

Serial No. 01
Regular List



HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.Rev.P. No. 6 of 2021

Date of Decision: 10.12.2021

State of Meghalaya

Vs.

Shri. Heibormi Dkhar

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. N.D. Chullai, AAG. with
Ms. R. Colney, GA.
For the Respondent(s) : Mr. A.H. Hazarika, Adv.

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| i) | Whether approved for reporting in Law journals etc.: | Yes/No |
| ii) | Whether approved for publication in press: | Yes/No |

JUDGMENT AND ORDER

1. An application under Section 439(2) read with Section 482 Cr.P.C. was preferred before this Court primarily against an Order dated 24.06.2021 passed by the Learned Special Judge (POCSO), Khliehriat, East Jaintia Hills District of Meghalaya, whereby vide the impugned order, the Court while considering the Bail Application No. 60 of 2021 moved by the accused/ Respondent herein, has granted bail in Khliehriat Women P.S. Case No. 9(03) of 2021 under Section 363/364/302/201 IPC r/w Section 11/12 of the POCSO Act.

2. Before advertng to the merits of the argument of the parties, it would not be out of place to go into the brief facts of the case before the learned Special Judge and also to the contents of the case record, including the case dairy duly produced before this Court.

3. On 13.03.2021, the police received a telephonic information from one Shri Honey Nongtdu, Secretary VDP, Lad Sutnga that one female dead body was found lying inside a jungle at 2 Kilo Wah Umbhuh Wai Khyrwi. On reaching the spot, the police met the informant and further the body was identified by one Shri Vickstar Siangshai as that of his sister.

4. On being certain of the identity of the deceased, one of the family members lodged a formal FIR before the Officer-In-charge, Women Police, Khliehriat Police Station, East Jaintia Hills District on 13.03.2021 whereby the incident leading to the discovery of the body of the deceased was narrated.

5. In course of investigation, the police questioned a number of persons and in the process, one Shri Heibormi Dkhar and Shri Resmon Rymbai were interrogated, which eventually led to the arrest of Shri Heibormi Dkhar as the prime suspect. The accused was then forwarded to the Court on 27.03.2021 and was remanded to police custody and thereafter to judicial custody.

6. After the investigation is completed, the I/O filed the charge sheet and remarked that a prima facie case is found well established against the accused Heibormi Dkhar under Section 364/302/201 IPC r/w Section 3(a)/4/11(iv)/12 POCSO Act and he was forwarded to the Court for trial.

7. On 24.06.2021 a bail application under Section 439 Cr.P.C. was moved

on behalf of the accused by his father Shri Eki Phawa and the learned Special Judge (POCSO), Khliehriat upon hearing the learned Counsel for the Petitioner as well as the learned Special PP, vide order dated 24.06.2021 has enlarged the accused Heibormi Dkhar on bail on certain conditions.

8. Being aggrieved by the said order dated 24.06.2021 whereby the accused Heibormi Dkhar was granted bail by the Special Court (POCSO), the Petitioner/State of Meghalaya has accordingly approached this Court with this application under Section 439(2) r/w Section 482 Cr.P.C. with a prayer to set aside the impugned order and to direct the learned Special Judge (POCSO), Khliehriat to cancel the bail bond of the accused/Respondent herein and also to direct the police to take the accused/Respondent into custody.

9. Heard Mr. N.D. Chullai, learned AAG along Ms. R. Colney, learned GA who has submitted that the manner in which the impugned order granting bail to the Respondent herein was made, reveals that there was no application of mind and the same was passed in a mechanical manner by the learned Special Judge, (POCSO), inasmuch as, bail was granted to the accused/Respondent only on humanitarian and medical ground without considering the gravity and nature of the offence where the victim was kidnapped, murdered and raped.

10. The learned AAG has also submitted that though the accused/Respondent was stated to be suffering on account of having kidney stones, yet the report from the Jail Superintendent clearly stated that he was receiving treatment in the jail itself and as such, the ground on which bail was

granted is not tenable.

11. It is further submitted that the accused/Respondent is residing next door to the family of the deceased victim and would have easy access to the witnesses and having a significant sway over the local community, he can easily influenced and even threatened the witnesses.

12. Another ground raised is that the provision of Section 29 of the POCSO Act mandates that the Court is required to presume the guilt of the accused until proven otherwise was not followed by the learned Special Judge while passing the impugned order granting bail to the accused/Respondent.

13. It is also submitted that on investigation being completed, the charge sheet was filed on 23.06.2021 before the Court and charges have been found well established and are supported by overwhelming materials on record against the accused/Respondent whereas the impugned order was passed on 24.06.2021 without taking into account the nature of the accusation and the severity of punishment in case of conviction.

14. In support of the argument and contention raised herein, the learned AAG has cited the following cases:

- i) ***State of Maharashtra v. Ritesh s/o Vasudeo Wanjari: (2001) 4 SCC 224 paragraphs, 5, 6;***
- ii) ***Panchanan Mishra v. Digambar Mishra & Ors: (2005) 3 SCC 143 paragraphs, 11,18;***
- iii) ***Kanwar Singh Meena v. State of Rajasthan & Anr: (2012) 12 SCC 180, paragraph 10;***

- iv) *State of Kerala v. Mahesh: 2021 SCC Online SC 308*
paragraphs 16, 17, 18, 29;
- v) *Vijay Kumar v. Narendra & Ors: (2002) 9 SCC 364;*
- vi) *State of U.P. through CBI v. Amarmani Tripathi: (2005) 8*
SCC, 21;
- vii) *Vipan Kumar Dhir v. State of Punjab & Anr: (2021) SCC*
Online SC 854;
- viii) *Ranjit Singh v. State of Madhya Pradesh & Ors: (2013) 16*
SCC 797;
- ix) *State of Meghalaya v. Md. Nurul Islam: (2015) SCC Online*
Megh 137;
- x) *Shyamsindar Ghosh v. State of West Bengal & Ors: (2000)*
SCC Online Cal 101;
- xi) *T. Nagappa v. Y.R. Muralidhar: (2008) 5 SCC 633 and*
- xii) *Puran & Ors. v. State of Maharashtra & Anr: (2001) 6 SCC*
338, paragraphs 10 & 11.

15. Mr A. H. Hazarika, learned Counsel appearing on behalf of the Respondent herein has submitted that from the facts and circumstances of the case, the FIR did not disclose the name of the Respondent and it was only subsequently that he was arrested.

16. It is also submitted that the fact that the accused/Respondent is suffering and undergoing treatment cannot be denied by the State/Petitioner, inasmuch as, reference was made in this application about the report of the Jail

Superintendent, as regard the treatment given to the accused/Respondent. The illness is so serious that it is life threatening, therefore treatment is required in some specialised hospital to be provided for by the relatives, which was accordingly done so when he was admitted for treatment at Woodland Hospital, Jowai and since he could not be treated at Jowai, he was then referred to NEIGRIHMS, Shillong for further treatment.

17. In this regard, Mr. Hazarika has submitted that under Section 437 Cr.P.C., it is clearly provided that bail can be given under certain exceptions, one of them is the ground of sickness.

18. Another contention raised by Mr. Hazarika is that the State/Petitioner has not resorted to the provision of Section 437(5) Cr.P.C. which provides that orders such as the one impugned herein ought to have been challenged before the selfsame Court, but instead the State/ Petitioner has directly approach this Court.

19. Yet another contention put forth by Mr. Hazarika is that this application is without any basis as the accused/Respondent has not violated any of the conditions set out in the impugned order and as such, this application is not maintainable.

20. Lastly, Mr. Hazarika has submitted that the case against the accused/Respondent is at the stage of evidence and this Court may be pleased to direct that the proceedings be expedited.

21. After hearing the learned Counsels for the parties, this Court is called upon to decide as to whether the State/petitioner has been able to make out a

case for cancellation of bail to the Respondent herein.

22. At the outset, it would be proper to mention that a competent court exercising jurisdiction under the Code of Criminal Procedure is also endowed with the power to grant bail under the relevant provisions, particularly under Sections 437 and 439 respectively. This power is a plenary power circumscribed by the exercised of discretion and as such, an exercise of power to grant bail or to refuse bail cannot be upset without very strong and cogent reasons.

23. It is also well settled that bail is usually granted, followed by directions to comply with certain conditions, which in the ordinary sense would also imply that failure to adhere to all or any of the conditions imposed would render the bail granted to be cancelled or set aside.

24. However apart from the above cardinal rule or in a departure of the same, the higher Courts are also called upon to examine the manner in which a particular bail order is passed as to whether the discretionary power exercised has been done so, taking into account the overall facts and circumstances of the case.

25. It stands to reason therefore that on an application made or on proper scrutiny of an impugned order granting bail, the higher courts can reverse the same and cancel the bail granted by giving a proper explanation.

26. In this regard, the reference of the learned AAG to the case of *State of Kerala v. Mahesh* (supra) would aptly elucidate the principle set out above.

In this case, the Hon'ble Supreme Court at paragraphs 16 and 17 of the same,

the concept discretionary power and the parameters under which the same can be exercised has been briefly explained as under1: -

“16. It is well settled that though the power to grant bail under Section 439 of the Cr.P.C is discretionary, such discretion has to be exercised judiciously, as held by this Court in Ram Govind Upadhyay v. Sudarshan Singh reported in (2002) 3 SCC 598. Speaking for the Court, Umesh Chandra Banerjee, J. said:-

“3. Grant of bail though being a discretionary order – but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the court and facts, however, do always vary from case to case. While placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always to be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic considerations for the grant of bail – more heinous is the crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.

4. Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture, though however, the same are only illustrative and not exhaustive, neither there can be any. The considerations being:

- (a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.*
- (b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.*
- (c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.*
- (d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the*

genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”

17. In Prasanta Kumar Sarkar v. Ashis Chatterjee reported in (2010) 14 SCC 496, D.K. Jain, J., speaking for a two-Judge Bench of this Court laid down the principles for examining the correctness of orders granting bail to an accused. This Court held:-

“9....It is trite that this Court does not, normally, interfere with an order (Ashis Chatterjee v. State of W. B., CRM No.272 of 2010, order dated 11-1-2010 (Cal)) passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

- (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;*
- (ii) nature and gravity of the accusation;*
- (iii) severity of the punishment in the event of conviction;*
- (iv) danger of the accused absconding or fleeing, if released on bail;*
- (v) character, behaviour, means, position and standing of the accused;*
- (vi) likelihood of the offence being repeated;*
- (vii) reasonable apprehension of the witnesses being influenced; and*
- (viii) danger, of course, of justice being thwarted by grant of bail.”*

27. Short of repeating the facts and circumstances of the case as indicated above, the Respondent/accused has been charged primarily with offences under Sections 364/302 201 IPC r/w Section 3(a)/4/11 (iv)/12 of the POCSO Act, 2012 which are very serious offences on the face of it. While in judicial custody, the Respondent/accused had made a prayer for grant of bail, for which the learned Special Court (POCSO), Khliehriat had granted the bail by

the impugned order.

28. As pointed out by the learned AAG, the only ground cited for grant of bail is that the Respondent/accused is suffering from kidney problem and that bail was also granted on humanitarian ground.

29. In the light of the serious charges against the accused and the materials on record, it appears that the learned Special Court (POCSO) could not have released the Respondent/accused on such grounds even while exercising its discretionary power since there is no extraordinary circumstances which would endanger the life of the Respondent/accused if bail is withheld, inasmuch as, the jail authorities are duty bound to ensure that proper medical treatment is afforded to the inmates, and there are also adequate number of treatment centres and hospitals where the Respondent/accused could be referred for treatment under custody.

30. In bail jurisprudence the concept of granting bail on humanitarian ground is not so prevalent and the same is not legally tenable which also renders the impugned order passed on this account to fail the scrutiny of law.

31. The learned AAG has also referred to a number of decisions however, almost all speaks of the same issue and as such, only the relevant citation will be required to be noted herein for the purpose of adjudication of this instant application for a case to be made out for cancellation of bail granted by the said impugned order.

32. In the case of *Kanwar Singh Meena v. State of Rajasthan* (supra) at paragraph 10, extract of which is reproduced herein, the Hon'ble Supreme

Court has held as under

“10.If the court granting bail ignores relevant materials indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such orders are against the well-recognised principles underlying the power to grant bail. Such orders are legally infirm and vulnerable leading to miscarriage of justice and absence of supervening circumstances such as the propensity of the accused to tamper with the evidence, to flee from justice, etc. would not deter the court from cancelling the bail. The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing the accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society. Needless to say that though the powers of this Court are much wider, this Court is equally guided by the above principles in the matter of grant or cancellation of bail.”

33. To counter the argument advanced by the learned Counsel for the respondent, as far as jurisdiction of this Court is concerned, and also that bail once granted cannot be cancelled, if there is no findings and evidence of violation of any of the conditions imposed while granting bail, the Hon'ble Supreme Case in the case of ***Puran & Ors. v. State of Maharashtra & Anr.*** (supra) has answered this issue at paragraphs 10 and 11 of the same which are reproduced below as:-

“10. Mr. Lalit next submitted that once bail has been granted it should not be cancelled unless there is evidence that the conditions of bail are being infringed. In support of this submission he relies upon the authority in the case of Dolat Ram v. State of Haryana:1995 (1) SCC 349. In this case it has been held that rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted have to be considered and dealt with on different basis. It has been held that very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted. It has been held that generally speaking the grounds for

cancellation of bail broadly are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. It is, however, to be noted that this Court has clarified that these instances are merely illustrative and not exhaustive. One such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of this nature and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the society. Therefore, an arbitrary and wrong exercise of discretion by the trial court has to be corrected.

11. *Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in Gurcharan Singh v. State (Delhi Admn.):AIR 1978 SC 179. In that case the Court observed as under:(SCC p. 124, para 16)*

"If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under Section 439 (2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High Court."

34. In the light of the above findings and observations of this Court, it is obvious that the impugned order was passed without due application of mind and the discretionary power was not exercised judiciously which leaves this

Court with no option but to set aside and quash the same.

35. This instant petition succeeds and is hereby allowed. Accordingly, the impugned order dated 24.06.2021 is hereby set aside and quashed and the bail bond executed stands cancelled. The I/O is hereby directed to ensure that the Respondent/accused is hereby taken into custody.

36. With the above, this petition is hereby disposed of. No cost.

Judge

Meghalaya
10.12.2021
"D. Nary, PS"

