

Serial No. 01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

AB. No. 56 of 2023

Date of Decision: 07.12.2023

Smti. Sopiwara Begum Vs. State of Meghalaya

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. S.A. Sheikh, Adv.

For the Respondent(s) : Mr. H. Abraham, GA.
Ms. S. Bhattacharjee, GA.

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

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

JUDGMENT (ORAL)

1. Heard Mr. S.A. Sheikh, learned counsel for the petitioner who has submitted that the petitioner herein apprehending arrest in connection with Tura Women P.S. Case No. 36 (5) 2023 under Section 376DA/120B IPC read with Section 5(g)/6 of the POCSO Act, 2012 has approached this Court with an application under Section 438 Cr.P.C with a prayer for

grant of pre-arrest bail on behalf of the petitioner.

2. The learned counsel has submitted that the said Tura Women P.S. Case was registered on the basis of an FIR filed on 27.05.2023 before the In-charge Jangkipara Outpost, West Garo Hills District.

3. The complainant who is the father of a minor girl aged about 15 years has alleged that on 26.05.2023 at about 2:00 pm, his minor daughter, while collecting firewood from a nearby jungle was accosted by the three accused persons named in the said FIR, who has committed the act of rape on the said minor.

4. In course of investigation, the name of the petitioner herein has also figured, inasmuch as, it was alleged that she along with her son had lured the said minor girl to the jungle and had also arranged that the three accused persons be present at the place of occurrence to commit the said offence. Accordingly, the police are on the look out to arrest the petitioner in connection with the said case. Hence, this application.

5. Before proceeding further, the learned counsel, on a query by this Court has submitted that though, there is a clear provision in the Code of Criminal Procedure, 1973, wherein under Sub-Section 4 of Section 438 Cr.P.C, it is clearly provided that prayer for grant of pre-arrest bail by any

person accused of having committed an offence, inter alia, under Section 376DA shall not be entertained. This in effect, would mean that this application cannot be considered on the said provision being attracted. However, the learned counsel has referred to a case reported in 2023 SCC OnLine Ker 8345, wherein the Hon'ble High Court of Kerela in Bail Appl. No. 144 of 2023 and Bail Appl. No. 2157 of 2023, vide order dated 20.09.2023 has discussed at length the applicability of this section. Paras 1, 18, 19, 20, 24 and 25 of the judgment which are relevant are quoted herein below:

“1. Does sub-section (4) of Section 438 of the Code of Criminal Procedure create an absolute bar in granting pre-arrest bail to an accused involved in the offence of rape of a minor girl? – This is the important question that arises for consideration in these bail application.

18. A conjoint reading of Sections 438(4), 60A and 41 of Cr.P.C. and Section 26 of IPC would reveal that the bar under subsection (4) of Section 438 of Cr.P.C. would attract only in a case where the information received by the police regarding the commission of the offence by the accused is credible and based on that credible information, there are reasons to believe that the accused has committed the offence. In other words, in cases where no prima facie materials exist warranting the arrest of the accused, the bar under sub-section (4) of Section 438 would not attract, and the court has the power to direct a pre-arrest bail. There cannot be any mandate under the law to arrest an innocent.

19. *Certain special statutes have excluded the operation of Section 438 of the Cr.P.C for the accusation of offences punishable under those special statutes, for example, Section 18 of the Scheduled Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 (for short, SC/ST Act), Section 43D(4) of the Unlawful Atrocities Prevention Act, 1967 (for short, UAP Act) and Section 20(7) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA). The wording in the above provisions is identical to that of sub-section (4) of Section 438 of Cr.P.C. Interpreting those provisions, the Apex Court, as well as this Court, has held that the bar created by those provisions for the operation of Section 438 would not apply when no prima facie case is made out for applicability of the penal provisions of those statutes.*

20. *Section 18 of the SC/ST Act explicitly excludes the application of Section 438 of the Cr.P.C in relation to any case involving the arrest of any person on an accusation of having committed an offence under the Act. Interpreting this provision, in Dr. Subhash Kashinath Mahajan v. State of Maharashtra [(2018) 6 SCC 454], a two-judge Bench of the Apex Court held that the exclusion of anticipatory bail provisions of Cr.P.C (by Section 18 of the Act) did not constitute an absolute bar for the grant of bail if a prima facie case of commission of an offence under the Act is not made out or if it can be shown that the allegations about atrocities or violation of the provisions of the Act were false. The Court also issued some other directions. Later, by the judgment in Union of India v. State of Maharashtra [(2020) 4 SCC 761], a few of the directions issued in Dr. Subhash Kashinath's judgment (supra) were reviewed. In the meantime, Section 18A of the SC/ST Act was introduced to overcome the rigour of the abovementioned judgments. Subsection (2) of Section 18-A specifically excluded the*

application of the provisions of Section 438 of the Cr.P.C, notwithstanding any judgment, order or direction of a court. The validity of the said amendment was considered by the three-judge Bench of the Apex Court in Prathvi Raj Chauhan (supra). While affirming and reiterating the right of an applicant to seek pre-arrest bail, despite the bar under Sections 18 and 18A of the SC/ST Act, it was held that the exclusion of the right of anticipatory bail is applicable only if the case is shown to be bonafide and that prima facie it falls under the SC/ST Act and not otherwise. Thus, after the decisions in Dr. Subhash Kashinath Mahajan (supra) and Prathvi Raj Chauhan (supra), there is no absolute bar against the grant of pre-arrest bail in cases under the SC/ST Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. In view of the latter decision, the position of law regarding the power of the court to grant pre-arrest bail remains almost the same as that laid down in the former judgment despite the review judgment and the enactment of Section 18A of the Act.

24. *No doubt, rape is not only an offence against the person of a woman, rather a crime against the entire society. It degrades and humiliates the victim; it is more so if the victim is a minor. It can have lasting effects on a victim's development and sense of safety to varying degrees throughout life. The offences fall within sub-section (4) of Section 438 (Sections 376(3), 376- AB, 376-DA or 376-DB of the IPC) are related to the offence of rape or gang rape with a minor woman under the age of twelve or sixteen years. Considering the grievous nature of those offences, excluding the provision of pre-arrest bail in genuine cases is absolutely justified. However, there can be no dispute that there are cases where patently false or motivated allegations are made misusing the provisions relating to rape and sexual abuse, and innocent persons are*

termed as accused. A Division Bench of this Court in Suhara v. Muhammed Jaleel (2019 (2) KLT 960) observed that there is a growing tendency in recent years to foist false crimes against the biological father alleging sexual abuse of his own child misusing the provisions of the POCSO Act when serious fight for custody of ward is pending resolution before the Family Courts. If the exclusion of the provision for pre-arrest bail embodied in Section 438(4) of Cr.P.C. is treated as absolute, there will be no protection available to innocent persons against whom false and motivated accusations are made. Protecting the innocent is equally important, like convicting the guilty. The criminal justice system needs to strike a balance between punishing the guilty and protecting the innocent. Thus, the exclusion clause cannot, by any reasonable interpretation, be treated as applicable when no case is made out or allegations are patently false or motivated. Limiting the exclusion to genuine cases is essential to protect the fundamental right of life and liberty guaranteed under Article 21 of the Constitution of India.

25. In the wake of the above findings, the question posed at the beginning of this order is answered negatively. I hold that the exclusion of pre-arrest bail provision by Section 438(4) of Cr.P.C. in respect of the offences mentioned therein is not to be read as absolute, where it was discernible to the court that the allegations are patently false or motivated and no prima facie materials exist warranting the arrest of the accused. The exclusion clause applies only when a prima facie case of commission of offences is made out. This may have to be determined by the Court concerned in the facts and circumstances of each case.”

6. The learned counsel also submits that even though, there is a

clear provision under Section 438 Cr.P.C for non-grant of bail or pre-arrest bail, under certain circumstances, the provision would however not apply where no prima facie case is made out against the applicant/accused. It is also the observation of the Hon'ble High Court of Kerala referring to the decision passed by the Hon'ble Supreme Court that there is no absolute bar against the grant of pre-arrest bail, vis-à-vis the provision of Section 438 (4) Cr.P.C.

7. Another limb of argument advanced by the learned counsel is that the offence involved is that of rape, particularly gang rape and the petitioner being a woman cannot be accused of such offence.

8. The case of *Priya Patel v. State of M.P* and another reported in (2006) 6 SCC 263 was referred to in this regard, wherein the Apex Court in the said case, while discussing on the provision of Sections 375 and 376 IPC, has opined that the section is very clear to say that rape can only be committed by a man and a further observation is made that a woman cannot be said to have an intention to commit rape. In this context, the Apex Court in the case of *Kamaljit Kaur v. The State of Punjab* vide order dated 01.12.2023 in Special Leave to Appeal (Crl.) No(s). 15265/2023 dealing with a matter for grant of pre-arrest bail to a lady who is aged

about 61 years had relied on the decision in the case of Priya Patel(supra) and has accordingly granted relief sought for in the aforesaid petition, that is, pre-arrest bail.

9. Another contention raised by the learned counsel for the petitioner is that on the alleged date when the incident occurred, she was not at the place of occurrence since she had gone for treatment at the Ampati Civil Hospital, South West Garo Hills and OPD ticket dated 25.05.2023 has been produced by the petitioner to prove this point. As such, the learned counsel prays that this Court may be pleased to allow this application and to pass necessary orders ensuring that in the event of her arrest, the petitioner may be released on bail with any conditions fit to be imposed by this Court.

10. Mr. H. Abraham, learned GA appearing on behalf of the State respondent has a one point counter to make, that is, on the basis of the investigation carried out by the Investigating Officer which was duly noted in the case diary produced before this Court today, at best, the petitioner can be said to have abetted the crime committed on the minor since she was present at the time of the said occurrence and as such, the prayer made in this application is strongly objected to by the State

respondent.

11. This Court, on consideration of the submission made and on perusal of the application and the case diary as well as the authorities cited by the learned counsel for the petitioner, would agree with the observation made by the Hon'ble High Court of Kerala in the case referred to herein to say that for the provision of Sub-Section 4 of Section 438 Cr.P.C would not be a bar for the Court to grant pre-arrest bail in deserving cases, one of which, when no prima facie case is made out against the accused concerned. Again, as far as the grant of bail in favour of the a lady in cases involving an offence of rape, the authority cited in the Priya Patel's case is sufficient to convince this Court that a woman cannot be said to have committed rape and as such, any action for allegation in such regard, would not stick as far as a woman is concerned.

12. Given the case of Kamaljit Kaur(supra) nothing is said about the circumstances which has led the Hon'ble Supreme Court to allow the application for grant of pre-arrest bail on behalf of the petitioner, who is a woman, suffice it to say that the reason for such an order being passed is the decision in the case of Priya Patel(supra) which was relied upon by the Hon'ble Supreme Court in this respect. Though, the offence involved is

indeed very serious, however, going by the well settled principle of consideration as far as grant or non-grant of pre-arrest bail is concerned, since an apprehension has been made out, this Court, on this ground, would be inclined to allow the prayer made.

13. It is however made clear that the observation of this Court as regard the complicity of the petitioner in the case shall not be taken as an opinion of this Court to influence the course of trial. In course of trial, evidence will prove the involvement of the petitioner/accused in the case in the final analysis.

14. Under the facts and circumstances as noted hereinabove, this application is hereby allowed. सत्यमेव जयते

15. In the event of her arrest, the petitioner Smti. Sopiwara Begum shall be released on pre-arrest bail with the following conditions that:

- i) She shall not abscond or tamper with the evidence and witnesses;
- ii) She shall not leave the jurisdiction of the State of Meghalaya without prior permission of the court;
- iii) She shall appear before the Investigating Officer or the court concerned as and when required;

- iv) She shall bind herself on a personal bond of ₹ 30,000/-
(Rupees thirty thousand) only with one surety of like
amount to the satisfaction of the Trial Court.

16. As observed above, this application is accordingly disposed of.

No costs.

17. The case diary produced before this Court is hereby returned to
the learned GA.

Judge

Meghalaya
07.12.2023
"D. Nary, PS"

