Serial No. 01 & 02
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

AB. No. 7 of 2020 with
AB. No. 8 of 2020

Date of Decision: 30.06.2020

Shri. Daniel Khongsit Vs. State of Meghalaya & Ors.
Shri. D. Donstan Khonglah Vs. State of Meghalaya & Ors.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

In AB. No. 7 of 2020

Appearance:

For the Petitioner/Appellant(s) : Dr. N. Mozika, Sr. Adv. with
Mr. J. Shylla, Adv.
For the Respondent(s) : Mr. S. Sengupta, Addl. Sr. GA.

In AB. No. 8 of 2020

Appearance:

For the Petitioner/Appellant(s) : Ms. S.K. Nongrum, Adv.
For the Respondent(s) : Mr. H. Abraham, GA

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

1. The anticipatory bail application No. 7 of 2020 has been filed by the petitioner Shri. Daniel Khongsit, who is presently the Headman of Bakur (Dawki) village, West Jaintia Hills District, Meghalaya.

2. The anticipatory bail application No. 8 of 2020 has been filed by the petitioner Shri. D. DonstanKhonglah, who is the Secretary of the Bakur Durbar Shnong, Bakur Village, West Jaintia Hills District, Meghalaya since

May 2019.

3. These two applications have arisen from the same criminal case registered as Dawki P.S. Case No. 63 (06) 2020 under Sections 354/357/341/326/34 IPC, it is therefore considered expedient to take up the same together and a common order be passed.

4. The brief facts of the case which led to the filing of these applications is that on 04.06.2020, the Complainant Smti. Kashmir Dkhar lodged an FIR with the Officer-in-Charge, Dawki P.S to the effect that on 31.05.2020 at about 3.35 PM while she was going out for walk as soon as she reached the road, Smti. Bobby Lamin, Smti. Jennyfer Sumer and Shri. D. DonstanKhonglah (petitioner No. 2) accosted her and started assaulting her. Thereafter, they took her to Khasi Pnar School and again assaulted her and cut her hair with a scissor. Hence, the complaint.

5. The police on receipt of the complaint had registered the same as Dawki P.S. Case No. 63 (06) 2020 and has launched an investigation. Another FIR dated 06.06.2020 was filed by the said Complainant alleging that after recollecting her memory, she remembered that it was Shri. Daniel Khongsit (petitioner No. 1) who ordered to torture her by cutting her hair and beaten her on 31.05.2020 wherein, she also stated that Shri. Daniel Khongsit warned her not to name or file FIR against the other three accused aforementioned. However, two sections i.e. Section 506/109 IPC was added to this FIR.

6. The police on receipt of the second FIR had treated the same as a supplementary FIR and the same was included in the said Dawki P.S. Case No. 63 (06) 2020 for the purpose of investigation.

7. As the name of the petitioner No. 1 Shri. Daniel Khongsit (Headman) appeared in the supplementary FIR dated 06.04.2020, the petitioner No. 1, apprehending arrest, approached the Court of the learned Additional District

& Sessions Judge, Jowai on 09.06.2020 with an application under Section 438 Cr.P.C for grant of pre-arrest bail and the Court was pleased to grant interim bail to the petitioner vide order dated 09.06.2020 with certain conditions. On 08.06.2020, Shri. D. Donstan Khonglah, the petitioner No. 2 herein who is also the Secretary of Bakur Village approached the Court of the learned Additional District & Sessions Judge, Jowai with an application under Section 438 Cr.P.C for grant of pre-arrest bail and the Court was pleased to grant interim bail to the petitioner with certain conditions.

8. On finally hearing the parties, on 15.06.2020 and 16.06.2020 respectively, the learned Additional District & Sessions Judge, Jowai rejected the application under Section 438 Cr.P.C for anticipatory bail, resulting in the petitioners who are highly aggrieved by the impugned orders dated 15.06.2020 and 16.06.2020 to approach this Court for grant of pre-arrest bail in connection with Dawki P.S. Case No. 63 (6) 2020.

9. Dr. N. Mozika, learned Sr. counsel assisted by Mr. J. Shylla, learned counsel appearing on behalf of the petitioner No. 1 has submitted that the petitioner No. 1 is the Headman of Bakur village (Dawki) village, West Jaintia Hills District, Meghalaya and has served the village in different capacity and finally as Headman since the year 2018 with utmost sincerity and dedication. It is also submitted that on 18.04.2020, one Smti. Kashmir Dkhar (the Complainant) of Bakur village broke the lockdown, in view of the COVID-19 pandemic by willfully roaming in the village in a drunken state, wherein she was intervened by the Woman Organization of the village known as Seng Kynthei. In order to ensure peace and tranquility in the village, the petitioner No. 1 Shri. Daniel Khongsit, being the Headman of Bakur village reported the matter to the police and the District Administration. He also submits that on 30.04.2020 the Complainant broke the lockdown by roaming outside her house. She was also suspected to have indulged in cross border fishing trade, wherein the petitioner No. 1 (Shri. Daniel Khongsit) reported the matter to the police of Dawki P.S and she was

taken to the Thana. Thereafter, in consultation with the Nodal officer, the Officer-in-Charge of Dawki P.S, the doctor of Dawki PHC, Shri. D. Donstan Khonglah, the petitioner No. 2 who is also the Secretary of Bakur Village and a woman representative decided to keep the Complainant for quarantine at the Community Quarantine Centre at Bakur Village. However, on the last day of the quarantine i.e. 14 days, it came to the notice of the volunteers over phone that the Complainant is threatening the leaders of the village so as to settle scores with them.

10. The learned Sr. counsel has further submitted that the Complainant has lodged the two FIR's only as an act of revenge against the action of the petitioners herein, which can be seen from the date on which the first FIR was filed i.e. 04.06.2020 five days after the alleged incident of assault took place when the police station was located only about 700 metres from the place of occurrence and just a few metres from the house of the Complainant.

11. The learned Sr. counsel has again submitted that the petitioner No. 1 being a respectable member of the community and the Headman of the village if arrested, would cause ignominy, humiliation, disgrace and mental harassment to him and his family members, which will affect his reputation and social understanding.

12. Expressing strong apprehension of arrest in connection with the said Dawki P.S. No. 63 (06) 2020, the petitioner No. 1 has approached this Court with this instant application seeking pre-arrest bail with an undertaking that he will abide with any condition to be imposed by this Court.

13. Ms. S.K. Nongrum, learned counsel appearing on behalf of the petitioner No. 2, Shri. D. Donstan Khonglah has submitted that the complaint filed by the Complainant against the petitioner No. 2 is false and fabricated and the registration of the case particularly under Sections 354 and 326 IPC would show that there are no ingredients necessitating

incorporation of the said sections of law.

14. Learned counsel for the petitioner No. 2 has gone on to submit that the ingredients of Section 320 IPC where the definition of grievous hurt has been laid down is not found in the records of the said Dawki P.S. case aforementioned and as such, the ingredients of Sections 354 and 326 IPC are not attracted as far as the case of the Complainant is concerned. The petitioner No. 2 has been unnecessarily harassed and made to lose face in the society greatly impairing his reputation and standing, and if arrested, great injustice would be caused to him. Hence, there being a reasonable apprehension of being arrested in the said Dawki P.S. Case, particularly after a similar application has been rejected by the Court of the learned Additional District and Sessions Judge, Jowai, the petitioner No. 2 has approached this Court with this instant application.

15. It is prayed that the petitioner No. 2 may be granted pre-arrest bail with any condition to be imposed by this Court to which he undertakes to comply with the same.

16. Mr. S. Sengupta, learned Addl. P.P for the State respondents in his counter has submitted that the status report filed by the I/O of the case would show that the accused/petitioners herein are evading police arrest and since recording of statement of vital witnesses in the case is still pending, the witnesses may be tampered by the petitioners if they are enlarged on bail.

17. I have heard the submission and contention of the learned counsels for the petitioners as well as the reply by the learned Addl. P.P and I have also perused the case diary including the status report referred to by the learned Addl. P.P.

18. Before adverting to the facts and circumstances of the said Dawki P.S case, it would be profitable to briefly delve on the aspect and statutory relevance of Section 438 Cr.P.C. The said section reads as follows:

"438. Direction for grant of bail to person apprehending arrest. – *(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-*

i) the nature and gravity of the accusation;

ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii) the possibility of the applicant to flee from justice; and.

iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including –

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

[(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA and section 376DB of the Indian Penal Code (45 of 1860).]"

19. A five Judge Bench of the Hon'ble Supreme Court has expounded the principle of anticipatory bail in the now famous case of ***Shri. Gurbaksh Singh Sibbia & Ors. v. State of Punjab: (1980) 2 SCC 565*** which has been consistently followed by the Apex Court itself and many High Courts in subsequent pronouncements while dealing with the subject.

20. At paragraph 7 of the abovementioned case, the Court while explaining the purport of Section 438 Cr.P.C has held that:

> ***"7.*** *The facility which Section 438 affords is generally referred to as 'anticipatory bail', an expression which was used by the Law Commission in its 41st Report. Neither the section nor its marginal note so describes it but, the expression 'anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest……The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued…"*

21. In further explanation of the scope and ambit of anticipatory bail, the Hon'ble Supreme Court in the case of ***Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors: (2011) 1 SCC 694***, referring to the authority of the ***Shri. Gurbaksh Singh Sibbia*** case, has, at paragraph 109 held as follows:

> ***"109.*** *A good deal of misunderstanding with regard to the ambit and scope of Section 438 CrPC could have been avoided in case the Constitution Bench decision of this Court in Sibbia case 1980 SCC (Cri) 465, was correctly understood, appreciated and applied. This Court in Sibbia case 1980 SCC (Cri) 465, laid down the following principles with regard to anticipatory bail:*
>
> *(a) Section 438(1) is to be interpreted in the light of Article 21 of the Constitution of India.*
>
> *(b) Filing of FIR is not a condition precedent to exercise of power under Section 438.*
>
> *(c) Order under Section 438 would not affect the right of police to conduct investigation.*
>
> *(d) Conditions mentioned in Section 437 cannot be read into Section 438.*
>
> *(e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are discretionary to be exercised in light of the circumstances of each case.*
>
> *(f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such ad interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant".*

22. An extract of paragraph 12 of the ***Gurbaksh Singh Sibbia case*** would show that it has been held that the power to grant anticipatory bail is a discretionary power, which the legislature has conferred on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand

in the grant of relief in the nature of anticipatory bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Sub-section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail….."

In paragraph 21 of the same, the Court has further held that *"... A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail…"*

23. Again, in the said case of ***Siddharam Satlingappa Mhetre (supra)*** the Apex Court on the point of relevant consideration for exercise of the power in paragraphs 111 and 112 of the judgment has held that:

> ***"111.*** *No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia case 1980 SCC (Cri) 465, that the High Court or the Court of Session has to exercise their jurisdiction under Section 438 CrPC by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour".*
>
> ***"112.*** *The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:*

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;

(viii)While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail".

24. Viewed in the light of the above authorities, the facts of the case would show that the petitioner No. 1 was allegedly present on the day of the incident when the Complainant was assaulted and had her head shaved. In fact, as the Headman of the village, he was said to be responsible for giving the order for the said assault and tonsure. The petitioner No. 2 who is also

the Secretary of the village was also allegedly present and also took part in the assault of the Complainant along with the other co-accused, Smti. Bobby Lamin and Smti. Jennyfer Sumer.

25. The medical report would show that the Complainant/victim was found with multiple sign of injuries at shoulder (right and left), on lower limb and lower back with head being shaved and no alcohol intake. This would show that something must have happened to the Complainant, which would only corroborate the actual happenstance of the incident reported.

26. Prima facie, it appears that the petitioners herein are involved in the incident and being responsible persons and leaders of the community, instead of referring the matter to the police, had taken part in an unlawful act to the detriment of the Complainant.

27. Peculiar to the society in this part of the country, including the place of occurrence, the shaving of one's head as a form of punishment or public reprimand has a deep rooted implication leading to a form of ostracization and a symbol before the community of bearing an immoral character. In the case in hand, the Complainant who have been subjected to such a treatment has to bear the shame of such an action inflicted on her. Thus, her modesty has been outraged by such act.

28. It is also seen from the report of the I/O that the Complainant because of the fear of reprisal by the accused person was shifted to the shelter home for women at Swadhar Greh, Umshing, Mawlai Mawroh, Shillong, which is very far from her village, which implicitly indicates that she is not safe in her own village, while some of the accused persons are at large.

29. As to the contention and submission of the learned Sr. counsel for the petitioner No 1, I find that the I/O has not filed any report to substantiate the allegations made against the Complainant, which if found to be correct would by itself require a separate police proceedings and this Court finds no

co-relation with the complaint made against the petitioners herein in the said Dawki P.S. Case No 63 (06) 2020.

30. In the context of the facts and circumstances of the case and the discretionary powers vested on this Court, I find that the petitioners herein have not been able to make out a case for grant of anticipatory bail.

31. In the event, the applications for grant of anticipatory bail are hereby rejected.

32. The interim order passed by this Court in its earlier order stands vacated.

33. Registry is directed to return the C.D to the learned Addl. P.P.

34. Matter stands disposed of by this common order. No cost.

Judge

Meghalaya
30.06.2020
"D. Nary, PS"