

GAHC010198382022



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

Case No. : Crl.Pet./996/2022

MRINAL KALITA
S/O LATE SURJYA KANTA KALITA
R/O VILL- BORGHULI
P.S. AND DIST. TAMULPUR, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
TO BE REP. BY THE PP, ASSAM

2:SRI DHANJIT KALITA
S/O LATE GHANASHYAM KALITA
R/O VILL- BORGHULI
P.S. AND DIST. TAMULPUR
ASSA

Advocate for the Petitioner : MR. A AHMED

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 02-06-2023

Heard Mr. A Ahmed, learned counsel for the petitioner. Also heard Mr. D Das, learned Additional Public Prosecutor appearing for the State respondent as well as Mr. Z Alam, learned counsel for the respondent No. 2.

2. The petitioner has filed an application under Section 482 of the Cr.PC read with Section 439(2) of the Cr.PC for quashing of the order dated 09.09.2022, passed by the learned Special Judge, POCSO, Baksa, Mushalpur in connection with Special POCSO Case No. 83/2022, whereby the learned Trial Court granted bail to the respondent No. 2/accused, who was shown as absconder in the charge-sheet.

3. The case of the petitioner is that an FIR was lodged on 12.03.2022 before the Officer-In-Charge of Tamulpur Police Station stating *inter alia* that on 08.03.2022 when his minor daughter aged about 15 years was watching TV at the house of one Dibakar Singh, the respondent No. 2/accused called her to his house on the pretext of correcting her Admit Card. When she went to his house, the respondent No. 2/accused taking advantage of absence of other family members in the house pushed the victim into the bed, squeezed her nipples and touched her private parts thereby tried to commit rape on her. The victim girl somehow escaped from the clutches of the respondent No. 2/accused and ran away from the place.

4. On receipt of the complaint, a case was registered vide Tamulpur P.S. Case No. 50/2022 under Sections 354(A)/376/511 of the IPC read with Section 8 of the POCSO Act.

5. It is alleged that during investigation, the respondent No. 2/accused was absconding and therefore, Police could not find him for which charge-sheet has been submitted showing the respondent No. 2/accused as absconder. Accordingly, the trial is going on in the Court of learned Special Judge after taking cognizance. As the respondent No. 2/accused did not appear before the learned Trial Court, NBWA was issued against him. Thereafter, the respondent No. 2/accused filed an application before the learned Trial Court by suppressing

the material fact and thereby obtaining the bail order from the learned Trial Court by playing fraud.

6. Learned counsel for the petitioner has submitted that the respondent No. 2/accused in his petition stated that he has no knowledge that he had been searched by the Police, but in fact, the respondent No. 2/accused while apprehending arrest filed one anticipatory bail application before this Court. Subsequently, charge-sheet has been submitted therefore, this Court vide order dated 26.07.2022 passed in AB No. 1422/2022 directed the respondent No. 2/accused to appear before the learned trial court within 10 (ten) days from the date of order and prayed for regular bail. But, the respondent No. 2/accused failed to comply with the direction of this Court. Subsequently, on 09.09.2022, respondent No. 2/accused appeared before the learned Trial Court by filing a petition wherein he suppressed the fact that he preferred a pre-arrest bail application before this Court. It is also the submission of the learned counsel for the petitioner that the respondent No. 2 obtained bail order from the learned Trial Court by playing fraud and only on that ground itself, the order dated 09.09.2022 granting bail is required to be set aside.

7. On the other hand, the learned Additional Public Prosecutor has submitted that there is no information before him that the respondent No. 2/accused has misused his liberty after grant of bail. Under such circumstances, there is no scope to cancel the bail granted to the respondent No. 2/accused by the learned Trial Court.

8. I have considered the submissions made by the learned counsels for the parties. I have also perused the order passed by the learned Trial Court.

9. In view of the above referred facts and rival submissions of both counsel,

it is to be considered as to whether the impugned order is liable to be set aside by cancelling the bail of the respondent No. 2 or not. No doubt, in the present case the offence with which respondent No. 2/accused is charged is serious in nature, but every accused is presumed innocent until proven guilty beyond reasonable doubt and every accused person has the right to enjoy the bail granted to him unless there is evidence to show the abuse of this right given to him.

10. Section 439 Cr.P.C. confers wide powers on the Court and the Court of Sessions regarding bail. But, while granting bail, the High Court and the Sessions Court are guided by the settled law i.e. the gravity of the crime, the character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the witnesses and obstructing the course of justice and such other grounds are required to be taken into consideration.

11. It is settled law that the court must not undertake meticulous examination of the evidence collected by the police and comment on the same. Such assessment of evidence and premature comments are likely to deprive the accused of a fair trial. While cancelling bail under [Section 439\(2\)](#) Cr.P.C., the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with due course of justice or evade the due course of justice. While considering the bail application, it is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. There can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should

express not only application of mind but also exercise of jurisdiction on accepted and established norms.

12. [In Sanjay Chandra vs. CBI](#), reported in **(2012) 1 SCC 40**, it was observed by the Hon'ble Supreme Court that:-

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before

conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.

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25. The provisions of CrPC confer discretionary jurisdiction on criminal courts to grant bail to the accused pending trial or in appeal against convictions; since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, is a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognised, then it may lead to chaotic situation and would jeopardise the personal liberty of an individual.

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27. This Court, time and again, has stated that bail is the rule and committal to jail an exception. It has also observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under [Article 21](#) of the Constitution.

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13. It is true that the order of bail can be cancelled on existence of cogent and overwhelming circumstances but not on re-appreciation of evidence. But in

the case in hand, no circumstances have been explained by the learned counsel for the petitioner, except it was alleged that the impugned order is illegal and there is an apprehension of tampering of evidence as the victim is a minor and a relative of the respondent No. 2/accused.

14. It is a settled law that bail granted can be cancelled on the ground which has arisen after the bail was granted. It is presumed that after hearing learned counsel for the parties on the bail application, the order was passed by the learned Trial Court granting bail on the grounds as stated in the order and, therefore, when once bail has been granted to the accused, the petitioner cannot have the bail cancelled on some circumstances which may have existed before the grant of bail.

15. Learned Counsel for the respondent No. 2 has submitted that there is no allegation against the respondent No. 2 that he has misused his liberty after granting bail by the learned Trial Court.

16. The ground for cancellation of bail and grounds for rejection of bail are two different circumstances and hence the approach of the Court should also be different. The Court should be more rigid here and actual proof of violation is required. The power of cancellation of bail must be exercised with care and circumspection of cogent and overwhelming circumstances which are necessary for an order seeking cancellation of bail. The bail already granted should not be cancelled in a routine manner as it jeopardize personal liberty of a person.

17. In the present case, no incriminating material has been brought by the petitioner which would create a different opinion regarding the conduct of the respondent No. 2 after the grant of bail or he has threatened any witness or the victim or has tried to run away from justice.

18. Admittedly, the respondent No. 2/accused was not available during investigation and accordingly, charge-sheet was submitted showing him as an absconder. As per provisions of law, the Investigating Officer/Police has no power to show the accused as absconder in the charge-sheet and only the Court has the power to declare the accused as an absconder. However, the learned Trial Court has granted bail to the respondent No. 2/accused on the ground that no proper procedure was followed by the Police to show the accused as an absconder in the charge-sheet.

19. It is true that as per allegation made by the minor victim girl against the respondent No. 2/accused is serious in nature that he took the advantage of her loneliness, had committed the offence which falls under Section 8 of the POCSO Act. The allegation made against him will be decided and taken up during trial. At this stage, regarding cancellation of bail, the petitioner has not shown any such cogent and valid ground for which the bail granted to the respondent No. 2/accused be cancelled under Section 439(2) of the Cr.PC.

20. In view of the above facts and settled law as discussed, this Court does not agree with the submission of the learned counsel for the petitioner that the learned Trial Court has passed an illegal order by granting bail to the respondent No. 2/accused. The same cannot be set aside, in view of the settled law. However, it is correct that the charge is yet to be framed and thereafter the evidence of the material witnesses, like the victim is yet to be recorded by the learned Trial Court. Under these circumstances and from the entire gamut of the matter, I am of the view that so far as prayer made in the present petition for cancellation of bail is concerned, the same cannot be allowed in the absence of any evidence regarding misuse of his liberty or threatening of any of the witnesses. But in the nature of the present case and the involvement of the

respondent No. 2 in the alleged offence, the impugned bail order is liable to be modified by imposing certain conditions, which are as follows:-

a. the respondent No. 2 is directed to appear before the learned Trial Court on each and every day fixed for hearing,

b. the respondent No. 2 will not approach the victim or other witnesses relating to the case or their relatives till disposal of the case, and

c. the respondent No. 2 shall not leave the territorial jurisdiction of the learned Trial Court without his/her prior permission.

Subject to these conditions, the order passed on regular bail during trial shall continue. In case of any violation of the abovementioned conditions, the petitioner shall be entitled to file an application for cancellation of bail.

21. In the result, the criminal petition is dismissed and disposed of accordingly.

JUDGE

Comparing Assistant