

Serial No. 01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

AB. No. 9 of 2020

Date of Decision: 13.07.2020

Shri. Erickson Lyngdoh Vs. State of Meghalaya.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. B. Laitmon, Adv.
For the Respondent(s) : Mr. K. Khan, P.P. with
Mr A.H. Kharwanlang, GA.

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

1. On 06.05.2020, an FIR was lodged by the complainant before the Officer-In-charge Khliehriat Women Police Station with the information that her daughter on complaint of sickness was taken for a medical examination at the Khliehriat CHC upon which she came to know that her daughter was two months pregnant and on enquiry, it was learned that it was on account of a physical relationship she had with the petitioner herein in the month of February 2020. Hence the complaint.

2. As the place of occurrence falls within the jurisdiction of Jowai Police Station, West Jaintia Hills District, the matter was referred thereto upon which a case was registered being Jowai P.S. Case No 45 (5) 2020 under Section 5 (j) (ii)/6 of the POCSO Act.

3. Investigation was launched and the I/O had taken the statement of the

Complainant and the Doctor. In the meantime, the petitioner herein had obtained an order of interim bail from the Court of the Learned Special Judge (POCSO) Jowai and as directed by the Court, he appeared before the I/O who has also taken down his statement.

4. However, in course of the proceedings, the learned Special Judge (POCSO) vide order dated 11.06.2020 rejected the prayer for grant of pre-arrest bail by the petitioner and accordingly, the I/O sought to arrest him in accordance with law.

5. The petitioner then approached this Court with an application under Section 438 Cr.P.C. and on admission of the same, this Court had granted interim bail to him pending production of the case diary and further hearing.

6. On the case diary being duly produced and after hearing the parties, this Court has adjudicated the matter and the decision is arrived at, which is now reflected in this instant order.

7. Heard Mr. B. Laitmon, learned counsel for the petitioner who has submitted that the petitioner is a 19 year old Class XII Science Student of St. Edmunds College with a meritorious record and the alleged victim is also a student of ATS School. The petitioner and the alleged victim are family friends and are acquainted with each other and had admittedly entered into a consensual physical relationship.

8. The learned Counsel has also submitted that when the alleged victim complained about having abdominal pain and was medically examined to confirm that she was about two months pregnant, reluctantly, on being threaten with legal action by the authorities, the mother of the alleged victim was compelled to file the complaint which is evident from the fact that the FIR was lodged very belatedly.

9. As to the age of the alleged victim, the learned counsel has submitted that she is not 15 years as alleged but as can be seen from the document

annexed at Annexure-X of the application, which is the report of Woodland Hospital under the column “age”, the same is noted as 18 years as on 01.06.2020.

10. Again, the learned counsel has submitted that when the petitioner was summoned by the Police on 13.05.2020, he went to the Police Station and had co-operated with the investigation and as such, on this ground alone, he is entitled to pre-arrest bail. Reliance was placed on the decision of the Apex Court in the case of ***Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors: (2011) 1 SCC 694*** at paragraph 89.

11. Another point of argument raised by the learned counsel for the petitioner is that the possibility of the case either being charge sheeted or landing the petitioner in conviction is bleak considering that the mitigating and extenuating circumstances are in favour of the petitioner, the petitioner and the alleged victim are now cohabiting together willfully as husband and wife with the knowledge and consent of the family and as such, the arrest of the petitioner will result in great injustice and will cause suffering to the alleged victim and the unborn child. Again the case of ***Siddharam Satlingappa Mhetre (supra)*** at paragraph 86 as well as the case of ***Sushila Agarwal v. State (NCT of Delhi) and Anr: AIR 2020 SC 483*** was referred to by the learned counsel in this regard.

12. The antecedent of the petitioner and the consideration thereof is a vital characteristic for grant of pre-arrest bail asserts the learned counsel for the petitioner and the case of ***Siddharam Satlingappa Mhetre (supra)***, ***Sushila Agarwal (supra)*** and the case of ***Gurbaksh Singh Sibbia & Ors v. State of Punjab: (1990) 2 SCC 565*** at paragraph 31 was cited in this connection.

13. On the issue of consent, the learned counsel for the petitioner has submitted that assuming but not conceding that the alleged victim is a minor, in this regard there are a number of authorities to show that when there is mutual consent between the parties and there is no use of force in the

relationship, the Courts would be lenient in the area of grant of bail.

14. The cases cited by the learned counsel for the petitioner in this regard are as follows:

- i) ABC 2016(1) 34 Bom/2016 (2) All MR (Criminal) 1712
High Court of Bombay
Sunil Mahadev Patil v. State of Maharashtra, paragraphs 5, 9, 10, 12 & 13
- ii) (2018) 1 Lawherald 324
Punjab and Haryana High Court
Naveen v. State of Haryana, paragraphs 2 & 5
- iii) (2019) 3 MLJ(Criminal)110
Madras High Court
Sabari @ Sabarinathan @ Sabarivasan v. Inspector of Police, paragraphs 19, 20, 27 & 28 and
- iv) Unreported case
Karnataka High Court
Puttappa @ Putta v. State of Karnataka, paragraphs 3 & 5.

15. Finally, the learned counsel has submitted that at this stage of the argument, the same is limited only to bail and the question of consent, conviction and acquittal will be at the wisdom of the Trial Court and the authority cited by the learned Public Prosecutor, that is (2017) 10 SCC is not relevant in the context of the instant case.

16. It is therefore prayed that this Court may consider the prayer of the petitioner, for which he is willing to comply with any conditions ordered by this Court.

17. Also heard Mr. K. Khan, learned P.P assisted by Mr. A.H. Kharwanlang, learned GA who has opposed this bail application on the ground that the FIR was filed by the mother of the victim and there is an admitted physical relationship between the accused and the victim who is a

minor.

18. The learned P.P has also submitted that the birth certificate would show that the victim is a minor of about 15 years or so and as such, even if there is consent, the provision of Section 375(d) (sixthly) IPC, which, inter-alia, defines rape as an act of sexual intercourse with a woman who is under eighteen years, with or without her consent, would be applicable in this case. As to the contention that the petitioner and the victim are now living as husband and wife, the learned P.P has submitted that there is no proof to this effect without the Marriage Certificate being produced.

19. The learned P.P has again submitted that admittedly, the victim is a minor which is proved by the birth certificate enclosed in the case diary, which certificate shows that the date of birth of the victim is 03.11.2004 and as such, as on date she will be a few months older than 15 years but below 16 years.

20. The provision of Section 29 of the POCSO Act has also been cited by learned P.P to say that the accused is being prosecuted for committing an offence under Section 5 of the POCSO Act and as such, a presumption that the accused has committed the offence, has to be accepted, unless the contrary is proved.

21. Finally, the learned P.P has cited the case of ***Independent Thought v. Union of India: (2017) 10 SCC 800*** and has submitted that this bail application may be rejected as devoid of merit.

22. On consideration of the contention and submission of the parties, what is understood is that this is an application for grant of pre-arrest bail resorting to the provisions of Section 438 Cr.PC, the section reads thus:

“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).]”

23. Section 438 Cr.P.C therefore primarily speaks of a situation where a person who has reasons to believe that he may be arrested on accusation of having committed a non-bailable offence; he may approach the High Court or the Court of Sessions with a prayer for grant of pre-arrest bail.

24. Facts as stated and from the entry in the case diary by the I/O would show that the petitioner is accused of having committed an offence under section 5 (j) (ii)/6 of the POCSO Act, 2012 which is a non-bailable offence and as such, the apprehension is justified.

25. Section 438 Cr.P.C further provides that the Court may take into consideration certain factors such as the nature and gravity of the accusation, the antecedents of the applicant, the possibility of the applicant fleeing from justice amongst others, before a direction is given that the applicant, thereafter if arrested without warrant by an Office-In-charge of a Police Station on such accusation, if he is prepared to give bail, shall be released on bail.

26. The nature of the case as is apparent from the FIR and the status of investigation as on date would show that the petitioner and the victim are known to each other and apparently they are having a close relationship which has led to a point where a physical relationship took place. This fact was not reported to the police except when the complainant, on a complaint by the victim took her to the local Community Health Centre (CHC) at Khliehriat and on examination, it was found that the victim was pregnant. As mandatorily required, the Doctor reported the same to the Officer-In-charge

Women Police Station, East Jaintia Hills District, Khliehriat on 24.04.2020, but the FIR was filed by the Complainant, the mother of the victim only on 06.05.2020.

27. As to the antecedents of the petitioner/accused, what has been stated is that he is a student of class XII with no criminal antecedents and as such, there is no likelihood of his absconding or tampering with the evidence. The fact that the petitioner has cooperated with the investigation was also pointed out by the learned counsel for the petitioner, which has been proven by records. In this regard, the case cited by the petitioner, that is, ***Siddharam Satlingappa Mhetre (supra)*** at paragraph 89, the Apex Court has held that “...In cases where the Court is of the considered view that the accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided...” has relevance.

28. In the case of ***Sunil Mahadev Patil v. State of Maharashtra (Bom) (supra)*** the Court had to deal with the case of the accused who was about 20 years of age and the prosecutrix who was about 15 years eloping and getting married and also had sexual relationship with each other, where on the complaint of the parent of the prosecutrix, the accused was arrested, whereupon he had moved a bail application which was duly considered by the Court. The Hon’ble Bombay High Court taking everything into consideration, including the principle of bail and the law involved, noting that there is a love relationship between the accused and the prosecutrix, bail was accordingly granted.

29. The facts of the case of the petitioner herein are also similar to those of the Bombay case referred to above, the age of the Petitioner and the alleged victim being 19 and 15 approximately and the fact that there has been a physical relationship (sexual relationship) bears a striking resemblance to this case in hand. Adopting the same principles as was held in the said case of ***Sunil Mahadev Patil (supra)***, this Court sees no reason

why pre-arrest bail cannot be granted to the petitioner taking into consideration his antecedents and the fact that he had cooperated with the investigation.

30. The other cases cited by the learned counsel for the petitioner relates to almost similar facts and circumstances, that is, it involves a sexual relationship between a minor girl and a boy, sometimes leading to their cohabiting together as husband and wife and in the meantime, as per the provisions of the POCSO Act and IPC, proceedings are drawn against the boy and while applying for grant of bail or for acquittal, the Courts would lean favourably on the side of the accused.

31. It may be noted that the case cited by the learned P.P, that is, *Independent Thought (supra)* deals with the specific provision of exception 2 to section 375 IPC which prescribes that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape and after a detailed discussion, the Apex Court has read down the provision to read as “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape”. This in the opinion of this Court has no relevance to the facts and circumstances of the case, the marriage of the Petitioner and the alleged victim not having been proved.

32. In view of the above, taking into consideration every possible angles in this matter, this Court is hereby convinced that at this juncture, the Petitioner is entitled to be granted pre-arrest bail.

33. Accordingly, in the event of his arrest, the I/O is directed to release the petitioner on the following conditions:

- i) That he shall execute a bond of ₹ 20000/- (Rupees twenty thousand) only with two sureties of like amount;
- ii) That he shall not abscond or tamper with the evidence and witnesses;

- iii) That he shall cooperate with the I/O as and when required;
- iv) That he shall not leave the jurisdiction of India without prior permission of the I/O or the Court taking cognizance of the offence.

34. The interim bail granted herein is hereby made absolute.

35. With the above, this application is accordingly allowed.

36. Registry to ensure that the case dairy is returned.

37. Matter stands disposed of. No cost.

Judge

Meghalaya
13.07.2020
"D. Nary, PS"

