

GAHC010223652024



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

Case No. : AB/2884/2024

ABDUL RAHIM
S/O LATE GULAM ALI, MACHAKHOWA, JALUGUTI, P.S.-MORIGAON, PIN-
782104, DIST-MORIGAON, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:RUNUWARA BEGUM
W/O HABIBUR RAHMAN
JALUGUTI
JULAGAON
PIN-782104
P.S.-MORIGAON
DIST- MORIGAON
ASSA

Advocate for the Petitioner : SWATI. B. BARUAH (TG), MR I AHMED

Advocate for the Respondent : PP, ASSAM, MS. D SAIKIA, Amicus Curiae, (R-2)

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

17.12.2024

Heard Swati B. Baruah, learned counsel for the petitioner and also heard Mr. K. Baishya, learned Additional Public Prosecutor and also heard Mr. K. Islam on behalf of Ms. D. Saikia, learned Amicus Curiae, appearing for respondent No.2.

2. This is the second pre-arrest bail application filed u/s 438 CrPC by the petitioner, namely, **Abdul Rahim**, seeking pre-arrest bail, who is apprehending arrest in connection with **Morigaon PS Case no. 146/2024 u/s 354/354A IPC r/w Section 10 of the POCSO Act.**

3. The learned counsel for the petitioner has submitted that the petitioner was wrongly implicated in this case without knowing the actual truth and was made a scapegoat to face the dire consequences with a baseless allegation. The real fact is that on 02.09.2021, one Babul Ali, nephew of the informant, while in drunken state started to utter obscene song in front of the shop of one Jeherul Islam, who is the son of the present petitioner. Accordingly, Jeherul brought the same to the notice of the informant and mother of Babul Ali. After the aforesaid incident, the informant and mother of Babul Ali warned Jeherul with dire consequences. On the same day, Jeherul lodged an FIR against the accused persons who were the family members of the respondent no.2 before the Morigaon PS vide Morigaon PS Case no. 573/2021. And later on, the accused persons were acquitted due to lack of evidence.

4. Learned counsel for the petitioner also narrated another incident on the same day i.e. 02.09.2021 in which the said Babul Ali, with his hired goons attacked and assaulted the wife of Jeherul Islam and sister-in-law. Accordingly, another case was registered vide Morigaon PS case no. 577/2021 which is still pending in the Morigaon Court.

5. According to Learned counsel for the petitioner, as those cases have been lodged against the family members of the respondent no.2, this false case has been instituted against the present petitioner for harassing the petitioner and his family members.

6. It is also the submission of Learned counsel for the petitioner that even if it is assumed or presumed that the petitioner was present at the time of the incident, and due to the alleged incident, it is quite natural that a child of 12 years had raised alarm for such misdeeds. But it is interesting to note that no one heard the same and came for the rescue of the victim and the petitioner was succeeded to flee away. It is also added that the informant lodged a complaint after 23 hours of the incident and the delay of the same has not been mentioned anywhere in the FIR and such delay reflects the training sessions for preparing a child to be used as a scapegoat for the complaint.

7. By referring the judgment of Manish Sisodiya v. Directorate of Enforcement, reported in 2024 INSC 595, the Ld. Counsel for the petitioner has pointed out that the Hon'ble Supreme Court has stated in the judgment that bail is the rule and jail is the exception, which is reproduced as follows: (51-53)

“51. Recently this court had an occasion to consider an application for bail in the case of Javed Gulam Nabi Sheikh v. State of Maharashtra and Another wherein the accused was prosecuted under the provisions of the Unlawful Activities (Prevention) Act, 1967. This court surveyed the entire law right from the judgment of this Court in the cases of Gudikanti Narsimhulu and Others v. Public Prosecutor, High Court of Andhra Pradesh, Shri Gurbaksh Singh Sibbia and Others v. State of Punjab, Hussainara Khatoon and Others (I) v. Home Secretary, State of Bihar, Union of India v. K.A. Najeeb and Satender Kumar Antil v. Central Bureau of Investigation and Another. The Court observed thus:

“19. If the state or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right

of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime”.

“53. The court further observes that, over a period of time, the trial courts and the High Courts have forgotten a very well settled principle of law that bail is not be withheld as a punishment. From our experience, we can say that, it appears that, the Trial courts and High Courts attempts to play safe in matter of grant of bail. The Principle that, bail is a rule and refusal is an exception is, at times followed in breach. On account of non-grant of bail even in straight forward open and shut cases, this Court is flooded with huge number of bail petitions thereby adding to the huge pendency. It is high time that the trial courts and the High Courts should recognize the principle that "bail is rule and jail is exception”.

8. In response, Learned Additional Public Prosecutor has vehemently opposed in granting bail to the petitioner by stating that an earlier bail application, the petitioner took the plea that as the land dispute is prevailing between the petitioner and the informant's family as a result of which this false case has been instituted against the petitioner to harass him. But in this bail application, the Ld. Counsel for the petitioner has changed the earlier plea by stating that as some cases has been instituted against the informant and his family members, the respondent no.2 has brought the present case against the petitioner by way of bringing false allegation. Ld. Addl. PP further submits that there are sufficient incriminating materials against the petitioner for committing the offence of sexual assault towards the victim who is a minor girl and as such he has prayed for dismissal of the bail application.

9. Ld. Counsel representing the respondent no.2 also has argued in the same tune by stating that the victim is a minor girl aged about 12 years and she has been sexually abused by the petitioner. As such the benefit of pre-arrest bail may not be extended to him.

10. Having heard the learned counsel for both the parties, it is not in dispute that the victim is a minor girl. The investigating officer collected the birth certificate of the victim which shows that the victim is around 12 years of age on the date of incident. The statement of the victim recorded u/s 164 CrPC (S 183 BNSS) shows that on the date of incident the accused petitioner came to her residence in absence of her parents and one of the witness whose statement was recorded u/s 161 CrPC stated that she noticed the accused petitioner entering into the house of the victim. As per statement of the victim, she has been sexually abused by the petitioner.

11. Coming to the question of delay in lodging the FIR, mere delay is not a factor to disbelieve the prosecution case. In Joy v. State of Kerala (2019) Vol. 1(1) KLT 935, it has been held that mere delay in reporting the matter to the authorities concerned specially sexual assault on a minor girl is immaterial and it would not be fatal to the prosecution case.

12. In the case of ***Sumitha Pradip v. Arun Kumar C.K*** reported in ***criminal appeal no. 1834/2022*** wherein the Hon'ble Supreme Court observed that while granting anticipatory bail to the accused no.1 (original accused) in para 9 of the impugned order, which has really disturbed us. Para 9 reads thus,

“With the above principle in mind, when the facts of the case are noticed, it is revealed that the petitioner is the maternal uncle of the victim to whose house the victim went in December, 2021. On 14.12.2021, the victim is alleged to have been asked to sit on the lap of the petitioner, who thereafter is alleged to have hugged and kissed the victim on her cheeks. Though on the one side, there is a possibility of such hugs and kisses being manifestations of affection by an uncle, one cannot ignore the possibility of such show of ‘affections’ being coloured by sexual overtones. However, those are all matters for investigation”.

13. Hon'ble Supreme Court opined that :-

“In our considered opinion, the observations made in Para 9 of the impugned order are totally unwarranted and have been made overlooking the specific allegations contained in the FIR, duly supported with the statement of the victim-girl child u/s 164 of the Code.

In a case containing such serious allegations the High Court ought not to have exercised its jurisdiction in granting protection against arrest, as the Investigating Officer deserves freehand to take the investigation to its logical conclusion. It goes without saying that appearance before the Investigating Officer who has been prevented from subjecting Respondent no.1 to custodial interrogation, can hardly be fruitful to find out the prima facie substance in the allegations, which are of extreme serious in nature.

Be that as it may, even assuming it a case where Respondent no.1 is not required for custodial interrogation, we are satisfied that the high court ought not to have granted discretionary relief of anticipatory bail.

We are dealing with a matter wherein the original complainant (appellant herein) has come before this court praying that the anticipatory bail granted by the High Court to the accused should be cancelled. To put it in other words, the complainant says that the High Court wrongly exercised its discretion while granting anticipatory bail to the accused in a very serious crime like POCSO and, therefore, the order passed by the High Court granting anticipatory bail to the accused should be quashed and set aside.”

14. In the case in hand, the petitioner has preferred this second bail application but no such new ground has been shown. It is well settled by Hon'ble Supreme Court in catena of decisions that subsequent bail application is maintainable only when there is change of circumstances in favour of the accused. Reference in this context can be made to a decision in State of TN v. S. A. Raja reported in 2005 Vol. 8 SCC 380. Here in this case, admittedly, Ld. Counsel for the petitioner took the plea of institution of false case against the family members of the informant/respondent No.2. Though in earlier bail application, the petitioner took the plea that land dispute is prevailing between

the petitioner and the informant's family and as such a false case has been instituted which appears to be not acceptable.

15. Under the facts and circumstances of the case, this court is of the view that it is not a fit case to grant the privilege of pre-arrest bail to the petitioner. In the result, the bail application stands dismissed and disposed of accordingly.

16. The Case diary be sent back.

JUDGE

Comparing Assistant