

IN THE HIGH COURT OF ORISSA, CUTTACK.

BLAPL NO. 18298 OF 2014

An application under section 438 of the Code of Criminal Procedure.

Sunil Kumar Mishra and others Petitioners
-Versus-
State of Orissa & another Opp. Parties

For Petitioners: - Mr. Debasis Panda,
Deepak Kumar,
P.P. Parida.

For Opp. parties: - Mr. Karunakar Nayak &
Mr. Jyoti Prakash Patra
Addl. Standing Counsels
and
Mr. Bikash Panda and
Girish Chandra Sahu
(for informant)

P R E S E N T :-

THE HONOURABLE MR. JUSTICE S.K. SAHOO

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Date of Argument. 31.10.2014 Date of order- 31.10.2014
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S.K.SAHOO, J. The petitioners who claim themselves to be journalists and respectable persons of the society have approached this Court in an application under section 438 Cr.P.C. seeking pre-arrest bail in a case of gang rape of a widow in her rented house situated in the

district of Dhenkanal. The case relates to Dhenkanal Town P.S. Case 218 of 2014 registered on 5.9.2014 under sections 341/294/509/354(B)/376(D) and 506 Indian Penal Code which corresponds to G.R. Case No. 928 of 2014 pending in the Court of learned S.D.J.M., Dhenkanal.

2. The victim presented an F.I.R. before Inspector-in-charge, Town Police Station, Dhenkanal stating therein that she was working at SKY AUTOMOBILES situated at Kathagada where the petitioner No.1 was working in the sales division. She was tortured by petitioner No.1 both physically and mentally, for which she resigned from her service. At that point of time, while she was being tortured by petitioner No.1, she did not disclose the matter before anybody due to fear of social stigma and because she was a widow lady. She came to Dhenkanal about seven months prior to the incident and started working at BIKAS AUTOMOBILES, Mahisapata as a customer care Manager and staying in a rented house. Even then also she was further humiliated by petitioner No.1 during the span of 7 months of stay at Dhenkanal as the petitioner No.1 was passing obscene comments against her on the way and also abusing her in obscene language over telephone on several occasions. Two days prior to the date of occurrence while the victim was

preparing to come back to her rented house during lunch break, petitioner No.1 took away the key of her scooty and when the victim protested to such conduct and called her office staff, petitioner No.1 left the spot. Just the previous day of occurrence while the victim was proceeding to her office at about 9 O' clock in the morning, the three petitioners obstructed her on the way and outraged her modesty. At that point of time, the Works Manager of BIKAS AUTOMOBILES, namely Satya Narayan Dash was fortunately passing by that road towards his office and seeing the misbehavior on the victim, he stopped there and protested the petitioners, but the petitioners also abused him. When Satya Narayan Dash stated that he would call his office staff, the petitioners decamped from the spot giving threat to him. On the date of occurrence at about 9 O' Clock in the night, the three petitioners trespassed into the house of the victim and locked the door of her house from inside. When the victim started to shout, petitioner No.1 gagged her mouth by means of a towel and petitioner No.1 made her complete naked and took her forcibly on the bed and thereafter the petitioners raped her one after another. While leaving the spot after committing gang rape, they threatened the victim that they are the journalists and in case she discloses

the matter before anybody, she would face dire consequence and further told that if she would oblige them then she would not face any kind of problem in future and she would be given a lot of money. The victim became very much depressed after the shocking incident. Though initially she could not gather any courage to report the matter against the petitioners in the police station as the petitioners were very influential persons but subsequently she gathered courage and reported the matter.

It appears from the case diary produced by the learned counsel for the State that after registration of the case, the statement of the victim was recorded under section 161 Cr.P.C., the I.O. visited the spot and took necessary steps for recording the statement of the victim under section 164 Cr.P.C. before the learned S.D.J.M., Dhenkanal which was accordingly recorded by the learned J.M.F.C., Dhenkanal as per the direction of learned S.D.J.M., Dhenkanal. The victim supported her case in the 164 Cr.P.C. statement. The victim was medically examined at the District Head Quarters Hospital, Dhenkanal and her wearing apparels and other necessary materials were also seized.

3. The learned counsel for the petitioners, Mr. Debasis Panda assiduously argued that prior to the lodging of the F.I.R., the petitioners had conflict with one Viki Gupta who was the Owner-cum-Manager of M/s. BIKAS AUTOMOBILES where the victim was working and petitioner No.1 lodged an F.I.R. against the said Viki Gupta on 4.9.2014 before Inspector-in-charge, Town Police Station, Dhenkanal, on the basis of which Dhenkanal Town P.S. Case No. 216 of 2014 was registered under sections 341/323/294/506/307 read with section 34 I.P.C which corresponds to G.R. Case 925 of 2014 pending in the Court of learned S.D.J.M., Dhenkanal. Mr. Panda submitted that the said Viki Gupta has set up the informant and has foisted a case against the petitioners. He further submits that even though the incident stated to have taken place on 3.9.2014 at about 9.00 p.m. but for the reasons best known to the informant, the F.I.R. was lodged on 5.9.2014 i.e, after delay of two days which has not been explained at all. He further contends that the Medical Report of the victim negatives the allegation of commission of gang rape and therefore, it cannot be prima facie said that the victim was subjected to gang rape. He further contends that no criminal force was used by the petitioners to disrobe the victim in any public place and therefore the ingredients of offence

under section 354-B I.P.C will not be attracted. Mr. Panda lastly contended by filing a copy of the complaint petition vide I.C.C. Case 271 of 2014 pending in the Court of learned S.D.J.M., Dhenkanal filed by Bikash Kumar Gupta against the petitioners on 5.9.2014 that the gang rape case alleged against the petitioners is nothing but a brain child of the employer of the victim against whom a case has been instituted at the instance of petitioner No.1.

The learned counsel for the State on the other hand produced the case diary and placed the 161 as well 164 Cr.P.C. statements of the victim so also her medical examination report and submitted that prima facie case is clearly made out against the petitioners and at the stage of consideration of an application for anticipatory bail, particularly in a case of this nature, detailed documentation, scanning of the evidence like the trial is not permissible and if the petitioners who claim themselves to be journalists and respectable persons of the society are indulged in such type of heinous crime then they deserve no sympathy and the anticipatory bail application should be rejected particularly when the custodial interrogation as well as medical examination of the petitioners is very much necessary.

Mr. Subha Bikash Panda, learned counsel for the informant submitted that the victim has explained the delay in lodging the F.I.R. not only in the F.I.R itself but also in her statements recorded under section 161 and 164 Cr.P.C. He further contended that the offence under section 376-D I.P.C. carries punishment of R.I. for a term which shall not be less than 20 years but which may extend to life which shall mean imprisonment for the remainder of that person's natural life and with fine. He further contended that the investigation is at a nascent stage and many more important witnesses are yet to be examined and at such a juncture if anticipatory bail is granted to the petitioners who are very influential persons then there is less chance of free, fair and full investigation and there would be chance of tampering with the witnesses and threatening to the victim and therefore, the anticipatory bail application should be rejected.

4. In case of **Siddharam Satlingappa Mhetre -v- State of Maharashtra and others reported in (2011) 48 Orissa Criminal Reports (SC) 1**, the Hon'ble Supreme Court held as follows:-

"122. 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 the 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 the other offences;
- (v) Where the accusation have been made only with the object of injuring or humiliating the applicant by arrest 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 materials against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of section 34 and 149 of the I.P.C., the Court should consider even with greater care and caution because over implication 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.

123. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of the case.

124. The Court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

125. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualize all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the concerned Judge, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of....."

Let us first analyse whether there is any prima facie material against the petitioners in the alleged crime. The statement of the victim given in the F.I.R. gets corroboration from her statements recorded under section 161 Cr.P.C. as well as 164

Cr.P.C. The victim has categorically stated, inter alia, as to how on the fateful night the petitioners trespassed into her rented house and how she attempted to protest the petitioners by shouting and how her mouth was gagged by means of a towel and how she was gang raped by the petitioners one after another.

Even though it was contended by the learned counsel for the petitioners that the Medical Report of the victim does not indicate any bodily injury on her person suggesting forcible sexual intercourse or any sign of recent sexual intercourse but on perusal of the Medical Report, it indicates that sexual intercourse cannot be ruled out. In this case the incident stated to have taken place on 3.9.2014 that to on a bed and she was medically examined on 6.9.2014. In such circumstances, even if the Medical Officer did not notice any bodily injuries on her person or any recent sign and symptoms of forcible sexual intercourse, it would not prima facie nullify the effect of the statements of the victim. Whether in the facts and circumstances of the case, the absence of injuries on the body and private parts of the victim would be significant or not that is to be better appreciated by the trial court and it is not proper to have a detailed discussion at this stage.

5. The contention of the learned counsel for the petitioners that due to some disputes between the petitioners and the

employer of the victim, namely Viki Gupta, the case has been foisted by the victim at the instance of her employer is a very far fetched imagination to be considered at this stage. A woman like the informant who is a widow in the tradition bound non-permissive society would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. When she left her services in her first place due to physical and mental torture of petitioner No.1 fearing social stigma, it is prima facie difficult to accept the contention of the learned counsel for the petitioners that she would venture to bring a concocted allegation of gang rape against the petitioners at the instance of her employer.

6. So far as the contention of the learned counsel for the petitioners that there was two days delay in the lodging of F.I.R. which has not been explained by the petitioners, it is found that in the F.I.R., as well as in the 161 and 164 Cr.P.C. statements, the victim has stated that she could not gather courage immediately after the occurrence to report against the petitioners who were stated to be very influential persons. She was also given threat by the petitioners that in case she reports the matter, she would face dire consequence. In such circumstances, some delay in lodging F.I.R. particularly in a case of this nature is inevitable and the

same has been prima facie explained by the victim and it is not the proper stage to scan the evidence relating to explanation of delay in lodging F.I.R. which is to be better adjudicated by the trial court.

A victim of gang rape inevitably suffers acute trauma and it takes some time for her to come to a position to make lucid and sensible statement. Rape itself brings enormous shame to the victim and it is after much persuasion and gathering of some courage that a rape victim goes to the police station to lodge a report and if some delay is occasioned that cannot in any way detract the credible evidence of the victim.

In case of **Md. Iqbal and another -v- State of Jharkhand** reported in **AIR 2013 SC 3077**, it is held as follows:-

"16. Rape cannot be treated only as a sexual crime but it should be viewed as a crime involving aggression which leads to the domination of the prosecutrix. In case of rape besides the psychological trauma, there is also social stigma to the victim. Majority of rapes are not sudden occurrences but are generally well planned as in this case. Social stigma has a devastating effect on rape victim. It is violation of her right of privacy. Such victims need physical, mental, psychological and social rehabilitation. Physically she must feel safe in the society, mentally she needs help to restore her lost self esteem, psychologically she needs help to overcome her depression and socially, she needs to be accepted

back in the social fold. Rape is blatant violation of women's bodily integrity."

8. So far as the contention of the learned counsel for the petitioners regarding absence of ingredients of offence under section 354-B I.P.C. is concerned, it would be clear from a bare reading of the section that the ingredients of such offence are as follows:-

- (i) There must be some assault or use of criminal force to any woman or abetment to commit such act;
- (ii) Such assault or use of criminal force or abetment must have been with an intention of disrobing or compelling her to be naked.

"Assault" has been defined in Section 351 I.P.C. and "Criminal force" has been defined in section 350 I.P.C. Section 354-B I.P.C. makes it very clear that actual disrobing or making a woman naked is not necessary to constitute an offence rather the intention of disrobing or compelling the woman to be naked is necessary. Similarly, mere assault or use of criminal force to a woman or abetment for such act would not itself constitute an offence under section 354-B I.P.C. Therefore, the action must be correlated to the intention. The intention has to be gathered or inferred from the conduct of the accused displayed in the course of commission of the crime.

In this case from the statement of the victim, it appears that while she was proceeding towards her office, she was obstructed on the way by the accused persons who came in a bike and also in an Activa. They not only pushed and pulled her but misbehaved with her ("Mote Tanaotara Kariba Saha Asada Acharana Kale"). It also appears that when she was hounded by the petitioners, the Works Manager of her office intervened, objected to the accused-petitioners, for which she was saved. In such a situation, at this stage it would not be proper particularly while adjudicating a bail application to opine whether the ingredients of offence under section 354-B I.P.C. is attracted or not. Such an aspect is to be left to the trial court for adjudication at appropriate stage.

9. There is no dispute that the nature and gravity of the accusation is very serious which depicts as to how a widow was harassed and humiliated from time to time not only at her service place for which she was constrained to leave her service but also in the public place and finally in her rented house where she was gang raped.

Mr. Panda during course of produced filed an affidavit stated to have been executed by the brother of the informant wherein it is stated that after the death of her first husband, the victim has

got married to another person on 6.9.2013 and her husband is residing at Bhadrak. Nobody has filed power for the person who has sworn the affidavit. Such an affidavit prima facie establishes a case of tampering with the evidence against the petitioners.

The apprehension of the prosecution as well as the informant that in case of grant of anticipatory bail, there would be chance of tampering with the witnesses and there cannot be any free, fair and full investigation because the petitioners are very influential persons appears to be prima facie correct. The conduct of the petitioners as appears from the statements of the victim in giving threat to her is a feature which supports the contention made by the learned counsel for the informant that there cannot be a proper investigation in case the petitioners are released on anticipatory bail and there would be chances of tampering with the evidence. From the materials available on record at this stage, it cannot be said that the accusations have been made only with the object injuring or humiliating the petitioners by arresting them or that it is a frivolous prosecution. The genuineness of the prosecution from the materials available on record cannot be doubted at this stage. In a case of this nature when serious allegations have been directly attributed to the petitioners and these allegations are corroborated by the materials available on

record and when custodial interrogation as well as medical examination of each of the petitioners would be very much necessary in terms of section 53-A Cr.P.C., it would not be proper to exercise discretion of grant of anticipatory bail in favour of the petitioners rather it is one of the exceptional cases where arresting the petitioners is imperative in the facts and circumstances of the case. Accordingly, the bail application stands dismissed.

Before parting with the case, it is felt necessary to recommend the case of the victim to the District Legal Services Authority, Dhenkanal to examine the case after conducting necessary enquiry in accordance with law for grant of compensation under the "The Odisha Victim Compensation Scheme, 2012". Let a copy of this order be sent to District Legal Services Authority, Dhenkanal for compliance.

With the aforesaid observation, the BLAPL stands disposed of.

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S.K. Sahoo,J.

