



Bail Application No. 07/2017

Bishal Gurung v. State of Sikkim

**BEFORE
BHASKAR RAJ PRADHAN, JUDGE**

28.11.2017: Present: Mr. Sudesh Joshi, Advocate for the Petitioner.

Mr. S.K Chettri and Ms. Pollin Rai, Asst. Govt.
Advocates for the Respondent-State.

.....

ORDER (O R A L)

Bail Application No. 07/2017 has been filed by the Petitioner seeking Bail in a case relating to FIR lodged on 25.10.2017 in Kaluk Police station against the Petitioner for sexually assaulting a minor girl child. The Petitioner was arrested by the Kaluk Police on 26.10.2017 and sent to judicial custody on 31.10.2017.

2. On 06.11.2017, the Petitioner moved an application for bail before the learned Special Judge, POCSO Act, 2012 (Learned Special Judge).

3. On 07.11.2017, the learned Special Judge was pleased to reject the Bail Application on the ground that the investigation is at preliminary stage.

4. Bail Application No. 07/2017 was filed before this Court on 13.11.2017. On 15.11.2017 notice was issued. Mr. S.K Chettri, learned Assistant Govt. Advocate, having accepted notice sought time to file reply to the same.

5. Pursuant thereto the matter was listed today. However, Mr. S.K Chettri, for the State has not filed any



reply and chooses to argue his case orally. Why time for filing a reply was sought is a question Mr. S.K Chettri is unable to answer.

6. Heard Mr. Sudesh Joshi, learned Counsel for the Petitioner as well as Mr. S.K Chettri.

7. The Petitioner seeks to rely upon Annexure -P2, purportedly, a certificate issued by the Head Mistress, one Ms. H.K Gurung, of a School in Yangsum, West Sikkim dated 31.10.2017 as well as Annexure- P3 purported to be an extract of the register of daily attendance of the said school in which the victim is said to be residing in its hostel. Mr. Sudesh Joshi, would submit that the two documents would reflect that on the alleged day of the incident the victim had not gone out of the hostel. He would further submit that the allegation against the Petitioner would be proved highly improbable if one were to notice that in spite of the alleged incident of sexual assault the victim seem to have attended school the very next day without a complaint.

8. Mr. Sudesh Joshi draws the attention of this Court to the order passed on 07.11.2017 by the learned Special Judge and to the submission made by the learned Additional Special Public Prosecutor (P.P) therein that the prosecution had strong objections to the application for bail on the ground that the accused has allegedly committed serious offence of having attempted to sexually assault a minor victim of about 11 years. Mr. Sudesh



Joshi draws strength from this submission of the Additional Special P.P emphasizing on the words '*having attempted to sexually assault a minor*' and seeks to compare the FIR registered on 25.10.2017 and the statement made by the Additional Special P.P. and submits that the Prosecution itself is uncertain about the nature of the alleged crime. Mr. Sudesh Joshi, would submit that this is a case in which the prosecution does not have even a prima-facie case against the Petitioner and seek grant of bail. He further submits that the Petitioner is willing to furnish adequate security, reliable surety and ensure his attendance during the investigation of the case. Mr. Sudesh Joshi further submits that the Petitioner has his hearth and home in Sikkim and therefore, would not abscond. Further, being a teacher by profession his antecedent must be well respected.

9. Mr. S.K Chettri, on the other hand would submit that the facts and circumstances of the present case and the nature of the relationship that the Petitioner seems to enjoy with the witnesses would surely lead to tampering of vital evidence if bail is so granted and resultantly, the prosecution case would be gravely hampered. Mr. S.K Chettri, on instruction, submits that the signatory to the aforesaid two documents placed by the Petitioner is the sister of the Petitioner and therefore suspect.

10. On instruction, Mr. S.K Chettri submits that the statement of the victim under Section 164 CrPC has been recorded on 02.11.2017 and that the investigation is more



or less complete, however, charge sheet is yet to be filed.

11. I have examined the case records placed before me. The nature of probable evidence which has been gathered during the investigation and the allegations made are of serious nature. The offence charged are heinous. The Petitioner is alleged to have committed offences U/s 6 of POCSO Act, 2012 and Section 376, Indian Penal Code (IPC). If the victim is 11 years old only it may amount to aggravated sexual assault attracting harsher punishment. The charge sheet not being filed, compliance of Section 35 of POCSO Act, 2012 is yet to be done.

12. The documents obtained and filed by the Petitioner to plead his innocence are the certificate and attendance register of the School in which the Headmistress is admittedly the Petitioner's sister. The investigation is still not complete. Grant of bail at this juncture in such circumstances would definitely not ensure fairplay and justice. The Petitioner has been in custody for just about a month. The Charge sheet, as per the prosecution, would be filed in haste. Although "bail not jail" is the rule, pre-trial custody seems to be the only way out at this stage by which this Court can ensure fair investigation and witness protection.

13. Accordingly, the Bail Application No. 07/2017 is rejected.

Judge
28.11.2017