IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.M.P.(M) No.1620 of 2025

Reserved on:12.08.2025

Decided on: 19.08.2025

Rishi Kumar ..... Petitioner

Versus

State of Himachal Pradesh .....Respondent

Coram

The Hon'ble Mr. Justice Rakesh Kainthla, Judge.

***Whether approved for reporting?*[1]No**

For the Petitioner: **Mr. K.B. Khajuria, Advocate.**

For the Respondent: **Mr. Lokinder Kuthleria, Additional Advocate General, with Mr. Prashant Sen, Mr. Ajit Sharma and Ms. Sunaina Chandhari, Deputy Advocates General.**

Rakesh Kainthla, Judge

The petitioner has filed the present petition for seeking regular bail in F.I.R. No.57/2024, dated 20.05.2024, registered at Police Station, Kihar, District Chamba, for the commission of offences punishable under Sections 363 and 376 of the Indian Penal Code (IPC) and Section 4 of the Protection of Children from Sexual Offences (POCSO) Act.

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[1] *Whether the reporters of the local papers may be allowed to see the Judgment? Yes*

2. It has been asserted that a false case was registered against the petitioner by the police. The allegations are baseless and incorrect. There is no evidence to connect the petitioner with the commission of crime. The petitioner shall abide by the terms and conditions which the Court may impose. Hence, the petition.

3. The petition is opposed by a filing status report asserting that the informant, the father of the victim, made a complaint that the victim was born on 04.08.2007. She left her home on 19.5.2024 without informing any person. The informant suspected that Rishi (petitioner) had kidnapped the victim. The police registered the F.I.R. and recovered the victim. The victim revealed that she was talking to the petitioner. She called the petitioner and told him that her parents were marrying her. She asked the petitioner to marry her. She left her home. No illegal act was done by the petitioner against her. The police seized various articles, and the doctors obtained various samples, which were sent to the State Forensic Science Laboratory (SFSL), Junga. As per the report of SFSL, Junga, the DNA profile obtained from the victim's salwaar and vaginal swab matched the DNA profile obtained from the petitioner’s blood. The victim made a supplementary statement that she

was frightened and could not disclose the commission of rape earlier. The police arrested the petitioner and filed the chargesheet before the court. One witness out of 31 cited by the prosecution has been examined. The petitioner would intimidate the witnesses in case of his release on bail. Hence, it was prayed that the bail petition be dismissed.

4. I have heard Mr. Kulbhushan Khajuria, learned counsel for the petitioner and Mr. Lokender Kutlheria, learned Additional Advocate General for the respondent-State.

5. Mr. Kulbhushan Khajuria, learned counsel for the petitioner, submitted that the victim made a statement under Section 164 of Cr.P.C. that she had left her matrimonial home voluntarily. Therefore, there was no kidnapping. The victim carried her Aadhar card in which her date of birth was mentioned as 1.1.2005. Therefore, there were reasonable grounds to believe that the victim was not a minor on the date of the incident. The police have filed a charge-sheet, and no fruitful purpose would be served by detaining the petitioner in custody. Hence, he prayed that the present petition be allowed and the petitioner be released on bail.

6. Mr. Lokinder Kutlheria, learned Additional Advocate General for the respondent-State, submitted that the petitioner had raped a minor, which is a heinous offence. This fact was corroborated by the report of forensic analysis in which the DNA of the petitioner was found in the salwaar and vaginal swab of the victim. The prosecution's evidence is yet to be recorded, and releasing the petitioner on bail would adversely affect the fair trial. Therefore, he prayed that the present petition be dismissed.

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

8. The parameters for granting bail were considered by the Hon'ble Supreme Court in ***Ajwar v. Waseem (2024) 10 SCC 768: 2024 SCC OnLine SC 974,*** wherein it was observed at page 783: -

> ***"Relevant parameters for granting bail***
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> **26.** While considering as to whether bail ought to be granted in a matter involving a serious criminal offence, the Court must consider relevant factors like the nature of the accusations made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, the role attributed to the accused, the criminal antecedents of the accused, the probability of tampering of the witnesses and repeating the offence,

if the accused are released on bail, the likelihood of the accused being unavailable in the event bail is granted, the possibility of obstructing the proceedings and evading the courts of justice and the overall desirability of releasing the accused on bail. [Refer: ***Chaman Lal*** **v.** ***State of U.P.*** **[*Chaman Lal* v. *State of U.P.*, (*2004) 7 SCC 525: 2004 SCC (Cri) 1974]; Kalyan Chandra Sarkar v. Rajesh Ranjan [Kalyan Chandra Sarkar v. Rajesh Ranjan, (2004) 7 SCC 528: 2004 SCC (Cri) 1977]; Masroor v. State of U.P. [Masroor v. State of U.P., (2009) 14 SCC 286 : (2010) 1 SCC (Cri) 1368]; Prasanta Kumar Sarkar v. Ashis Chatterjee [Prasanta Kumar Sarkar v. Ashis Chatterjee, (2010) 14 SCC 496 : (2011) 3 SCC (Cri) 765]; Neeru Yadav v. State of U.P. [Neeru Yadav v. State of U.P., (2014) 16 SCC 508 : (2015) 3 SCC (Cri) 527]; Anil Kumar Yadav v. State (NCT of Delhi)[Anil Kumar Yadav v. State (NCT of Delhi), (2018) 12 SCC 129 : (2018) 3 SCC (Cri) 425]; Mahipal v. Rajesh Kumar [Mahipal v. Rajesh Kumar, (2020) 2 SCC 118 : (2020) 1 SCC (Cri) 558] .*]

9. This position was reiterated in ***Ramratan v. State of M.P., 2024 SCC OnLine SC 3068,*** wherein it was observed as under:-

> **"12.** The fundamental purpose of bail is to ensure the accused's presence during the investigation and trial. Any conditions imposed must be reasonable and directly related to this objective. This Court in ***Parvez Noordin Lokhandwalla*** **v.** ***State of Maharastra (2020) 10 SCC 77*** observed that though the competent court is empowered to exercise its discretion to impose "any condition" for the grant of bail under Sections 437(3) and 439(1)(a) CrPC, the discretion of the court has to be guided by the need to facilitate the administration of justice, secure the presence of the accused and ensure that the liberty of the accused is not misused to impede the investigation, overawe the witnesses or obstruct the course of justice. The relevant observations are extracted herein below:

> **"14.** The language of Section 437(3) CrPC, which uses the expression "any condition ... otherwise in the interest of justice" has been construed in several decisions of this Court. *Though the competent court is empowered to exercise its discretion to impose "any condition" for the grant of bail under Sections 437(3) and 439(1)(a) CrPC, the discretion of the court has to be guided by the need to facilitate the administration of justice, secure the presence of the accused and ensure that the liberty of the accused is not misused to impede the investigation, overawe the witnesses or obstruct the course of justice.* Several decisions of this Court have dwelt on the nature of the conditions which can legitimately be imposed both in the context of bail and anticipatory bail." (Emphasis supplied)

13. In ***Sumit Mehta*** **v.** ***State (NCT of Delhi) (2013) 15 SCC 570***, this Court discussed the scope of the discretion of the Court to impose "any condition" on the grant of bail and observed in the following terms:—

> **"15.** The words "any condition" used in the provision should not be regarded as conferring absolute power on a court of law to impose any condition that it chooses to impose. *Any condition has to be interpreted as a reasonable condition acceptable in the facts permissible in the circumstance, and effective in the pragmatic sense, and should not defeat the order of grant of bail.* We are of the view that the present facts and circumstances of the case do not warrant such an extreme condition to be imposed." (Emphasis supplied)

14. This Court, in ***Dilip Singh*** **v.** ***State of Madhya Pradesh (2021) 2 SCC 779***, laid down the factors to be taken into consideration while deciding the bail application and observed:

> "**4.** It is well settled by a plethora of decisions of this Court that criminal proceedings are not for the realisation of disputed dues. It is open to a

> court to grant or refuse the prayer for anticipatory bail, depending on the facts and circumstances of the particular case. *The factors to be taken into consideration while considering an application for bail are the nature of the accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution; reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; the reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence; character, behaviour and standing of the accused; and the circumstances which are peculiar or the accused and larger interest of the public or the State and similar other considerations.* A criminal court, exercising jurisdiction to grant bail/anticipatory bail, is not expected to act as a recovery agent to realise the dues of the complainant, and that too, without any trial." (Emphasis supplied)

10. This position was reiterated in ***Shabeen Ahmed versus State of U.P., 2025 SCC Online SC 479.***

11. The present petition has to be decided as per the parameters laid down by the Hon'ble Supreme Court.

12. It was submitted that the victim had taken her Aadhar card in which her date of birth was mentioned as 01.01.2005. Therefore, there was sufficient reason to doubt the victim's minority on the date of the incident. This submission is not acceptable. It was laid down by the Hon'ble Supreme Court in ***Saroj and Ors. vs. Iffco-Tokio General Insurance Co. and Ors.***

(24.10.2024-SC): MANU/SC/1152/2024 that an Aadhar card is not proof of date of birth. It was observed as under:-

> "9.5. Turning back to the question of whether the Aadhar Card can serve as proof of age, a perusal of some High Court judgments reveals that this question has been considered on quite a few occasions in the context of the JJ Act. Illustratively, in ***Manoj Kumar Yadav v. State of M.P. MANU/MP/1386/2023:2023:MPHC-JBP:17541*** a learned Single Judge of the Madhya Pradesh High Court held that when it comes to establishing the age, on a plea of juvenility the age mentioned in the Aadhar Card could not be taken as a conclusive proof in view of Section 94 of the JJ Act. Similar observations have been made in ***Shahrukh Khan v. State of M.P. MANU/MP/3883/2023***, holding that if the genuineness of the School Leaving Certificate is not under challenge, the said document has to be given due primacy.
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> The Punjab & Haryana High Court, in the context of the Prohibition of Child Marriage Act, 2006, in ***Navdeep Singh & Anr. v. State of Punjab & Ors. MANU/PH/1054/2021*** held that Aadhar Cards were not "firm proof of age". Observations similar in nature were also made in ***Noor Nadia & Anr. v. State of Punjab & Ors. 2021 SCC OnLine P&H 1514, Muskan v. State of Punjab MANU/PH/0580/2021***, as well as several other orders/judgments, in various contexts.
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> Views aligning with the one referred to above have been taken by the High Court of Judicature of Allahabad in ***Parvati Kumari v. State of U.P. MANU/UP/0248/2019***; the Himachal Pradesh High Court in ***Kumit Kumar v. State of H.P. MANU/HP/1245/2024*** and the High Court of Kerala in ***Sofikul Islam v. State of Kerala MANU/KE/3292/2022: 2022:KER:63899***.
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> 9.7. Judicial notice has also been taken of the circular above. Recently, a learned Single Judge of the Gujarat High Court in ***Gopalbhai Naranbhai Vaghela v. Union of India & Anr***. in view thereof directed the release of the Petitioner's pension in accordance with the date as

> mentioned in the School Leaving Certificate, keeping aside the difference in the date of birth as mentioned in the Aadhar Card, which was not relevant for the purpose of such consideration.
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> 9.8. In ***Shabana v. NCT of Delhi***, a learned Division Bench of the Delhi High Court in a case where the Petitioner-mother sought a writ of habeas corpus for her daughter, recorded a statement made for and on behalf of UIDAI that "Aadhar Card may not be used as proof of date of birth."
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> 9.9. Here, we may clarify that we have not expressed any view on the merits of these cases before their respective High Courts, and reference has only been made to them for the limited purpose of examining the suitability of the Aadhar Card as proof of age.

13. Therefore, no advantage can be derived from the fact that the date of birth of the victim was mentioned as 01.01.2005 in the Aadhar card.

14. It was submitted that the victim disclosed herself to be a major, and no offence under POCSO has been made out. This submission cannot be accepted. The status report shows that the victim was born on 04.08.2007. Therefore, she was less than 18 years old on 19.05.2024, the date of the incident. The plea taken by the petitioner that the victim told him her incorrect age will not help him. In a classic case of ***Reg. V. Prince., [L.R.] 2 C.C.R. 154,*** the prisoner Prince unlawfully took an unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father. The jury found

that the girl went with the prisoner willingly; she told the prisoner that she was aged 18 years, and the prisoner believed that she was aged 18 years, and he had a reasonable cause for doing so. It was held that this finding recorded by the jury would not help the prisoner. The act of the prisoner was unlawful *per se*, and if the girl was found to be less than sixteen years, the representation by the girl or the belief of the prisoner was immaterial. Brett J observed:

> "Upon all the cases, I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind or mens rea. Then comes the question: What is the true meaning of the phrase? I do not doubt that it exists where the prisoner knowingly does acts which would constitute a crime if the result were as he anticipated, but in which the result may not improbably end by bringing the offence within a more serious class of crime. If a man strikes with a dangerous weapon, with the intent to do grievous bodily harm, and kills, the result makes the crime murder. The prisoner has run the risk. So, if a prisoner does the prohibited acts without caring to consider what the truth is as to facts — as if a prisoner were to abduct a girl under sixteen without caring to consider whether she was, in truth, under sixteen — he runs the risk. So if he, without abduction, defiles a girl who is, in fact, under ten years old, with a belief that she is between ten and twelve. If the facts were as he believed, he would be committing the lesser crime. Then, he runs the risk of his crime, resulting in greater crime. It is clear that ignorance of the law is not an excuse. It seems to me to follow that the maxim as to mens rea applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to

believe and does believe to be the facts, would, if true, make his acts no criminal offence at all.

15. Blackburn J observed:

> "It seems impossible to suppose that the intention of the legislature in those two sections could have been to make the crime depend upon the knowledge of the prisoner of the girl's actual age. It would produce the monstrous result that a man who had a carnal connection with a girl, in reality not quite ten years old, but whom he, on reasonable grounds, believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. He could not be convicted of the misdemeanour, because she was in fact not above the age of ten. It seems to us that the intention of the legislature was to punish those who had bad connections with young girls, though with their consent, unless the girl was, in fact, old enough to give valid consent. The man who has a connection with a child, relying on her consent, does it at his peril if she is below the statutory age."

16. Bramwell B said:

> "I have used the word "knowingly;" but it will, perhaps, be said that here the prisoner not only did not do the act knowingly, but knew, as he would have said, or believed, that the fact was otherwise than such as would have made his act a crime; that here the prisoner did not say to himself, "I do not know how the fact is, whether she is under sixteen or not, and will take the chance," but acted on the reasonable belief that she was over sixteen; and that though if he had done what he did, knowing or believing neither way, but hazarding it, there would be a mens rea, there is not one when, as he believes, he knows that she is over sixteen.
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> It is impossible to suppose that, to bring the case within the statute, a person taking a girl out of her father's possession against his will is guilty of no offence unless

he, the taker, knows she is under sixteen, that he would not be guilty if the jury were of opinion he knew neither one way nor the other. Let it be, then, that the question is whether he is guilty where he knows, as he thinks, that she is over sixteen. This introduces the necessity for reading the statute with some strange words introduced; as thus: "Whosoever shall take any unmarried girl, being under the age of sixteen, and not believing her to be over the age of sixteen, out of the possession," &c. Those words are not there, and the question is whether we are bound to construe the statute as though they were, on account of the rule that the mens rea is necessary to make an act a crime. I am of the opinion that we are not, nor as though the word "knowingly" was there, and for the following reasons: The act forbidden is wrong in itself, if without lawful cause; I do not say illegal, but wrong. I have not lost sight of this, that though the statute probably principally aims at seduction for carnal purposes, the taking may be by a female with a good motive. Nevertheless, though there may be such cases, which are not immoral in one sense, I say that the act forbidden is wrong"

17. Denman J said:

"The belief that she was eighteen would be no justification to the defendant for taking her out of his possession, and against his will. By taking her, even with her own consent, he must at least have been guilty of aiding and abetting her in doing an unlawful act, viz., in escaping against the will of her natural guardian from his lawful care and charge. This, in my opinion, leaves him wholly without lawful excuse or justification for the act he did, even though he believed that the girl was eighteen, and therefore unable to allege that what he has done was not unlawfully done, within the meaning of the clause. In other words, having knowingly done a wrongful act, viz. in taking the girl away from the lawful possession of her father against his will, and in violation of his rights as guardian by nature, he cannot be heard to say that he thought the girl was of an age beyond that

> limited by the statute for the offence charged against him. He had wrongfully done the very thing contemplated by the legislature: He had wrongfully and knowingly violated the father's rights against the father's will. And he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing."

18. This judgment has become a *locus classicus* and is cited in all the law books on the Indian Penal Code. Therefore, the fact that the victim represented herself age more than 18 years old will not help the petitioner.

19. The legislature enacted the POCSO Act to protect children from themselves as well as from others who are minded to prey upon them. (please see ***R v Corran [2005] EWCA Crim 192***, para 6). The children are deemed to be incapable of consent, and consent is no defence to the offences punishable under the POCSO Act. Dealing with the plea of consent under the Sexual Offences Act 2003 (which is almost similar to the POCSO Act but for the age, which is 13 under the Sexual Offences Act, 2003 and 18 under the POCSO Act), ***Baroness Hale of Richmond*** held in ***R vs G [2008] UKHL 37*** as under:

> "44. Section 5 of the 2003 Act has three main features. First, it singles out penetration by the male penis as one of the most serious sorts of sexual behaviour towards a child under 13; second, it applies to such penetration of a child under 13 of either sex; and thirdly, it calls this

“rape". This is its novel feature, but it is scarcely a new idea. The offences of unlawful sexual intercourse under sections 5 and 6 of the 1956 Act were often colloquially known as “statutory rape". This is because the law regards the attitude of the victim of this behaviour as irrelevant to the commission of the offence (although it may, of course, be relevant to the appropriate sentence). Even if a child is fully capable of understanding and freely agreeing to such sexual activity, which may often be doubted, especially with a child under 13, the law says that it makes no difference. He or she is legally disabled from consenting.

45. There are a great many good reasons for this: see, eg, ***R v Hess; R v Nguyen [1990] 2 SCR 906***, per McLachlin J. It is important to stress that the object is not only to protect such children from predatory adult paedophiles but also to protect them from premature sexual activity of all kinds. They are protected in two ways: first, by the fact that it is irrelevant whether or not they want or appear to want it; and secondly, by the fact that in the case of children under 13, it is irrelevant whether or not the possessor of the penis in question knows the age of the child he is penetrating.

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54. In effect, therefore, the real complaint is that the appellant has been convicted of an offence bearing the label “rape". Parliament has very recently decided that this is the correct label to apply to this activity. In my view, this does not engage the Article 8 rights of the appellant at all, but if it does, it is entirely justified. The concept of private life “covers the physical and moral integrity of the person, including his or her sexual life” (***X and Y v The Netherlands***, para 22). This does not mean that every sexual relationship, however brief or unsymmetrical, is worthy of respect, nor is every sexual act which a person wishes to perform. It does mean that the physical and moral integrity of the complainant, vulnerable by reason of her age if nothing else, was worthy of respect. The state would have been open to criticism if it did not provide her with adequate

> protection. This attempts to do by a clear rule that children under 13 are incapable of giving any sort of consent to sexual activity and treating penile penetration as a most serious form of such activity. This does not, in my view, amount to a lack of respect for the private life of the penetrating male.
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> 55. Even supposing that it did, it cannot be an unjustified interference with that right to label the offence which he has committed "rape". The word "rape" does indeed connote a lack of consent. But the law has disabled children under 13 from giving their consent. So there was no consent. In view of all the dangers resulting from underage sexual activity, it cannot be wrong for the law to apply that label even if it cannot be proved that the child was, in fact, unwilling. The fact that the appellant was under 16 is obviously relevant to his relative blameworthiness and has been reflected in the second most lenient disposal available to a criminal court. But it does not alter the fact of what he did or the fact that he should not have done it. In my view, the prosecution, conviction and sentence were both rational and proportionate in the pursuit of the legitimate aims of the protection of health and morals and the rights and freedoms of others."

20. The argument that the minor had misrepresented her age and the accused was not liable was repelled as under:

> "He also commits an offence if he behaves in the same way towards a child of 13 but under 16, albeit only if he does not reasonably believe that the child is 16 or over. So in principle, sex with a child under 16 is not allowed. When the child is under 13, three years younger than that, he takes the risk that she may be younger than he thinks she is. The object is to make him take responsibility for what he chooses to do"

21. Dealing with the dangers of premature sexual activities, the Court held that:

> "Penetrative sex is the most serious form of sexual activity, from which children under 13 (who may well not yet have reached puberty) deserve to be protected, whether they like it or not. There are still some people for whom the loss of virginity is an important step, not to be lightly undertaken, or for whom its premature loss may eventually prove more harmful than they understand at the time. More importantly, anyone who has practised in the family courts is only too well aware of the long-term and serious harm, both physical and psychological, which premature sexual activity can do. And the harm which may be done by premature sexual penetration is not necessarily lessened by the age of the person penetrating. That will depend upon all the circumstances of the case, of which his age is only one."

22. The status report shows that the DNA of the petitioner was found in the salwar and vaginal swab of the victim. Hence, *prima facie*, there is sufficient material to connect the petitioner with the commission of offences punishable under Section 376 of the IPC and Section 4 of the POCSO Act. Considering the fact that the victim was a minor, the submission that the offence was heinous has to be accepted as correct.

23. The status report shows that the statement of only one witness has been recorded. Releasing the petitioner on bail would affect the fair trial. Hence, the petitioner cannot be released on bail.

24 In view of the above, the present petition fails and the same is dismissed.

25. The observation made herein before shall remain confined to the disposal of the instant petition and will have no bearing, whatsoever, on the merits of the case.

(Rakesh Kainthla)
Judge

19 August 2025.
(yogesh)