

03.01.2024
tkm/ct 28
sl no. 80

C.R.M. (DB) 1856 of 2023

In Re : An application for cancellation of bail under section 439 (2) of the Code of Criminal Procedure

And

In Re : Soni Khatun

..... petitioner

Ms. Aiswarjya Gupta

Mr. K Roy

Ms. Priyanka Saha

..... for the petitioner

Ms. Z N Khan

Mr. Arup Sarkar

..... for the State

Mr. Pratip Kr. Chatterjee

..... for OP Nos. 2 to 6

1. Affidavit-in-opposition is placed on record.
2. Petitioner is the victim lady. She has assailed order dated 24.2.2023 granting bail to opposite party nos. 2 to 6 herein.
3. Learned lawyer for the victim contends that the offence involves gang rape which attracts life imprisonment. Hence the magistrate ought not to have granted bail in view of the bar under section 437 Cr.P.C.
4. It is also contended that the magistrate enlarged opposite parties-accused on bail at a nascent stage of investigation merely after three days of detention. It is also argued that the magistrate prejudged the issues and made unnecessary adverse observations with regard to the prosecution case. Accordingly, she prays for cancellation of bail.
5. On the other hand learned lawyer for the opposite parties-accused contends the magistrate had considered the contradictions and/or embellishment in the versions of the

victim and the complainant during investigation. Victim had refused medical examination. There was prior enmity between the parties and the allegation of gang rape was patently absurd. Accordingly, the court had granted bail.

6. Learned lawyer for the State produces the case diary.
7. We have considered the materials on record. Bail granted by the magistrate has been *inter alia* challenged on a jurisdictional issue i.e. the magistrate lacked jurisdiction to grant bail in a case involving gang rape which attracts life imprisonment.
8. Subsection (i) to section 437 Cr.P.C imposes an embargo on the magistrate to grant bail in cases where there are reasonable grounds for believing that the accused is guilty of offence punishable with death or imprisonment for life.
9. Learned lawyer for opposite parties-accused would argue that the magistrate found allegations to be patently absurd and inherently improbable and hence there was no reasonable ground to believe that the accused were guilty of gang rape. In doing so, the magistrate had noted the contradictions in the statement of the victim and the complainant before police under section 161 Cr.P.C and under section 164 Cr.P.C. He has also noted refusal of the victim subjected herself to medical examination. Be that as it may, it is undeniable in the FIR it is alleged that the opposite party no. 2, 3 and 4 had trespassed into the house and committed gang rape. In view of such accusation made in the FIR itself we are of the

opinion the magistrate ought not to have gone into weighing of the materials collected to test the reasonableness of the allegations and grant bail. On this ground alone we are of the view the order granting bail by the magistrate is unsustainable. Accordingly, we set aside the order granting bail to the opposite party nos. 2, 3 and 4 (against whom allegation of gang rape is leveled). However, we take note of the submissions on behalf of the accused that there was prior enmity and delay in lodging FIR. There is also embellishment in the statements of the victim and the complainant which requires to be gone into while testing the credibility of the accusation. Though the magistrate may lack jurisdiction to do so, there is ample power in the sessions judge under section 439 Cr.P.C to examine these issues with adequate scrutiny.

10. Accordingly, we direct accused opposite party nos. 2, 3 and 4 to appear before the sessions judge within fortnight from date and pray for regular bail.
11. In the event they do so, victim shall be notified and the matter shall be disposed of within a fortnight thereof.
12. Keeping in mind the various issues raised before us pertaining to the credibility of the allegation of gang rape particularly the contradictions in the statement of the victim under section 161 Cr.P.C and 164 Cr.P.C we permit the opposite party nos. 2, 3 and 4 to remain on interim bail till disposal of the application for bail before the sessions judge

or two months whichever is earlier. We also make it clear that the sessions judge shall consider the bail application independently and without being swayed by the observations made by the learned magistrate or this court.

13. In the event opposite party nos. 2, 3 and 4 fail and neglect to pray for regular bail within the aforesaid time frame, the interim bail shall immediately cease to operate and they shall be apprehended in accordance with law.

14. Allegations of gang rape have not been leveled against opposite party nos. 5 and 6 herein. It cannot be said that the learned magistrate lack jurisdiction to consider the bail prayer of the said opposite parties-accused. There is prior enmity between two families and the possibility of roping in all the family members cannot be ruled out. Hence, we do not interfere with the bail granted to opposite party nos. 5 and 6 herein.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)