrin came back to her house on 14.03.2021 at 9.30 a.m. and on receiving that information, police party reached her home and brought her to Police Station for interrogation and on the same day, at about 2.10 p.m., she was arrested by giving due information to Rahees, Pradhan of Dhakia Panchayat.

10. During investigation, Naasrin had disclosed that Ibrahim had brought the minor victim to her house on 07.03.2021 and on the mobile of Ibrahim, her brother Nazim @ Sameer had also talked with her and her husband, and he and her husband had kept minor in their home on asking of Nazim @ Sameer and despite having knowledge about age of victim, circumstances in which she had reached there and her religion as Hindu, they did not report the matter to the police and when during night they came to know about that staying of victim with them had come in the knowledge of police, Istiyaak brother of Ibrahim had come to their house to take victim to Delhi then, firstly they had resisted, but later on had sent victim to Delhi alongwith Istiyaak. During investigation, Naasrin had expressed her ignorance about mobile number and address of her brother Nazim @ Sameer and also mobile number of her husband and whereabouts of her husband.

11. Learned Deputy Advocate General has stated that after obtaining interim bail petitioner is not cooperating and neither disclosing phone number and mobile phone being used by him nor handing over the mobile phone and sim card to the police, which are necessarily required to be taken in possession for proper investigation and that petitioner is expressing his ignorance about whereabouts of Zuber and Ibad, whereas, all of them were in active contact with each other and Zuber is resident of his village and Ibad is his real brother-in-law (Jeeja) (husband of Naasrin). It is further stated that Investigating

Agency has also come across a piece of evidence which indicates that there was a plan to traffic the victim to Dubai and further that according to CDRs, between the period from 31.12.2020 to 05.03.2021 Nazim @ Sameer was in regular contact with victim and he had talked with her 850 times and on the day of leaving house by victim he was directing, dictating, controlling and monitoring the moment of victim on mobile from Shimla to Delhi with the help of a well connected network of his racket which smacks some big conspiracy amongst accused for trafficking the minor to Dubai after alluring her for marriage by giving false assurances and, therefore, it has been submitted that custodial interrogation of petitioner is warranted.

12. Learned Deputy Advocate General, under instructions, has also submitted that petitioner is a part of racket involved in fishing adolescent girls for throwing them in international flesh trade by trafficking them abroad after alluring them for marriage with emotional and sentimental blackmail under the garb of friendship and fake love affair and, therefore, for revelation and disclosure of actual amplitude and magnitude of such conspiracy, custodial interrogation of petitioner is necessary.

13. Learned Deputy Advocate General has further stated that some of accused are absconding and investigation is at initial stage and non-cooperation of accused persons, including petitioner, is hampering the investigation.

14. Learned counsel for the petitioner has submitted that it is not a case of big conspiracy, but of simple story of love affair where victim herself had left her house and reached Ambala and petitioner had only, in order to ensure her safety, had been making arrangements for her arrival to Delhi in his house and at the time of leaving house by the victim, petitioner was in Kerala and it was not possible for him to kidnap victim or allure her to leave lawful guardianship of her parents. He has further submitted that there is no overt act on the part of petitioner in leaving of the house by the victim, rather victim had voluntarily left her house and when she reached Ambala, petitioner had only helped her by providing shelter to her and victim was not sexually abused. It is also submitted that there is no past history of petitioner involving in commission of the same nature or any other offence, and Naasrin, sister of petitioner, had been ensuring security of victim and for that reason he was unwilling to send the victim alongwith Istiyaak to Delhi, which indicates bonafide behaviour of petitioner and his relatives, but no conspiracy to traffic the victim for her exploitation.

15. Section 156 Cr.P.C. empowers Police Officer to investigate in cognizable offences without order of the Magistrate and Section 157 prescribes procedure for investigation, which also provides that when an Officer Incharge of a Police Station has reason to suspect the commission of an offence, which he is empowered to investigate under Section 156, he, after sending a report to the Magistrate, shall proceed in

person or shall depute one of his subordinate Officers as prescribed in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender.

16. Chapter V of the Cr.P.C. deals with provisions related to arrest of persons, wherein Section 41 also, inter alia, provides that any Police Officer may, without an order from Magistrate, and without a warrant, arrest any person against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment which may be less than seven years or may extend to seven years, subject to condition that he has reason to believe, on the basis of such complaint, information, or suspicion, that such person has committed the said offence and also if the Police Officer is satisfied of either of the conditions provided under Section 41(1)(b)(ii), which also include that if such arrest is necessary "for proper investigation of the offence". Whereas Section 41(1)(ba) empowers the Police Officer to make such arrest of a person against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years or with death sentence and the Police Officer has reason to believe, on the basis of that information, that such person has committed the said offence, and for commission of such offence no further condition is required to be satisfied by

the Police Officer. Therefore, Police Officer/Investigating Officer is empowered to arrest the offender or the suspect for proper investigation of the offence as provided under Section 41 read with Section 157 Cr.P.C.

17. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Arrest of an offender during investigation, as discussed supra, is duly prescribed in Cr.P.C.

18. At the same time, Cr.P.C. also contains Chapter XXXIII, providing provision as to bail and bonds, which empowers the Magistrate, Sessions Court and High Court to grant bail to a person arrested by the Police/Investigating Officer in accordance with provisions contained in this Chapter. This Chapter also contains Section 438 empowering the Court to issue directions for grant of bail to a person apprehending his arrest.

19. Section 438 Cr.P.C. empowers the Court either to reject the application forthwith or issue an interim order for grant of Anticipatory Bail, at the first instance, after taking into consideration, inter alia, the factors stated in sub-section (1) of Section 438 Cr.P.C. and in case of issuance of an interim order for grant of Anticipatory Bail the application shall be finally heard by the Court after giving reasonable opportunity of being heard to the Police/ Prosecution. Section 438 Cr.P.C. prescribes certain factors which are to be considered at the time of passing interim order for grant of Anticipatory Bail amongst others, but no such

factors have been prescribed for taking into consideration at the time of final hearing of the case. Undoubtedly, those factors which are necessary to be considered at the time of granting interim bail are also relevant for considering the bail application at final stage.

20. A balance has to be maintained between the right of personal liberty and the right of Investigating Agency to investigate and to arrest an offender for the purpose of investigation.

21. The Legislature, in order to protect right of the Investigating Agency and to avoid interference of the Court at the stage of investigation, has deliberately provided under Section 438 Cr.P.C. that only High Court and the Court of Session are empowered to issue direction that in the event of arrest, an offender or a suspect shall be released on bail. The Court has no power to issue direction to the Investigating Agency not to arrest an offender. A direction under Section 438 Cr.P.C. is issued by the Court, in anticipation of arrest, to release the offender after such arrest. It is an extraordinary provision empowering the Court to issue direction to protect an offender from detection. Therefore, this power should be exercised by the Court wherever necessary and not for those who are not entitled for such intervention of the Court at the stage of investigation, for nature and gravity of accusation, their antecedents or their conduct disentitling them from favour of Court for such protection.

22. Where right to investigate, and to arrest and detain an accused during investigation, is provided under Cr.P.C., there are provisions of Articles 21 and 22 of the Constitution of India, guaranteeing protection of life and personal liberty as well as against arrest and detention in certain cases. It is well settled that interference by the Court at the investigation stage, in normal course, is not warranted. However, as discussed supra, Section 438 Cr.P.C. is an exception to general principle and at the time of exercising power under Section 438 Cr.P.C., balance between right of Investigating Agency and life and liberty of a person has to be maintained by the Courts, in the light of Fundamental Rights guaranteed under Articles 21 and 22 of the Constitution of India, but also keeping in mind interference by the Court directing the Investigating Officer not to arrest an accused amounts to interference in the investigation.

23. Though bail is rule and jail is exception. However, at the same time, it is also true that even in absence of necessity of custodial interrogation also, an accused may not be entitled for anticipatory bail in all eventualities. Based on other relevant factors, parameters and principles enumerated and propounded by Courts in various pronouncements, some of which have also been referred by learned counsel for CBI, anticipatory bail may be denied to an accused. Requirement of custodial interrogation is not only reason for rejecting bail application under Section 438 Cr.P.C.

24. Nature, gravity and seriousness of offence, extent of involvement of petitioners, manner of commission of offence, antecedents of petitioners, possibility of petitioners fleeing from justice and impact of granting or rejecting the bail on society as well as petitioner, are also amongst those several relevant factors which may compel the Court to reject or accept the bail application under Section 438 Cr.P.C. It is not possible to visualize all factors and enlist them as every case is to be decided in its peculiar facts and circumstances.

25. Considering entire facts and circumstances of the case placed before me and contention of learned Deputy Advocate General as well as learned counsel for the petitioner, and nature, gravity and seriousness of offence for the manner in which girl has been managed to be transported/travelled from Shimla to a remote village of Uttar Pradesh in an organized manner, and also for finding or ruling out possibility of amplitude and magnitude of the conspiracy, I find that prayer for custodial interrogation of the petitioner is justified and thus acceptable. Therefore, petition is dismissed with direction to the petitioner to surrender before Investigating Officer/police immediately.

(Vivek Singh Thakur),
Judge.

April 6, 2021
(Purohit)