

GAHC010020982023



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

Case No. : AB/317/2023

NALSAN ALI @ MANIK ALI
S/O- HACHAN ALI, R/O- VILL.- KURIHAMARI, P.S. SIALMARI, DIST.
NALBARI, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE P.P., ASSAM

Advocate for the Petitioner : MR J H SAIKIA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY

ORDER

Date : 06-02-2023

Heard Mr. J.H. Saikia, learned counsel for the petitioner and Mr. M.P. Goswami, learned Additional Public Prosecutor for the respondent State of Assam.

2. By this application under Section 438, Code of Criminal Procedure, 1973

[CrPC], the petitioner viz. Nalsan Ali @ Manik Ali has approached this Court seeking the benefit of pre-arrest bail, apprehending his arrest, in connection with Sualkuchi River Police Station Case no. 4/2022, registered for offences punishable under Sections 457/376D/377, Indian Penal Code [IPC] after rejection of the petitioner's first bail application, A.B. no. 1102/2022 by an order dated 25.05.2022 and the petitioner's second bail application, A.B. no. 3371/2022 by an order dated 16.11.2022 after perusal of the materials in the case diary.

3. In the First Information Report [FIR], lodged on 08.02.2022, the informant has arraigned three persons viz. [i] Siddik Ali, [ii] Nalsan Ali @ Manik Ali [the petitioner] and [iii] Fozal Haque @ Fojal Ali as accused. The informant has stated that she is a resident of Village – Bardia Chapori and the accused persons are also residents of the same village. It is stated that she had to take shelter in her paternal house after being driven from her matrimonial house by acts of cruelty by her husband. The informant has alleged that whenever the accused persons find the informant alone on roads, etc. they used to giving obscene gestures, etc. and made attempts to entice her to spent nights with them on payment of money. The informant stated that when she did not agree to the enticements given by the accused persons and the accused persons had, in turn, spread rumours against the informant in the society and threatened to kill her if the facts were disclosed to others. In the night intervening 31.12.2021 and 01.01.2022, all the accused persons had allegedly intruded into the house of the informant when she was sleeping inside her house alone with her minor child. Before she could make any noise, the accused persons had allegedly gagged her mouth and by showing dagger, repeatedly raped her. The informant has further stated that she could not make any noise due to fear of her life. It

has been alleged that the accused persons had also committed unnatural sex with her. In the FIR, the informant has stated that due to fear for her life, there was some delay in lodging the FIR.

4. The application, A.B. no. 1102/2022 was preferred by all the three accused persons named in the FIR i.e. [i] Siddik Ali, [ii] Nalsan Ali @ Manik Ali [the petitioner] and [iii] Fozal Haque @ Fojal Ali. A co-ordinate bench of this Court, after perusal of the materials in the case record and the case diary, declined the prayer for pre-arrest bail under Section 438, CrPC with the following observations :

"Also perused the record and the Case Diary.

The victim, herein, is a married lady, who is living with her child, separated from her husband and it is her statement that the accused persons, taking advantage of her loneliness used to follow her and made filthy gestures and finally, on 31.12.2021, all the accused persons forcefully entered into her house at night, at about 2:00 am and committed rape upon her, by threatening her to kill with the dagger, one after another and being frightened of death she could not scream. Because of the threat to her life, given by the accused persons, she could not disclose the matter immediately, but, however, she filed the FIR, after narrating all the facts and there appears no any other circumstance to disbelieve her statement.

Considering all entirety of the matter, and as the matter relates to commission of a serious offence of gang rape, this Court is not inclined to grant the privilege of pre-arrest bail to the petitioners and accordingly, their Anticipatory Bail Application stands rejected."

5. After rejection of the application, A.B. 1102/2022, two of the named accused persons viz. [i] Siddik Ali and [iii] Fozal Haque @ Fojal Ali were

arrested. The accused person, Siddik Ali was arrested on 04.07.2022 and he was released on bail by an order dated 13.09.2022 passed in bail application, B.A. no. 2153/2022 by a co-ordinate bench of this Court. While releasing the petitioner's co-accused, Siddik Ali, the Court has observed that the allegations against him were serious and as per the case diary, he is a habitual offender as there is another police case pending against him. The co-accused, Siddik Ali was released on bail as he had spent 68 days in judicial custody since arrest.

6. The second bail application, A.B. no. 3371/2022 was preferred by the present petitioner alone. In the second application, the petitioner had advanced contentions to the effect that as his co-accused, Siddik Ali had already been released on bail on 13.09.2022, the case of the instant petitioner could be considered on the ground of parity, apart from on merits. This Court on 16.11.2022, considered the second bail application of the petitioner and after hearing the learned counsel for the parties, rejected the same with the following observations :

"5. On perusal of the order dated 13.09.2022 passed in B.A. no. 2153/2022 [Md. Siddik Ali vs. The State of Assam], it is noticed that the co-accused was arrested on 04.07.2022 and thereafter, he was granted bail after 68 days of judicial custody since arrest. The Court in its order dated 13.09.2022 had considered and decided to allow the prayer for bail on the prime consideration of the said accused person's detention in judicial custody for 68 days while observing that the allegations against the said accused person were of serious nature.

6. The aspect of parity comes into consideration only when the two accused persons are positioned in exactly similar situation. The Court is of the view that the situation of one accused, already arrested, cannot be similarly

situated with another accused, who is considered to be at large and whose previous prearrest bail has already been rejected on merits. The Court in its order dated 25.05.2022 had already considered the aspect of delay in lodging the FIR and took into consideration the explanation given by the alleged victim in her statement. This Court is of the view that in a case of this nature, any medical examination conducted after a period of delay loses much of relevance. As this Court has found no change in the circumstances from the previous occasion when the earlier pre-arrest bail was rejected, the present pre-arrest bail application for the second occasion does not deserve reconsideration. Accordingly, the same is rejected.”

7. It is settled that after rejection of application for pre-arrest bail under Section 438, CrPC on merits, there is scope to file a subsequent bail application for pre-arrest bail only if there is a substantial change in the fact situation or in law which requires earlier view being interfered with or where the earlier finding has become obsolete.

8. In the instant bail application, it has been urged on behalf of the petitioner that marriage of the petitioner's son, Hamid Ali is going to be solemnized on 08.03.2023 and the petitioner being the father of the bride-groom, has many responsibilities to perform in the marriage so scheduled. It has been further urged on behalf of the petitioner that the FIR was lodged against the petitioner due to personal grudge of the informant.

9. Having considered the earlier two bail applications on merits, this Court is of the view that the new grounds urged are not such which indicate substantial changes in the fact situation of the case and the new grounds urged apparently have no direct impact on the earlier applications. The grounds urged in this third application on behalf of the petitioner do not, thus, appear to be of any

substance for re-consideration of the earlier order dated 25.05.2022 passed in A.B. no. 1102/2022 and the order dated 16.11.2022 passed in A.B. no. 3371/2022. In such view of the matter, this Court is of the unhesitant view that the instant application preferred for the third occasion, lacks merit and deserves to be dismissed. It is accordingly ordered.

JUDGE

Comparing Assistant