

HIGH COURT OF MEGHALAYA

AB No. 20 of 2014

1. Sri. Benedict M Marak (37 years)
S/o (L) Oren Sangma
R/o Kyrdoh village,
P.O. Hat Mawdon,
P.S. Mawsynram,
Dist: East Khasi Hills, Meghalaya
2. Sri. Clement Ch. Marak (38 years)
S/o (L) E. Sangma,
R/o Umiang village,
P.O. Hat Mawdon,
P.S. Mawsynram,
Dist: East Khasi Hills, Meghalaya

.... Petitioners

- Vrs -

State of Meghalaya

..... Respondent

BEFORE THE HON'BLE MR JUSTICE SR SEN

Advocate for the Petitioners	:	PK Borah
Advocate for the Respondents	:	Mr. ND Chullai Mr. KP Bhattacharjee Mr. GS Massar Mr. BB Narzary Mr. N Mozika Mr. S Dey Ms PS Nongbri
Date of Hearing	:	01.12.2014
Date of Judgment & Order	:	16.12.2014

JUDGMENT & ORDER (Oral)

The question arises in this instant pre-arrest bail application as to whether District Council Court has the power to entertain and redress pre-arrest bail application under Section-438 CrPC.

2. For proper adjudication, notice was issued to all the Districts Council Courts in Meghalaya. In response to the notice of this Court, District Council Courts namely; Khasi Hills

Autonomous District Council (KHADC), Jaintia Hills Autonomous District Council (JHADC) and Garo Hills Autonomous District Council (GHADC) entered appearance through their respective counsel. The State was represented by senior Government Advocate and the matter finally came up for hearing on 01.12.2014.

3. Mr. ND Chullai, learned senior counsel who appeared for on behalf of the State submitted that, District Counsel Court cannot entertain application under Section-438 CrPC. The learned senior further contended that, District Courts are the creation of the Sixth Scheduled of the Constitution of India and they can try only certain offences and not pre-arrest bail and he referred to classes of Courts as defined under CrPC as well as Section-32 and Section-33 CrPC. He also relied on Judgment of the Division Bench, Gauhati High Court reported in **1993 Vol. 2 GLR-99** as well as the Notification dated 10.08.2011.

4. On the other hand, Mr. GS Massar, learned senior counsel and Mr. BB Narzary appeared for on behalf of Khasi Hills Autonomous District Council, (KHADC) submitted that, as per Para-5 of the Sixth Scheduled of the Constitution of India, District Council has the power to try both civil and criminal cases. The learned senior counsel referred to Section-33 CrPC as well as Section-1 CrPC and further argued that District Council Court has the power to try civil suit as well as criminal trial in the administered areas where both parties are tribal. They also argued that, the Division Bench of Gauhati High Court in the case of **State of Meghalaya vrs Judge District Council Court, Shillong** has come to a conclusion that, District Council Court may try session cases as District Council is the creation of Para-4 & 5 of the Sixth Schedule of the Constitution of India.

5. According to the learned senior counsel, District Council Court is not inferior to District & Session Judge and also submitted that Anticipatory Bail under Section-438 CrPC is to be regarded as a part of CrPC, therefore, any Court having session power has the authority to consider the pre-arrest bail application under Section-438 CrPC.

6. In addition to oral submission, a written argument submitted which is on record. Mr. N Mozika, learned counsel appearing for on behalf of Jaintia Hills Autonomous District Council (JHADC), Mr. S Dey, learned counsel appearing for on behalf of Garo Hills Autonomous District Council (GHADC) adopted the submissions advanced by the learned senior counsel for Khasi Hills Autonomous District Council, (KHADC). To support their submissions, they also relied on the following Judgments in the cases of State of ***Nagaland vrs Ratan Singh & Ors reported in AIR 1967 SC 212, Forching Rava & Ors vrs The State reported in AIR 1952 Assam 3 (C.N.3), Jogendra Nath Banthao vrs The State reported in AIR 1962 Assam 62 (V 49 C 16), Sri Kulendra Kumar Dey & Anr. vrs Union Territory of Arunachal Pradesh reported in 1983 1 GLR 23.***

7. After hearing the submissions at length advanced by the learned counsel for the parties as well as written argument placed before this Court, I find that the crux issue involved in this instant case is whether District Council has the power to entertain pre-arrest bail under Section-438 CrPC ? To answer this important question, let me examine first the Code of Criminal Procedure, 1973 (in short CrPC). Section-438 CrPC is reproduced herein below for ready reference:

“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.

(1-A) 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.

(1-B) 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 think fit, including -

(i) a condition that the person shall make himself available for interrogation by a police officer 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).”

8. From the language expressed therein, it is very clear that the power under Section-438 can be exercised either by High Court or Court of Session. Now let me examine how Session Court is established. Chapter-2 Section-6 of the CrPC defined Classes of Criminal Courts, besides High Court they are (i) Court of Session (ii) Judicial Magistrates of the first class and, in any metropolitan areas, Metropolitan magistrate (iii) Judicial Magistrate of the second class and (iv) Executive Magistrates.

9. Session Court is established under Section-9 of the CrPC which is reproduced herein below for ready reference:

“9. Court of Session.

(1) The State Government shall establish a Court of Session for every sessions division.

(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise Jurisdiction in a Court of Session.

(4) The Sessions Judge of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in the other division as the High Court may direct.

(5) Where the office of the Sessions Judge is vacant, the High Court may make arrangements for the disposal of any urgent application which is, or may be, made or pending before such Court of Session by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the sessions divisions; and every such Judge or Magistrate shall have jurisdiction to deal with any such application.

(6) The Court of Sessions shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.

Explanation. For the purposes of this Code, “appointment” does not include the first appointment, posting or promotion of a person by the Government to any Service, or post in connection with the affairs of the Union or of a State, where under any law, such appointment, posting or promotion is required to be made by Government.”

10. On bare perusal of Section-9 of Court of Session, it is clear that the State shall established Court of Session for every session division; however, Court of Session shall be presided over by a Judge to be appointed by the High Court.

11. So on bare perusal of classes of Courts as well as establishment of Session Court and provision of Section-438 CrPC, nowhere it is found that District Council Court is a Session Court.

12. Session Court is established and power conferred by State Government in consultation with High Court and issue of Notification under Section-9 of CrPC.

13. On combine reading of Section-32, Section-33 of the CrPC, I find that it has nothing to do with the power of the District Council to exercise jurisdiction under Section-438 CrPC.

14. I have also perused Notification dated 10.08.2011 issued in the name of the Governor which is reproduced herein below.

**GOVERNMENT OF MEGHALAYA
DISTRICT COUNCIL AFFAIRS DEPARTMENT
Orders by the Governor**

Notification

Dated Shillong, the 10th August, 2011

No. DCA .46/2005/23: In exercise of the power conferred by Rule 9 of the Khasi Hills Autonomous District Council (Administration of Justice) Rules 1953 the Governor of Meghalaya is pleased to approve the appointment of Shri Stralwell Kharsyiemieli as Judge, District Council Court, Shillong.

Further, the Governor of Meghalaya in exercise of the powers conferred by sub-paragraph (1) of paragraph 5 of the Sixth Schedule to the Constitution of India is also pleased to confer on Shri Stralwell Kharsyiemieli, Judge of the District Council Court, Shillong, with the powers to try offences punishable with death, transportation for life or imprisonment for a term of not less than 5 (five) years under the India Penal Code or under any law for the time being applicable in the Khasi Hills Autonomous District Council.

Sd/-

(F. Kharlyngdoh)

**Secretary to the Govt. of Meghalaya
District Council Affairs Department**

M. DCA.46/2005/23-A Dated Shillong, the 10th August, 2011

Copy forwarded to:-

1.The Secretary , Executive Committee, Khasi Hills Autonomous District Council, Shillong with reference to his letter No. DC. 1/617/88-2011/86/607, Dt. 1.7.2011.

2. The Registrar, Guwahati High Court, Guwahati,

3.The Advocate General, Meghalaya, Guwahati High Court, Guwahati

- 4.The Deputy Commissioner, East Khasi Hills District, Shillong**
5.The Deputy Commissioner, West Khasi Hills District, Nongstoin
6. The Deputy Commissioner, Ri-Bhoi District, Nongpoh
7.The Law (B) Department
8. Shri Strawell Kharsyiemlieh, Additional District Council Court, Shillong
9.The Director, Printing & Stationery for publication in the next issue of the Gazette and supply 50 copies of the printed Notification to this Department and also 50 copies to the Secretary, Executive Committee, Khasi Hills Autonomous District Council Shillong.

By Order etc.

Sd/-

**Under Secretary to the Govt. of Meghalaya
District Council Affairs Department”**

15. On bare perusal of the above Notification it is clear that, Notification has been issued under Rule-9 of the United Khasi-Jaintia Hills Autonomous District (Administration of Justice) Rules, 1953 to appoint Judge of District Council and further conferred power under Sub-para (1) of Para-5 of the Sixth Schedule Constitution of India and empowered the said officer to try offences punishable with death, transportation for life, or imprisonment for a term of not less than five years under IPC. Here it is very clear that, Session Court is the creation under Section-9 of the CrPC whereas Judge District Council is the creation of Rule-9 of the United Khasi-Jaintia Hills Autonomous District (Administration of Justice) Rules, 1953 and power given under Sub-para (1) of Para-5. On minute reading of the said Notification, it is clear that Judge District Council has been given the power to try certain offences and he has not been given Session power as required under CrPC. So from that angle also, Court of District Council has no authority to entertain pre-arrest bail under Section-438 CrPC. We must remember that, trail and granting pre-arrest bail are two different things.

16. I have carefully gone through Para-5 of the Sixth Schedule of the Constitution of India wherein though mentioned that District Council may be given power to try certain suits and offences but did not found mentioned that Judge District Council is also the Court of Session or can exercise the power of the Court of Session. If it is so, Judge District Council Court should confine himself with the terms and language issued in the notification and he is not in a position to exercise the entire power under CrPC especially in cases of pre-arrest bail.

17. I have perused the Judgment reported in **(1984) GLR 305 in the case of Shri. IC Chakravorty, Assistant to the Deputy Commissioner, Shillong vs Khasi Hills District Council, Shillong.**

18. On perusal of the Judgment referred to above, I find that the matter involved therein is about territorial jurisdiction which is not a subject matter with this instant case.

19. On perusal of the Judgment in the case of **Longsan Khongngain vs State of Meghalaya reported in 2007 (4) GLT 938**, I find that it is not disputed that under Para-5 of the Sixth Schedule of the Constitution of India, the Governor is competent to appoint an officer for trial of suit cases or offences but this Judgment does not say that District Council Court has the power to grant or entertain pre-arrest bail.

20. In the case of **K.K. Mather vs R Krishna Iyer and A.C. Gupta reported in AIR 1975 SC 1022**. On perusal of this Judgment it appears that, it deals with territorial jurisdiction of Municipal area and Administered area, as such it is not applicable in this present case in hand.

21. **AIR 1988 SC 1530** in the case of **AR Antulay vs R.S Nayak & Anr.**

22. I have perused the above Judgment and I find that it is not applicable with this instant case.

23. **2002 CRI L.J.4265** in the case of **Virendra Singh & Ors vs State of U.P. & Ors**. On perusal of this Judgment I find that it is not relevant and not applicable with this instant case in hand.

24. On perusal of the Judgment in the case of **Everest Lyngdoh Nongpiur vs State of Meghalaya 2009 (4) GLT 514**, I find that it is not involved with the ratio in this instant case.

25. In the case of **Shri. Gurbaksh Singh Sibbia & Ors vs State of Punjab** reported in **(1980) 2 SCC 565**.

26. On perusal of the above Judgment, it appears that the Hon'ble Apex Court has interpreted the concept of Section-438 CrPC in the light of Article-21 of the Constitution of India and the issues involved therein are not applicable with this instant case.

27. For the reasons as discussed above and after evaluation of affidavits, written argument as well as provision of law, I have come to conclusion that District Council Court has no power to entertain or granting pre-arrest bail under Section-438 CrPC for the reason that District Council is not a Court of Session or established under Section-9 of CrPC nor Judge District Council is appointed by High Court. Secondly, District Council derives power on the basis of Notification dated 10.08.2011 issued in the name of the Governor, wherein it is clear that Judge District Council has been established under Rule-9 of the United Khasi-Jaintia Hills Autonomous District (Administration of Justice) Rules, 1953 and he has been empowered to try certain offences in exercise of power in sub-

para (1) of Para-5 of the Sixth Scheduled of the Constitution of India.

28. Now, the question remains whether trial and granting pre-arrest bail stand in the same footing and the answer is definitely not.

29. Trial and granting pre-arrest bail stand in two different footing and the same view has been expressed by the Division Bench of the Gauhati High Court in the case ***of State of Meghalaya vrs The Judge District Council Court, Shillong reported in (1993) 2 GLR 99*** and for ready reference Para- 9, 10 & 11 of the said Judgment are reproduced herein below:

“9. Even if the Designated Court or Officer under sub-paragraph (1) of paragraph 5 is a substitute of a Court of Session or Sessions Judge, as the case may be, for the trial of offences triable by a Court of Session, or of a Magistrate of the first class for offences triable by a Magistrate, the Court or the Officer shall not attain the status of a Court of Session or a Sessions Judge, as the case may be. That apart, as already stated, under sub-paragraph 3 of paragraph 5 of Code of Criminal Procedure shall not apply to the trial of the offence mentioned in sub-paragraph (1) of paragraph 5. However, for the purpose of ‘fair trial’, we are of the opinion that the spirit of Code may be applied, though exact requirements or form of words of law, rule etc, that is the latter of law shall not apply. In other words, technicalities of the Code shall not apply but the Court may be guided by the spirit of the Code and shall not be bound by the letter of the Code.

10. The power of trial is one thing and power to make an order of anticipatory bail conferred on the Court of Sessions or the High Court is another, for example, a Magistrate who has jurisdiction to try an offence cannot make an order of anticipatory bail.

11. For the reasons stated above, the District Council Court or Officer appointed under paragraph 5(1) of the Sixth Schedule for the trial of certain offences is not competent to make an order of anticipatory bail.”

30. Besides that, the language expressed under Section-438 CrPC does not include that Court of District Council to entertain pre-arrest bail.

31. For the foregoing reasons as discussed above, I hereby come to a conclusion that, District Council is barred from entertaining or granting pre-arrest bail under Section-438 CrPC. Hence, I direct the Secretary Law, Government of Meghalaya to instruct Courts of District Council to comply with this Judgment & Order with immediate effect.

32. Before I part with this case record, since there was no objection from the Government for granting pre-arrest bail, hence, the interim pre-arrest bail to the petitioner dated 07.07.2014 is hereby made absolute.

33. Registry is directed to send the copy of this Judgment & Order to the Law Secretary, Government of Meghalaya and to the Superintendent of Police, East Khasi Hills, Shillong for information immediately.

34. With these observations and directions, this instant petition is allowed and the matter stands disposed of.

JUDGE

V Lyndem