

Serial No. 01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

BA. No. 4 of 2021

Date of Decision: 14.06.2021

Smti. Biolinda Sten

Vs.

State of Meghalaya & Anr.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. S.S. Yadav, Adv.
For the Respondent(s) : Mr. N.D. Chullai, AAG. with
Mr. A.H. Kharwanlang, GA.
Mr. S. Sengupta, Addl. Sr. GA.

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

1. Matter taken up today via video conferencing.

2. The Petitioner have come before this Court with an application under Section 439 Cr.P.C. with a prayer for grant of bail on behalf of the accused person, Shri Sharingstar Sten who was arrested on 26.02.2021 on the strength of a Non-bailable warrant of arrest (NBWA) in connection with Special (POCSO) Case No. 5 of 2020 under Section 5(k)/6 of the POCSO Act. This application was preferred after four similar bail applications were rejected by the learned Trial Court.

3. On the previous date of hearing, this Court having heard the parties, have called for production of the records of the said Special (POCSO) Case No. 5 of 2020 which was duly produced accordingly.

4. From the application and the records, what can be seen is that an FIR was lodged on 28.02.2018 by one Shri Pawshai Kharumnuid who has alleged that the accused Shri Sharingstar Sten had sexually assaulted his sister, who

is a minor and who is a person with disability on 23.02.2018 at about 11.00 A.M at Jariot village. The said FIR was addressed to the Officer-in-Charge, Diengpasoh Police Station, East Khasi Hills District.

5. Again, from the records including the case dairy, it is seen that after registration of the FIR as Diengpasoh P.S case No. 2(2) of 2018 under Section 5(k)/6 of the POCSO Act, investigation was launched and the Investigating Officer has proceeded with recording of statement of all relevant witnesses and causing of examination of the victim medically at the Diengpasoh PHC on 26.02.2018. The victim was also referred to the Ganesh Das Hospital, Shillong for further examination which was done so on 26.02.2018 itself at about 4.00 P.M.

6. The I/O then reported that the accused person could not be apprehended as he has absconded right through the course of investigation. Therefore, the I/O while submitting the charge sheet has opined that a prima facie case is found established against the accused Shri Sharingstar Sten and that he is declared an absconder.

7. When the matter was taken up by the Trial Court, summons was issued upon the accused, but the Court on noting that the accused was declared an absconder, has caused a Non-Bailable Warrant of Arrest (NBWA) to be issued.

8. Eventually, the police apprehended the accused on 26.02.2021 and he was accordingly produced before the Trial Court on 01.03.2021 and was remanded to judicial custody.

9. Mr. S.S. Yadav, learned counsel for the Petitioner has submitted that this instant application was preferred before this Court after four similar bail applications were filed before the Trial Court which were rejected. Coming to his argument in this case, the learned counsel has submitted that the manner in which the case proceeded against the accused person was not in accordance with law and procedure, inasmuch as, the accused was never in

receipt of the summon issued to him and the learned Trial Court without first resorting to issue of aailable warrant of arrest has straight away issued the NBWA.

10. It is further submitted that the accused person has no knowledge of the FIR lodged against him and has also denied that he has committed the offence as alleged.

11. As to the offences cited in the charge sheet, the learned counsel has submitted that a perusal of the FIR would show that no penetrative sexual assault was committed as the medical report of the victim revealed that there were no injuries found in her body nor was the hymen torn to indicate penetrative sexual assault. Even the age of the victim was challenged as the medical report indicates that she is about 18 years of age and as such, no case under POCSO Act can be made out it is further submitted.

12. The learned counsel for the Petitioner has however urged upon this Court to consider the prayer for grant of bail to the accused mainly on the ground that the accused was not actually an absconder, but that after being estranged from his wife at Diengpasoh, he had left his matrimonial house and went to stay with his mother at Klew village in Ri-Bhoi District and nothing prevented the police to issue the summon to him at his present address which was not done so. Another contention raised is that since the accused was arrested on 26.02.2021, the Court had fixed the case for copies for the last 8(eight) dates and has thus not progressed at all, which considering the present pandemic situation, there is every likelihood of the case not progressing at all and as such, incarcerating the accused any further would not serve any purpose.

13. Finally, it is submitted that the accused being the only bread earner of the family comprising of a widowed mother, a wife and two minor children coupled with the fact that there is no question of intimidation of the victim as he is no longer residing at Diengpasoh, therefore prayer for grant of bail with any conditions to be imposed by this Court is hereby made. It is further

submitted that, if enlarged on bail, reliable and solvent sureties will be provided who will be none other than the mother and sister of the accused.

14. In support of his case, the learned counsel has referred to two cases, that is, "*Ahsan Shah v. State of Madhya Pradesh*" LAWS(MPH)-2021-5-2, which is an order dated 03.05.2021 in M.Cr.C No. 9730/2021 and "*Gulabbhai Parvatbhai Vadi v. State of Gujarat*" LAWS(GJH)-2021-1-4-4, which is an order dated 08.04.2021 in Criminal Misc. Application No. 1214 of 2021. In these two cases, on an application for grant of bail under Section 439 Cr.P.C, by the applicant who was accused of committing an offence, inter alia, under Section 5j(ii),6 of the POCSO Act, the Hon'ble Madhya Pradesh High Court has held that since investigation is completed and charge sheet has been filed and in view of the COVID-19 situation, there is no possibility of trial commencing in the near future, bail was accordingly granted. In the case of *Gulabbhai Parvatbhai Vadi (supra)*, the Hon'ble High Court, after hearing the parties, relying on the ratio of the case of *Sanjay Chandra v. Central Bureau of Investigation: (2012) 1 SCC 40*, without going into the merits of the case has granted bail to the applicant therein, who was charged with offences under Sections 4 and 6 of the POCSO Act amongst others.

15. Mr. N.D. Chullai, learned AAG in reply to the submission made by the learned counsel for the Petitioner has at the first instance, raised the issue of maintainability of this application, inasmuch as, it is submitted that the accused has stated that four bail applications were filed before the learned Trial Court and reference was made to the last bail application which was filed under Section 439 Cr.P.C. Now a look at Section 439 would show that concurrent power was conferred upon the Sessions Court as well as on the High Court to consider an application for grant of bail. This being the case, the learned AAG has submitted that when an earlier application under Section 439 Cr.P.C. was rejected by a Court of concurrent power, can a second application under the same provisions of law be filed before the High Court? This, according to the learned AAG is not acceptable and as such, the

Petitioner should have come by way of an appeal and not under Section 439 Cr.P.C.

16. Another point raised by the learned AAG is that the Petitioner has annexed in her application copies of some of the contents of the case diary, including the medical report of the victim, which documents are not privy to by the applicant or accused and as such, a serious breach has been committed which this Court must take notice of.

17. The learned AAG has submitted that Sub-Section 6 of Section 164 A, Cr.P.C. provides for forwarding of the medical report to the I/O who shall forward the same to the Magistrate referred to in Section 173 Cr.P.C. This is confidential information and as such, the fact that the accused or applicant has procured the same when the copies entitled to by him has not yet been supplied to him as provided under Section 207 Cr.P.C., as evident from the averments made by the Petitioner at paragraph 19 of her application herein, requires necessary action to be taken in this regard, it is further submitted.

18. The learned AAG has also submitted that the victim is a mentally retarded person and the accused taking advantage of this fact has committed the offence and besides being an absconder, the accused is not entitled to leniency for grant of bail in this case.

19. The learned AAG has also submitted that Section 439 Cr.P.C was recently amended as per the criminal law (Amendment) Act, 2018 effective from 21st April, 2020 by which it was made mandatory for the informant or any other person authorized by the informant to be present at the time of hearing of an application for bail filed by the accused under these provisions. Reference is made to the case of *Miss. G. v. State (NCT of Delhi) 2020 SCC Online Del 629* and emphasis was laid on paragraphs 6 and 24 of the same. It is therefore submitted that before proceeding further with the hearing of this case, notice may be issued upon the informant to be present at the time of hearing.

20. In reply, the learned counsel for the Petitioner has submitted that firstly, on the objection that an application under Section 439 Cr.P.C. cannot be filed before this High Court after exhausting the same privilege before the Sessions Court, there is no express provision to bar the Petitioner from approaching this High Court even after failing to get a positive result from the Sessions Court. Therefore, the argument of the learned AAG in this regard is not well founded.

21. Secondly, on the contention raised that the accused or the applicant has resorted to unfair means by obtaining the copies of the case without being supplied so under Section 207 Cr.P.C, the learned counsel has submitted that the copies were not received illegally, but were received from the Court by way of certified copies on proper application. It is also submitted that as stated, the matter was fixed for supply of copies to the accused, but for the prevailing situation, the case having been charge sheeted and the I/O having sent the said copies under Section 173 Cr.P.C. to the Court, in any case, the accused is due to receive the same and therefore, no illegality has been committed.

22. Having heard the argument advanced by the learned counsels for the parties, this Court have given due consideration to the same. What is required to be considered here is whether the accused Shri Sharingstar Sten is entitled to bail under the circumstances?

23. Before answering this question, the twin objections raised by the learned AAG may be taken up first as the issue of maintainability is involved. The first objection is that since the accused had approached the Sessions Court under Section 439 Cr.P.C. therefore he cannot approach the High Court under the same provision except by way of appeal.

24. In the case of *Sri Kwmta Gwra Brahma v. State of Assam*, the Hon'ble Gauhati High Court vide Judgment and Order dated 10.04.2015 passed in B.A. 3024/2014 dealing with the issue of law as to:

“(i) Whether it is essential that a person/accused before

approaching the High Court for grant of anticipatory bail u/s 438 of the CrPC and grant of bail u/s 439 of the CrPC should exhaust his remedies before the Sessions Court and then file application before the High Court”, has elaborately dwell upon the subject and for the limited purpose relevant to the issue in question, held as under:

“14) After carefully analysing the ratio laid down in the above decisions the salient aspects that emerges is to the effect that –

(ii) In so far as the provisions of section 439 are concerned no option to choose the forum is given to the person/accused unlike under section 438. When the inferior court and the superior court are invested with concurrent jurisdiction, normally a person/accused has to exhaust his remedy before the inferior court. If the person/accused is aggrieved by the order of the inferior court then he can approach the High Court, in which event the High Court will have the benefit of considering the reasons and opinion given by the inferior court...

(iii)...In the event of rejection of bail application by the Sessions Court the persons/accused can still move the High Court for grant of anticipatory bail u/s 438 of the CrPC or bail u/s 439 of the CrPC, as the case may be...

19) In view of the reasons and discussions made above it is held that normally a person/accused should exhaust his remedy u/s 438 or 439 of the CrPC before the Sessions Judge before making an application before the High Court u/s 438 or 439 of the CrPC.....”

25. In the opinion of this Court, the above has clarified the position that notwithstanding the fact that the accused or applicant having moved the Sessions Court with an application under section 439 Cr.P.C and the same was rejected, he can still move the High Court for grant of bail under the same provision. This instant application is therefore maintainable.

26. As to the contention that the Petitioner herein has committed an illegality in obtaining copies of the contents of the case dairy and charge sheet, including the medical report of the victim which is a confidential document, not meant for the eyes of the accused or applicant, the learned

counsel for the Petitioner has submitted that the stage of the case before the learned Special Judge is for supply of copies to the accused person. However, for the last eight dates, the same was not yet supplied and for the purpose of this bail application, the applicant has to apply for certified copy from the Court which was duly given and as such, no illegality was committed as the papers are already part of the case record. It is further submitted that in any case, the accused ought to have been given the said papers and as such, applying for certified copies of the same is not a contravention of the provisions of the Cr.P.C.

27. A look at Section 164-A Sub-Section 6 would show that the I/O on receipt of the medical report has to forward the same to the Magistrate as part of the documents referred to in clause (a) of Sub-Section 5 of Section 173 Cr.P.C. Again, what clause (a) of Sub-Section 5 of Section 173 generally speaks of is that it is incumbent upon the I/O to forward to the Magistrate the report including the said medical report on which the prosecution proposes to rely on during the trial. It is well settled that the accused cannot be caught by surprise at the trial as far as evidence against him is sought to be presented in court. This then mean only one thing, that copies of all relevant papers has to be supplied to him, including the said medical report. Therefore, there is nothing confidential about the said medical report as adverted to by the learned AAG.

28. That the matter before the Trial Court was for supply of copies and the same was not yet supplied inspite of several dates being fixed for the same, the accused therefore cannot be faulted, if he requires the same and has received the same by way of certified copy, which incidentally was allowed by the Court and which invariably, the Prosecution is duty bound to supply to him. Therefore, I find no force in the contention of the learned AAG in this regard, the same is hereby rejected.

29. Before referring to the citations relied upon by the learned counsel for the Petitioner in support of his submission, it would be beneficial to refer to the basic principles governing bail jurisdiction. In a catena of judgments, the

Hon'ble Supreme Court as well as the High Courts have maintained that grant or refusal of bail would basically depend on the particular facts and circumstances of a case, however the general guidelines that have been followed in this regard would be that a competent court of jurisdiction before coming to any decision would be well advised to consider, inter alia the following:

- i) The nature and gravity of the offence and the nature of supporting evidence;
- ii) Prima facie satisfaction of the Court that the accused has committed the offence;
- iii) Possibility of the accused absconding;
- iv) Reasonable apprehension of witnesses and evidence being tampered with.

30. This Court is also mindful of the fact that there can be no unlawful or unnecessary restriction on personal liberty of an individual, including the accused as guaranteed by Article 21 of the Constitution of India. Therefore, every prayer for grant of bail is given due diligence.

31. On perusal of the citations relied upon by the learned counsel for the Petitioner, what is noticed is that the accused persons in those cases were enlarged on bail on particular facts and circumstances which were not elaborated in the said judgments, though the offence involved are similar to the offence alleged to have been committed by the accused herein. This being the case, this Court respectfully decline to apply the ratio of the cited cases to the case in hand, under the peculiar facts and circumstances of this instant case.

32. On perusal of the records, particularly the charge sheet and the statement of the victim and witnesses in the case against the accused Shri. Sharingstar Sten, this Court is convinced that prima facie, an offence of sexual assault has been committed, though it is a matter of evidence and the onus is on the prosecution to prove the same at the trial, for which the opinion expressed by this Court shall not influenced the learned Trial Court in the

process of trial.

33. The conduct of the accused in absconding from the authorities has also caused considerable delay in the trial, and as such, keeping in mind the adherence to speedy trial, at this juncture, it would not be prudent to enlarge the accused on bail. In this connection, the Trial Court is directed to proceed with the trial expeditiously.

34. On the contention of the learned AAG that the informant is required to be present at the time of hearing of the bail application, it is noticed that the Hon'ble Delhi High Court has brought to the fore the said amendment to Section 439 Cr.P.C vis-à-vis the 'Practice Directions' meant for the guidance of the Courts under the Delhi High Court which is not applicable in this High Court.

35. It is also noticed that the said amended provision (1-A) requiring the presence of the informant at the time of hearing is obligatory in nature and not mandatory. Therefore, in the absence of specific rules in this regard, this Court is not call upon to strictly enforce the same.

36. In view of the above, it is the considered opinion of this Court that this application is devoid of merit and the same is hereby rejected.

37. Registry is directed to send back the case record to the Trial Court.

38. Application disposed of. No cost.

Judge

Meghalaya
14.06.2021
"D. Nary, PS"