

GAHC040011152022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : Crl.M.Appln. 4/2022

1:Topi Dirchi
D/o Mito Dirchi,
R/o Lipu, Likabali, PO/PS Likabali, District Lower Siang, Arunachal Pradesh.
Cont. No. 918730011306

VERSUS

1:Pindak Angu and Anr.
Resident of Kanubari, PO and PS Longding, Longding District, Arunachal Pradesh.

2:THE STATE OF AP
Represented by the Public Prosecutor
Arunachal Pradesh

Advocate for the Petitioner : Romjir Rakshap

Advocate for the Respondent : P P of AP

BEFORE
HONBLE MRS. JUSTICE MITALI THAKURIA

ORDER

Date : 20.04.2023

Heard Mr. R. Rakshap, learned counsel appearing for the petitioner.
Also heard Mr. T. Ete, learned Additional Public Prosecutor for the State of
Arunachal Pradesh.

This is an application filed under Section 439 (2) of Code of Criminal Procedure for cancellation of the bail granted to Shri Pindak Angu by the learned Sessions Judge, Pasighat vide order dated 13.09.2022 in connection with Likabali P.S. Case No. 19/2022 under Section 341/342/417/376 IPC.

Scanned copy of LCR has already been received.

It is submitted by the learned counsel for the petitioner that vide order dated 13.09.2022, the learned Sessions Judge Pasighat had granted bail to the respondent No. 1 by observing that "*after hearing the parties and upon perusal of the FIR, I find that the informant victim was having consensual relationship except the allegation of cheating, as such I am inclined to enlarge the accused at this stage as the statement of accused has been recorded.*" But the learned Session Judge failed to appreciate the nature of the accusation and gravity and severity of the offences. The learned Sessions Judge mechanically passed the impugned order dated 13.09.2022 without even considering the prima-facie material against the respondent No. 1/accused and the content in the FIR. The impugned order dated 13.09.2022 is apparently whimsical, capricious and perverse in the instant case and the learned Sessions Judge had failed to understand the contain of the FIR and the complaint of the victim girl.

Further, the learned Public Prosecutor was appointed at the moment of bail application and the learned Additional Public Prosecutor did not object to the bail as no opportunity was given to file any objection in the said bail petition. The learned Sessions Judge not even called for Case

Diary or the status report before passing any order of the bail even after adding of Section 376 IPC in the said case.

The learned counsel further relied on the decision of Hon'ble Apex Court in ***Subodh Kumar Yadav vs. State of Bihar*** reported in (2009) 14 SCC 638, wherein, it is observed that if a superior court finds that the subordinate court has erred in its decision for granting bail if considering irrelevant material, or non-application of mind, or fails to take note of any statutory bar to grant bail, or if there was improper conduct of proceeding e.g., failure to hear the prosecution/complainant were required. In such cases, the bail is liable to be cancelled.

Further, it is not expected at this stage for learned Session Judge to make any opinion that the victim had consensual sex with the accused. In the instant case, there has been a prima-facie case against the respondent No. 1/accused of false promise to marriage, the learned Sessions Judge, Pasighat had mechanically passed the impugned order dated 13.09.2022, and for which the said order of the case is liable to be cancelled. The learned counsel further relied another decision of Hon'ble Apex Court passed in ***Prakash Kadam and others vs. Ram Prasad Vishwanath Gupta and Anr.*** reported in (2011) 6 SCC 189, wherein, the Hon'ble Apex Court has opined that while considering a matter dealing with cancellation of bail, the Court must consider the gravity and nature of the offence, the prima-facie case against the accused, the position and status of the accused. If the allegations leveled against the accused are very serious in nature, then his bail may be cancelled even if there has been no misuse of the bail granted to him. It is further submitted that Hon'ble

Apex Court in case of the ***Deepak Yadav vs. State of Uttar Pradesh*** also express the same view which was reported in (2022) SC 562.

Mr. R. Rakshap, learned counsel for the petitioner submitted that the Hon'ble Apex Court in criminal appeal No. 329/2021 (Aparna Bhat & Ors. vs. State of Madhya Pradesh and Anr.) had also given some guideline while dealing with the bail matter in a sexual offence and in paragraph No. 44 of the said judgment gave as many as 7 numbers of guideline which are as follows:

- “44. Having regard to the foregoing discussion, it is hereby directed that henceforth:
- (a) Bail conditions should not mandate, require or permit contact between the accused and the victim. Such conditions should seek to protect the complainant from any further harassment by the accused;
 - (b) Where circumstances exist for the court to believe that there might be a potential threat of harassment of the victim, or upon apprehension expressed, after calling for reports from the police, the nature of protection shall be separately considered and appropriate order made, in addition to a direction to the accused not to make any contact with the victim;
 - (c) In all cases where bail is granted, the complainant should immediately be informed that the accused has been granted bail and copy of the bail order made over to him/her within two days;

- (d) Bail conditions and orders should avoid reflecting stereotypical or patriarchal notions about women and their place in the society, and must strictly be in accordance with the requirements of the Cr.P.C. In other words, discussion about the dress, behavior, or past "contact" or "morals" of the prosecutrix, should not enter the verdict granting bail;
- (e) The courts while adjudicating cases involving gender related crimes, should not suggest or entertain any notions (or encourage any steps) towards compromises between the prosecutrix and the accused to get married, suggest or mandate mediation between the accused and the survivor, or any form of compromise as is it beyond their powers and jurisdiction;
- (f) Sensitivity should be displayed at all times by judges, who should ensure that there is no traumatization of the prosecutrix, during the proceedings, or anything said during the arguments, and
- (g) Judges especially should not use any words, spoken or written, that would undermine or shake the confidence of the survivor in the fairness or impartiality of the court.

Accordingly, the learned counsel for the petitioner further submits that by passing the order dated 13.09.2022 by the learned Sessions Judge has traumatize the prosecutrix and also the same has shaken here confidence and also it is submitted that by invoking Section 439(2) of the Cr.P.C, the bail which was granted to the respondent No. 1/accused of the order dated 13.09.2022 is liable to

be cancelled.

In this context, Mr. N. Ratan, learned counsel appearing for the respondent No. 1/accused has submitted that there is no infirmity or illegality committed by the learned Sessions Judge while passing the order of bail for respondent No. 1/accused. He further submitted that no prima-facie case is made out under Section 376 IPC and the FIR was initially registered only under Sections 341, 342 & 417 IPC and as there is no allegation of rape etc., only it was alleged that they had a physical relationship with a false promise of marriage. However, subsequently Section 376 IPC was being added in this case, though prima-facie there is no case established under Section 376 IPC. From the FIR and the statement made by the victim it is very much evident that both the accused and the victim was known to each other and they continued their relationship since last 10 to 11 years and dispute arose only when one lady came and claimed herself to be the wife of the respondent No. 1/accused.

The learned Sessions Judge passed the order of bail considering the materials in the record as well as in the FIR and also considering their facts of the case and thus, he has not committed any illegality and the order was passed by applying his judicial mind.

The learned counsel for the respondent No. 1/accused also relied on the decision of Hon'ble Apex Court reported in (2019) 0 AIR SC 327 (***Dr. Dhruvaram Murlidhar Sonar vs State of Maharashtra & Ors***) has stressed on the paragraph No. 19 & 20 of the said judgment, wherein, which are read as follows:

“19. Recently, this Court, in **Shivashankar @ Shiva v. State of Karnataka & Anr.**, in Criminal Appeal No. 504 of 2018, disposed of on 6th April, 2018, has observed that it is difficult to hold that sexual intercourse in the course of a relationship which was continued for eight years is ‘rape’, especially in the face of the complainant’s own allegation that they lived together as man and wife. It was held as under:

“In the facts and circumstances of the present case, it is difficult to sustain the charges leveled against the appellant who may have possibly, made a false promise of marriage to the complainant. It is however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as ‘rape’ especially in the face of the complainant’s own allegation that they lived together as man and wife.”

20. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the IPC.

He further submitted that the bail once granted should not be cancelled mechanically without considering whether any supervening circumstances have rendered it no longer conclusive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail. The learned counsel for the respondent No.1/accused has also relied on the decision of **Hon'ble Supreme Court** reported in (2022) 8 SC 559 (**N.V. Ramana, Krishna Murari, Hima Kohli, JJ vs. State of Uttar Pradesh & Anr**). In reference to the above said judgment the learned counsel further submitted that in paragraph 30 of the said judgment it has been held as under:

30. This Court has reiterated in several instances that bail once granted, should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair to allow the accused to retain his freedom by enjoying the concession of bail during trial. Having said that, in case of cancellation of bail, very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail (which was already granted). A two-Judge Bench of this Court in Dolat Ram and Other vs. State of Haryana, (1995) 1 SCC 349 laid down the grounds for cancellation of bail which are:

- (i) interference or attempt to interfere with the due course of administration of justice.*
- (ii) Evasion or attempt to evade the due course of justice.*
- (iii) Abuse of the concession granted to the accused in any manner.*
- (iv) Possibility of accused absconding.*
- (v) Likelihood of/actual misuse of bail.*
- (vi) Likelihood of the accused tampering with the evidence or threatening witnesses.*

Accordingly, it is submitted by the learned counsel for the respondent No. 2 that there is no probability of any absconding by the accused nor there is probability of misuse of bail, nor there is any likelihood of the accused tempering with the evidences or threatening of the witnesses to cancel the bail which has already granted to the accused by the learned Sessions Judge.

More so, it is submitted that petitioner has not brought any issues in the petition except the issue that the learned Sessions Judge passed the order on the bail mechanically and also used the word of "consensual sex" which is termed to be as improper word or it has traumatized the petitioner. And accordingly, he submits that he has no objection if the word "consensual sex" is removed from the order passed by the learned Sessions Judge.

The learned Additional Public Prosecutor Mr. T. Ete, in his regards submitted that the learned Sessions Judge has committed no error or illegality while passing the order on bail and there are no materials in the instant petition wherefrom, it can be held that there is possibility of hampering and tempering the evidences of the prosecution or there is any threatening to the prosecutrix which may affect the fair trial of this case. For cancellation of bail, the conduct subsequent to release on bail and the supervening circumstances can only be considered while dealing with such petition but herein this case no circumstances is brought in the petition to cancel the bail granted to the respondent No. 1/accused, at the same time the

case has already been charge-sheeted against the respondent No. 1/accused and hence, the question of custodial interrogation also does not arise at this stage. The learned Additional Public Prosecutor has submitted that considering the entire circumstances as well as the conduct of the respondent No. 1 etc., is not a fit case to cancel the bail granted by the learned Sessions Judge.

Considering the entire submissions made by the learned counsels and on perusal of the case record, it reveals that initially the FIR was lodged only with the allegations of illegal restraintment and cheating against the accused/respondent No. 1 and hence, the case was registered under Sections 341, 342 & 417 IPC. However, considering prayer of the I.O, Section 376 IPC was also added. It is also a fact that the petitioner and the respondent No. 1 knows each other for a considerable period. They also had relationship with each other but whether it was a consensual sex or whether the consent was obtained with a false promise of marriage etc., are to be decided at the time of trial or final disposal of the case. But it is seen that the learned Sessions Judge has consider the FIR and the statement of the witnesses and passed the order for bail and therefore, I do not find any illegality in the said order passed by the learned Sessions Judge. Further, it is seen that the grievance of the present petitioner is only of using the word "consensual sex" and also raised the issue that order was passed by the learned Court below without applying his judicial mind and the order was passed on the day of production of the accused without giving him any opportunity of hearing to the prosecution side. But the order of the

learned Sessions Judge reveals that the learned Additional Public Prosecutor was heard who raised no objection in granting bail to the accused/respondent No. 1.

It is a settled law that bail can be cancelled under Section 439 Cr.P.C if a circumstances arises whether if there is any possibility of interference of the accused in administration of due justice and if the accused abuse the concession of bail or if there is any possibility of threat to the complaint of the victim especially in sexual offence but herein in the instant case, it is seen that there is no allegation of threat or absconding nor there is any supervening circumstances brought before the Court for cancellation of bail. However, the petitioner may be aggrieved or traumatized by the use of word "consensual sex" by the learned Sessions Judge. And hence, without commenting the order of the Sessions Judge I find it prudent to expunge the word "consensual sex" from the order of bail passed on 13.09.2022 by the learned Sessions Judge.

With the above observation the present petition for cancellation of bail is hereby stands rejected. However, with a direction to learned Sessions Judge to expunge the word "consensual sex" from the bail order passed by the learned Sessions Judge.

In terms of above, this Crl.Misc.Appl stands disposed of.

JUDGE

Comparing Assistant