

GAHC010218502022



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

Case No. : AB/3177/2022

SIRAJUL ISLAM @ SIRAJUL HAQUE
S/O- MD. HAJARAT ALI, R/O- NEKERAHABI, P.S. MAYANG, DIST.-
MORIGAON, ASSAM, PH- 9577748268

VERSUS

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

Advocate for the Petitioner : MR D MEDHI

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY

ORDER

03.01.2023

Heard Mr. B. Ali Sk., 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. Sirajul Islam @ Sirajul Haque has approached this Court seeking the benefit of

pre-arrest bail, apprehending his arrest, in connection with P.R. Case no. 1666/2020, which has arisen out of Mayang Police Station Case no. 435/2018, registered under Section 376, Indian Penal Code [IPC].

3. The First Information Report [FIR] was lodged by the informant, on 20.10.2018, before the Officer In-Charge, Morigaon Police Station. On receipt of the FIR, the case had been registered for the offence under Section 376, IPC. After completion of investigation in connection with Mayang Police Station Case no. 435/2018, the Investigating Officer [I.O.] of the case had submitted a charge sheet under Section 173[2], CrPC being Charge Sheet no. 42/2019 dated 30.04.2019 finding a *prima facie* case against the petitioner for committing the offence under Section 376, IPC. On submission of the charge sheet, the case has been registered as P.R. Case no. 1666/2020 and the same is presently pending before the Court of learned Chief Judicial Magistrate, Morigaon. In the charge sheet, the I.O. of the case has shown the petitioner as an absconder.

4. For consideration of the prayer for pre-arrest bail under Section 438, CrPC, the scanned copies of the case records of P.R. Case no. 1666/2020 and the case diary were called for by order dated 01.11.2022. As the case record of P.R. Case no. 1666/2020 and the case diary of Mayang Police Station Case no. 435/2018 have been received, the instant application is taken up for consideration with the perusal of the materials available therein.

5. In the FIR, the informant had stated that her marriage was initially solemnized with Md. Atab Uddin about 13 years earlier and she is a mother of two children. The informant had alleged that at around 11-00 a.m. on 05.10.2018, she was on her way to Jhargaon Hospital for her treatment. At that point of time, the petitioner met her at Buraburi Baazar and took her as a pillion rider in his motorcycle by stating that he would also go to Jhargaon. When they were so proceeding, the petitioner had suddenly stopped the motorcycle near Buraburi Hill and took her forcefully to an abandoned house by stating that the petitioner would drink water there. After reaching the house, the petitioner had allegedly committed forceful rape on her by putting a dagger at her neck.

6. In the course of investigation, the informant was medically examined on 23.10.2018 at Morigaon Civil Hospital after institution of the FIR by the informant on 22.10.2018 in respect of the alleged incident of alleged rape occurred on 05.10.2018. At the Morigaon Civil Hospital, the informant disclosed her age as 29 years. After medical examination, the Medical and Health Officer, Morigaon Civil Hospital reported that the age of the informant is about 25 years and there was no evidence of recent sexual intercourse. It was reported that there was no violent mark in her body and private parts. When the informant was asked for vaginal smear examination, she refused to do so. The informant stated her age as 29 years.

7. In the course of investigation, the statement of the informant was recorded under Section 161, CrPC. In her statement, the victim reiterated the version made in the FIR. She further stated that the petitioner by taking her inside the house, closed the door of the house and thereafter, by gagging her mouth and by putting a knife at her neck, committed rape on her. When she raised hue and cry, one Ainal Hoque, came to the place of occurrence and saw the petitioner committing sexual act within her and then, the petitioner fled from the scene. The statement of Ainal Hoque has been recorded under Section 161, CrPC who is a resident of Burabnuri Hills. In his statement, Ainal Hoque has stated that at around 11-00 p.m. on 05.10.2018, he saw a man and a woman going inside an abandoned house near the hillside. When he went near the house he saw both of them indulging into sexual act. Having seen him, the petitioner went out of the house. Ainal Hoque has further stated that there was no hue and cry from the informant. The statements of other two witnesses, who reside near the house where the alleged sexual act was committed, have also been recorded under Section 161, CrPC and the said two witnesses has corroborated the version given by Ainal Hoque. Both the witnesses have stated that having heard voices, they went near the house and found the petitioner and the informant indulging into sexual act. When they confronted the informant, the informant had stated before them that the petitioner had committed forceful sexual act upon her. Both the witnesses have also stated that there was no hue and cry from the informant. In the above fact situation emerging from the scanned copies of case record of P.R. Case no. 1666/2020 and the case diary of Mayang Police Station Case no. 435/2018, this Court is of the considered view that the petitioner has made out a case for extension of the benefit of pre-arrest bail under Section 438, CrPC.

8. There is no restriction in regard to exercise with regard to exercise of the power under Section 438, CrPC in an appropriate case by the Court of Sessions, High Court or the Supreme Court even when the cognizance is taken or charge sheet is filed. The object of [Section 438](#), CrPC is to prevent undue harassment of the accused persons by pre-trial arrest and detention. It is settled that the fact that a Court has either taken cognizance of the offences or the investigating agency has filed a charge sheet does not by itself prevent the Court from granting the benefit of pre-arrest bail in an appropriate case.

9. As the petitioner has not yet been declared as a proclaimed offender by the Court of learned Chief Judicial Magistrate, Morigaon, where the case, that is, P.R. Case 1666/2020 is pending, it is provided, that in the event of arrest of the petitioner viz. Sirajul Islam @ Sirajul Haque in connection with P.R. Case no. 1666/2020 arising out of Mayang Police Station Case no. 435/2018, he shall be released on bail on furnishing a bail bond of Rs. 50,000/- with one local surety of the like amount, to the satisfaction of the arresting authority.

10. As the case, that is, P.R. Case no. 1666/2020 is pending for trial, and / or commitment before the Court of learned Chief Judicial Magistrate, Morigaon as on date, the petitioner shall appear before the said Court on the next date of listing fixed by the said Court, without fail. Upon his appearance, the petitioner is at liberty to prefer an application for regular bail and in the event such an application is filed by the petitioner, the learned Chief Judicial Magistrate, Morigaon shall consider the same in accordance with law, more particularly, by taking into consideration the provisions contained in Section 209[b], CrPC r/w Section 437, CrPC.

JUDGE

Comparing Assistant