

GAHC040000062024



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

Case No. : BA/1/2024

Indra Daimari
S/o Late Chandra Daimari,
resident of village Kamarsubri,
PO Sirajuli, PS Dhekiajuli,
Sonitpur District, Assam

VERSUS

The State of AP and Anr
represented by the PP of AP

Advocate for the Petitioner : Adam Tatak

Advocate for the Respondent : P P of AP

BEFORE
HON'BLE MR. JUSTICE KARDAK ETE
ORDER

10.06.2024.

Heard Mr. A. Tatak, learned counsel for the petitioner. Also heard Ms. L. Hage, learned Addl. P.P., Arunachal Pradesh.

2. Considering the issue raised by the learned counsel for the parties with regard to the presence of the informant or any person authorized by him shall

be obligatory at the time of hearing of application for bail to the accused as provided under Section 439 (1A) of the Cr.P.C., 1973, I deem it appropriate to consider the same before taking up the Bail Application on merit.

3. Mr. A. Tatak, learned counsel for the petitioner submits that the victim is not mandatorily required to be heard in view of the unambiguous provision of Section 439 (1A) of the Cr.P.C. as the accused has been charged under section 376(2) of IPC and the presence of the informant or the victim or any person authorized shall be obligatory if an accused is charged under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of IPC, 1860. He submits that, in the present case, though the victim is impleaded as respondent No. 2, due to failure of service of notice upon the respondent No.2, despite all out efforts, the bail application has been pending for consideration since 05.01.2024, which has deprived the accused of consideration of his bail application, who is languishing in jail since 15.09.2023, for last 268 days. Therefore, he submits that the bail petition may be heard in the absence of the victim as the presence of victim or informant is not mandatory.

4. On the other hand, Ms. L. Hage, learned Addl. P.P., Arunachal Pradesh, while relying upon the judgment of the Hon'ble Supreme Court in the case of **Jagjeet Singh and others vs. Ashish Mishra @ Monu and another**, reported in (2022) 9 SCC 321, submits that the Hon'ble Supreme Court has held that in every Criminal Proceedings including the bail application, the victim has a legally vested right to be heard and for that victim is to be impleaded as a party/respondent and the presence of the victim and hearing is mandatory. In terms of the provision of Section 439 (1A) of the Cr.P.C. the presence of the informant or any person authorized by him shall be obligatory at the time of hearing of application for bail to the accused. She further submits that the

victim's right to be heard is mandatory in the bail application under Section 439 of the Cr.P.C. According to her, apart from Section 439 (1A) of the Cr.P.C., if the offence is punishable with more than 7 (seven) years, the victim is to be impleaded as party respondent and her presence is mandatory.

5. Section 439 (1A) of the Cr.P.C. provides that the presence of the informant or any person authorized by him shall be obligatory at the time of hearing of application for bail to the accused under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of IPC, 1860.

6. On bare reading of the above provision, it is clear that the presence of the informant or any person authorized by him is obligatory during the time of hearing of the bail application to a person under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the IPC, 1860.

7. In the present matter, the victim is arrayed as party respondent No.2. However, notice could not be served to the victim despite steps by the applicant as well as through the Public Prosecutor. The charges against the accused are under sections 376(2)(g)/363/506/34 of IPC.

8. In the case of **Jagjeet Singh (Supra)**, the Hon'ble Supreme Court has accorded specific recognition to the rights of a victim and held that the victim has legally vested right to be heard at every step post the occurrence of an offence and have the unbridled participatory rights in the legal proceedings including bail application.

9. The Hon'ble Division Bench of this Court, in the case of **Dipak Nayak vs. State of Assam**, in **CRL.A (J)/40/2022** has directed that in every Bail Application/ Criminal Appeal /Criminal Revision/ Criminal Petition arising from cases involving offences under the POCSO Act and those covered by Section 439 (1A) Cr.P.C.,

directs for impleadment of the victim/guardian/support person, as the case may be.

10. On consideration of the submissions and perusal of the above judgment of Hon'ble Supreme Court and the order of Division Bench of this Court, coupled with the provision Section 439 (1A) Cr.P.C., this Court is of the considered view that impleadment of the victim or informant in all the cases, except the offence involving under the POCSO Act and those covered by Section 439(1A) of the Cr.P.C., appears to be not obligatory. However, it would not mean that the victim has no right to be heard if she or her authorized person is willing to participate in the proceeding. The victim has a legally vested right and has unbridled participatory rights. In my view neither the Statute provides impleadment of victim as a party respondent nor the judgement in **Jagjeet Singh** (Supra), and **Dipak Nayak** (Supra) directs impleadment of victim as a party except the offences involving under the POCSO Act and those covered by Section 439(1A) of the Cr.P.C. It only provides that the victim has legally vested right to be heard at every step post the occurrence of an offence and have the unbridled participatory rights in the legal proceedings including bail application.

11. In the present case, though the victim has been impleaded as party/respondent No.2 and the steps for service has been taken by the applicant as well as through learned Public Prosecution, notice has not been affected. The offences charged against the accused in the present case is under Section 363/376(2)(g)/506/34 of the IPC.

12. Having considered the above, since the offences charged against the accused does not involved offences mentioned under Section 439(1A) of the Cr.P.C., in my view, the presence or hearing of the victim is not obligatory in the facts and circumstances of the present case.

13. Now, this Court would proceed to consider the bail application of the petitioner on its merit.

14. The prosecution story, in brief, is that on dated 15.09.23 at 0500 hrs a written FIR was received from one shri Ram Pandu, Vill-Narayanpur Bagan (Roshni Company), P.O./P.S. Dhekiajuli Distt- Sonitpur, to the effect that on 14.09.23, at around 0800 hrs he boarded in a LPG truck bearing Regn. No.AS-25 BC-6629 from Hotel Samphung alongwith his wife Mrs Rinki Pandu and 6 years Old son after paying Rs 500 to the driver namely Shivas to go to his native village at Assam. The driver (Shivash) was an acquaint of the complainant as Shivash used to visit the hotel where the complainant and his wife was working since last four months. The driver stopped the vehicle several times in hotel and took alcohol and they were getting delayed. The complainant asked Shivash to return back his Rs.500/- as the family were facing problems but instead was threatened. Having no option left, from a hotel at 900 mile the complainant left on foot with his wife and son. When they reached Sukha Nala area after half an hour foot march, Shivash and the handyman followed them by vehicle and asked them to board in the truck. As soon as the complainant's wife boarded the truck the handyman closed the door and sped away leaving the complainant and his six years son. After sometime a Bolero Pick-up came in which he boarded and chased the accused. He found his wife near the road side and when enquired his wife replied that she has been raped by the driver and after sexual assault his wife was thrown on the roadside and fled towards Assam.

15. On received of the FIR, the Balemu P.S. Case No.7/2023 was registered under Sections 363/376(g)/506/34 of the IPC.

16. Accordingly, Assam police was contacted and the suspected vehicle was intercepted by Lalpani Police Outpost personnel. On identified by the

complainant the accused/driver Shri Shivash Daimari and Shri Dipul Boro (handyman) were arrested on 15.09.2023 and since then the accused is in jail. The charge sheet has been filed on 06.12.2023.

17. The victim and the complainant was examined thoroughly and forwarded to Primary Health Centre for medical examination and collection of biological sample and foreign material.

18. The truck involved was seized and thorough search of the cabin was made where the victim has been sexually assaulted as per the statement. During the search one sword (Bodo dao) measuring 29 inches with handle and scabbard and a mobile phone was recovered and seized.

19. The trial of the case is at the stage of evidence of prosecution witnesses and as of now only two prosecution witnesses, out of 7 (seven) have been examined.

20. Mr. A. Tatak, learned counsel for the applicant, submits that since the investigation has been completed and the charge sheet has already been laid and the trial has started, there is no requirement of further detention of the accused in jail, as no custodial interrogation is required. He further submits that the accused in jail for last 268 days and there is no chance of hampering or tampering with the evidence and threat the prosecution witnesses. Therefore, considering the long detention of 268 days and to provide an opportunity to the accused to prepare his defence, he may be released on bail in any condition (s), as imposed by this Court.

21. On the other hand, Ms. L. Hage, learned Addl. P.P., Arunachal Pradesh, while vehemently opposing the prayer for bail, submits that since the offence involved is serious in nature, particularly Section 376(2)(g) of the Indian Penal

Code, at this stage the accused is not entitled to be released on bail, as the trial at the initial stage and there is likelihood of tampering with the evidence. She further submits that the victim and the informant had changed their location of residence and that could be a reason that the victim and the informant are not participating in the trial. As such, she submits that at this stage the accused may not be released on bail.

22. I have considered the submissions of learned counsel for the parties and perused the record.

23. On the perusal of the record, it is noticed that the victim has clearly stated that inside the moving truck, the accused person threatened to kill her by showing a machete (dao) and forcefully undressed her cloths and sexually assaulted her and thereafter pushed her from the moving truck, resultantly she had sustained serious injuries.

24. The condition laid down under section 437 (1)(i) of CR.PC is sine qua non for granting bail. It is well settled that the matters to be considered in an application for bail are whether there is any prima facie or reasonable ground to believe that the accused had committed the offence, nature and gravity of charge, severity of punishment in the event of conviction, danger of accused absconding or fleeing if released on bail, character, behavior, means and standing of the accused, likelihood of offence being repeated and reasonable apprehension of the witnesses being influenced.

25. In the case in hand, it involves a serious criminal offence of rape. The nature of accusations against the accused and the manner in which the crime has been alleged to have been committed and the role attributed to the accused is are glaring and serious. That apart, only 2 (two) prosecution witnesses have

been examined out of 7 (seven) prosecution witnesses. The accused is not the local resident. The victim and the informant are from very poor family and now their whereabouts are yet to be ascertained as they have said to have shifted from the earlier place of residence.

26. The accused was arrested on 15.09.2023 and since then he is in jail for 268 days. It is true that the long incarceration and prolong period in trial are some of the factors which the court requires to consider while considering application for bail to the accused. However, other equally important factors like prima facie or reasonable ground to believe that the accused had committed the offence, nature and gravity of charge, severity of punishment in the event of conviction, danger of accused absconding or fleeing if released on bail, character, behavior, means and standing of the accused, likelihood of offence being repeated and reasonable apprehension of the witnesses being influenced are also to be considered.

27. In the present case, record reveals the nature of accusations against the accused and the manner in which the crime alleged to have been committed and the role attributed to the accused being glaring and serious. Therefore, in my considered view, the accused is not entitled to be released on bail at this stage.

28. Considering the seriousness of the offence and the materials available against the accused and having considered the alleged monstrous act attributed to the accused, I am of the view that the accused does not deserve to be released on bail.

29. In view of the above, this court is not inclined to grant bail to the accused.

30. Bail application stands rejected, accordingly.

31. It is made clear that any observation made herein above shall not be construed to be an expression of opinion on the merits of the case.

JUDGE

Comparing Assistant