

IN THE HIGH COURT OF MANIPUR AT IMPHAL

Crl.Petn. No. 56 of 2022

The State of Manipur represented by the Commissioner (Home),
Government of Manipur, Babupara, P.O. & P.S. Imphal – 795001.

... *Petitioner*

- Versus -

Mr. Thanmipam Shinglai, aged about 19 years, S/o Phungreikan Shinglai of
Mawai Village, P.S. Kasom Khullen, Kamjong District Manipur.

... *Respondent/Accused Person*

BEFORE

HON'BLE MR. JUSTICE A. GUNESHWAR SHARMA

For the petitioner	:	Mr. Y. Ashang, P.P.
For the respondent	:	Nemo
Date of Hearing	:	28.04.2023
Date of Judgment & Order	:	31.05.2023

ORDER

[1] Heard Mr. Y. Ashang, learned PP for the State. None appeared for the respondents.

[2] By the present petition under Section 482 Cr.P.C., the State of Manipur/petitioner has prayed for setting aside the impugned order dated 03.08.2022 passed by (i/c) learned Judicial Magistrate First Class, Imphal West –I in Cril. Misc. (B) Case No. 35 of 2022 with respect to FIR No. 39(7)2022 WPS-IW U/S 376(g)/417/34 IPC. By the impugned order, the learned JMFC, IW-I, released the respondent/accused person on bail at the time of the second remand.

[3] This Court issued notice to the respondent on 22.12.2022 and summon was served to the respondent on 14.01.2023 by speed post. Since none appeared on behalf of the respondent on 17.03.2023 and 30.03.2023, one more opportunity was given on 28.04.2023. When the matter was taken up on 28.04.2023, none appeared on behalf of the respondent, in spite of due service and accordingly, this Court heard the learned PP for the State and reserved for order.

[4] Brief facts of the case is that as per the complaint dated 27.07.2022, two sisters (one of them is minor) left their home on 18.07.2022 and on 20.07.2022, the respondent/accused raped the elder sister. Later on, she was also subjected to gang rape at various places. The respondent/accused was remanded to police custody for a period of 5 days from 30.07.2022 to 03.08.2022. At the time of second remand, the Investigating Officer. of the case submitted a remand prayer stating that the present case arises out of Para 3(iv) of the OE (the complaint) of the case and therefore Section 376(g)/417/34-IPC was converted into Section 376-IPC.

Relevant portion of para 3.(vi) of the remand prayer dated 03.08.2022 submitted by the IO of the case reads as follows:

"3.(vi) The present case reflect Para 3(iv) of the OE of the case therefore section 376(g)/417/34-IPC is converted into section 376-IPC. A report is also submitted to the OC Woman PS, Imphal West to bifurcate the present case according to the P.O., Date and Hour. Hence the case.

During the course of investigation, examined the Complainant and she fully corroborated with the O.E of the case. Visited and inspected the different P.O. with assistance of Forensic Mobile Unit, Imphal West. Examined the victim in c/w the case. On examination she stated that on 20/7/2022 at about 7:30 pm the victim and her sister came out from their rented room, they meet the accused person namely Thanmipam Shinglai at Langol near Shija hospital. The accused person befriend with the victim and

took her at his workplace i.e., Shija Academy of Health Sciences, Langol and rape her.”

[5] It was stated in the remand prayer that investigation so far reveals that accused raped the victim at his workplace and prima facie evidence against the accused person to substantiate the charge U/S 376-IPC and prayed for 15 days judicial custody to enable the investigating agency to collect the material evidence.

[6] The accused also filed bail application under Section 437 Cr.P.C. being Cril.Misc. (B) Case No. 35 of 2022 and stated that the accused and the victim have recently developed love affairs one week before the incident and thereafter they have consensual physical relationship at the work place of the accused, and stated that the respondent/accused is a Security Guard at Shija Hospital and is maintaining family and sole bread earner, and prayed that he may be released on bail. Vide order dated 03.08.2022, the learned JMFC, Imphal West-I, is of the opinion that even though it is difficult to develop serious relationship after meeting only one occasion but prima facie evidence is lacking for involvement of the accused in a series of gang rape and accordingly released on bail bond with conditions that he will co-operate with the investigation, not hamper and tamper evidence, appear before the Court as and when called upon to do so. The impugned order is challenged amongst on the ground that the victim and the accused was never in love affairs and the accused person also admitted that he had sexual intercourse with the victim on 20.07.2022 at his work place, and on the day of second remand the accused admitted that he met the victim on the day of incident only; the learned JMFC overlooked that the prayer in the second remand stating that the offence is under Section 376 IPC and not for gang rape. It is also stated that in a heinous offence of the nature involving punishment may extent

to life, the Magistrate ought not to have allowed the bail application very casually and the impugned order fails to reflect the submissions made by the Assistant Public Prosecutor.

[7] Mr. Y. Ashang, learned PP, submits that while considering bail application involving offences punishable up to imprisonment of life or death, the Magistrate ought to have taken care and consider the matter keeping in view of all relevant facts. He further submits that in the present case, the learned Magistrate has come to the conclusion that the accused was not involved in gang rape and completely failed to consider the specific prayer in the second remand petition that the case against the present accused is converted as an offence under Section 376 IPC. This particular important fact was ignored and the bail application was allowed on the ground that there was no evidence of the accused involving in gang rape. The learned PP points out that the involvement of the accused in gang rape or otherwise is to be ascertained after a thorough investigation and it is premature at the stage of the second remand to arrive at a conclusion that the accused was not involved in gang rape. As per the admission of the accused in the bail application and as per the statement of the victim, it is admitted that the accused and the victim had sexual relationship. It is the specific case of the accused that it was consensual as the accused and the victim was having relationship recently. Learned PP, draws the attention of this Court to the statement of the victim that she met the accused only on the day of incident. He states that having sexual relationship on the very first meeting is highly improbable. Whether it was a consensual physical relationship or not has to be ascertained in the course of investigation. It is submitted that the bail application was allowed too soon by ignoring the inherent contradiction in the facts of the case. It is pointed out that the accused

has absconded after release on bail and did not appear before this Court to contest the present petition filed by the State for setting aside of the impugned order. Hence, the accused has violated the conditions of bail imposed by the learned Magistrate and this is a good ground for cancellation of the bail order. Learned PP further submits that it is settled proposition of law that a victim ought to be heard and given an opportunity to bail application filed by the applicant. Since the learned Magistrate has failed to consider all these facts into account, he prays that the bail application may be set-aside.

[8] This Court considered the submissions made by the learned PP for the State and perused the materials on record.

[9] In a recent case of **Jagjeet Singh and Ors. vs. Ashish Mishra and Ors. (18.04.2022 - SC) : MANU/SC/0491/2022: AIR 2022 SC 1918**, a Three Judge Bench of the Hon'ble Supreme Court considered the principles in granting bail in heinous offences and right of participation of the victim even in bail application. The Court set aside bail granted in a murder case hurriedly without hearing the victim and held as follow:

23. It cannot be gainsaid that the right of a victim under the amended Code of Criminal Procedure are substantive, enforceable, and are another facet of human rights. The victim's right, therefore, cannot be termed or construed restrictively like a brutum fulmen. We reiterate that these rights are totally independent, incomparable, and are not accessory or auxiliary to those of the State under the Code of Criminal Procedure. The presence of 'State' in the proceedings, therefore, does not tantamount to according a hearing to a 'victim' of the crime.

24. A 'victim' within the meaning of Code of Criminal Procedure cannot be asked to await the commencement of trial for asserting his/her right to participate in the proceedings. He/She has a legally vested right to be heard at every step post the occurrence of an offence. Such a 'victim' has unbridled participatory rights from the stage of investigation till the culmination of the proceedings in an appeal or revision. We may hasten to clarify that 'victim' and 'complainant/informant' are two distinct connotations in criminal

jurisprudence. It is not always necessary that the complainant/informant is also a 'victim', for even a stranger to the act of crime can be an 'informant', and similarly, a 'victim' need not be the complainant or informant of a felony.

25. The above stated enunciations are not to be conflated with certain statutory provisions, such as those present in Special Acts like the Scheduled Cast and Scheduled Tribes (Prevention of Atrocities) Act, 1989, where there is a legal obligation to hear the victim at the time of granting bail. Instead, what must be taken note of is that; First, the Indian jurisprudence is constantly evolving, whereby, the right of victims to be heard, especially in cases involving heinous crimes, is increasingly being acknowledged; Second, where the victims themselves have come forward to participate in a criminal proceeding, they must be accorded with an opportunity of a fair and effective hearing. If the right to file an appeal against acquittal, is not accompanied with the right to be heard at the time of deciding a bail application, the same may result in grave miscarriage of justice. Victims certainly cannot be expected to be sitting on the fence and watching the proceedings from afar, especially when they may have legitimate grievances. It is the solemn duty of a court to deliver justice before the memory of an injustice eclipses.

26. Adverting to the case at hand, we are constrained to express our disappointment with the manner in which the High Court has failed to acknowledge the right of the victims. It is worth mentioning that, the complainant in FIR No. 219 of 2021, as well as the present Appellants, are close relatives of the farmers who have lost their lives in the incident dated 03.10.2021. The specific stance taken by learned Senior Counsel for the Appellants that the Counsel for the 'victims' had got disconnected from the online proceedings and could not make effective submissions before the High Court has not been controverted by the Respondents. Thereafter, an application seeking a rehearing on the ground that the 'victims' could not participate in the proceedings was also moved but it appears that the same was not considered by the High Court while granting bail to the Respondent-Accused.

30. It will be beneficial at this stage to recapitulate the principles that a Court must bear in mind while deciding an application for grant of bail. This Court in the case of Prasanta Kumar Sarkar v. Ashis Chatterjee and Anr. MANU/SC/0916/2010 : (2010) 14 SCC 496, p. 9 & 10, after taking into account several precedents, elucidated the following:

9. ...However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

- (i) whether there is any prima facie or reasonable ground to believe that the Accused had committed the offence;
- (ii) nature and gravity of the accusation;
- (iii) severity of the punishment in the event of conviction;
- (iv) danger of the Accused absconding or fleeing, if released on bail;

- (v) character, behaviour, means, position and standing of the Accused;
 - (vi) likelihood of the offence being repeated;
 - (vii) reasonable apprehension of the witnesses being influenced; and
 - (viii) danger, of course, of justice being thwarted by grant of bail.
- (Emphasis Supplied)

31. The Court in Prasanta Kumar Sarkar went on to note:

10. It is manifest that if the High Court does not advert to these relevant considerations and mechanically grants bail, the said order would suffer from the vice of non-application of mind, rendering it to be illegal. In Masroor [MANU/SC/0683/2009 : (2009) 14 SCC 286; (2010) 1 SCC (Cri.) 1368], a Division Bench of this Court, of which one of us (D.K. Jain, J.) was a member, observed as follows: (SCC p. 290, para 13)

13. ... Though at the stage of granting bail an elaborate examination of evidence and detailed reasons touching the merit of the case, which may prejudice the Accused, should be avoided, but there is a need to indicate in such order reasons for prima facie concluding why bail was being granted particularly where the Accused is charged of having committed a serious offence.

(Emphasis Supplied)

32. The aforesaid principles have been affirmed and restated in a number of subsequent decisions, including in the recent judgments of Neeru Yadav v. State of U.P. and Anr. MANU/SC/1208/2014 : (2014) 16 SCC 508, p. 11, Anil Kumar Yadav v. State (NCT of Delhi) and Anr. MANU/SC/1454/2017 : (2018) 12 SCC 129, p. 17 & 18, and Mahipal v. Rajesh Kumar and Anr. MANU/SC/1677/2019 : (2020) 2 SCC 118, p. 13.

41. We are, thus, of the view that this Court on account of the factors like (i) irrelevant considerations having impacted the impugned order granting bail; (ii) the High Court exceeding its jurisdiction by touching upon the merits of the case; (iii) denial of victims' right to participate in the proceedings; and (iv) the tearing hurry shown by the High Court in entertaining or granting bail to the Respondent/Accused; can rightfully cancel the bail, without depriving the Respondent-Accused of his legitimate right to seek enlargement on bail on relevant considerations.

42. We are thus inclined to allay the apprehension in the mind of learned Senior Counsel for the Respondent-Accused that the cancellation of bail by this Court shall amount to denial bail to the Respondent-Accused till conclusion of the trial.

43. This Court is tasked with ensuring that neither the right of an Accused to seek bail pending trial is expropriated, nor the 'victim' or the State are denuded of their right to oppose such a prayer. In a situation like this, and with a view to balance the competing rights, this Court has been invariably remanding the matter(s) back to the High Court for a fresh consideration. We are also of the considered view that ends of justice would be adequately met by remitting this case to the High Court for a fresh adjudication of the bail application of the Respondent-Accused, in a fair, impartial and dispassionate manner, and keeping in view the settled parameters which have been elaborated in paragraphs 30 & 31 of this order.

44. Needless to say that the bail application shall be decided on merits and after giving adequate opportunity of hearing to the victims as well. If the victims are unable to engage the services of a private counsel, it shall be obligatory upon the High Court to provide them a legal aid counsel with adequate experience in criminal law, at the State's expense."

[10] In the case of **Sundeep Kumar Bafna v. State of Maharashtra, (2014) 16 SCC 623**, Hon'ble Supreme Court held that the power of Magistrate under Section 437 CrPC to grant bail is limited with regard to heinous offences punishable with death or for imprisonment for 7 years or more and extendable to life while there is no such restriction to Sessions Court or High Court under Section 439 CrPC. The only restrictions to the superior courts under the proviso and also under newly added Sub Section 1-A of Section 439 CrPC are giving notice to the Public Prosecutor and the presence of the informant at the time of hearing of bail application. Para 8 is reproduced below:

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a court", the present provision postulates the accused being "brought before a court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in *Gurcharan Singh v. State (Delhi Admn.)*⁵, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these courts. The legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Court of Session and High Court are bereft of this jurisdiction or if they were so empowered under the old Code now stood denuded thereof. Our understanding is in conformity with *Gurcharan Singh*⁵, as perforce it must. **The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in *State of Haryana v. Bhajan Lal*⁶, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear**

conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim viz. "where there is a right there is a remedy". The universal right of personal liberty emblazoned by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well-established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Sessions Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word "custody" the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher courts have only the procedural requirement of giving notice of the bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of "committal of cases to the Court of Session" because of a possible hiatus created by CrPC."

5. *Gurcharan Singh v. State (Delhi Admn.)*, (1978) 1 SCC 118 : 1978 SCC (Cri) 41

6. *State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426

[11] It may also be noted that vide judgment/order dated 02.11.2022 in AB No. 29 of 2022, this Court directed to ensure the complainant be impleaded as a party in the bail petition thereby meaning that the presence and hearing of the complainant during bail hearing is required. The provision of Section 439 CrPC also mandates even the Court of Sessions and/or High Court to hear the Public Prosecution and the complainant during bail application in cases of heinous offences. On the other hand, the power of Magistrate to grant bail in heinous offences is very much restricted by the provision of Section 437 CrPC. There is no doubt that rape case as punishable under Section 376 IPC is a heinous offence.

[12] In the present case, the accused is involved in a case under 376 IPC. While considering bail application in a session triable case that too involving heinous offences such as rape, murder etc. where the punishment is extendable to life imprisonment or death, the Magistrate ought not to have rushed to release the accused on bail at the stage of second remand when there are compelling materials against him. In the present case, the learned Magistrate has completely failed to consider them or rather ignored the prayer in the second remand that the case against the accused be treated under Section 376 IPC and not a case of gang rape, as the charge of gang rape against other accused persons involving the same victims are being bifurcated. At the stage of second remand, the learned Magistrate simply arrived at the conclusion that there is no prima facie material against the accused for involvement in gang rape and the physical relationship was consensual. In the second remand prayer, it is stated that the investigation made so far revealed that accused

person raped the girl at his work place and there is prima facie evidence against him to substantiate the charge under Section 376. It is too soon for the learned Magistrate to arrive at the conclusion that there is no prima facie material against the accused person for gang rape while the charge invoked in the second remand is for the offence under Section 376 IPC. There is complete non-application of mind and the factum of consensual physical relationship is to be ascertained during the course of investigation and trial. There is a presumption of absence of consent in a case of rape and the same has to be rebutted by the accused during the trial. No offence of rape will be made out, if there is a presumption of consent from the very beginning. After release on bail, the accused absconded and did not even appear before this Court to contest the present petition. The impugned order does not satisfy the dictum of law as propounded in the above cited cases.

[13] In view of the above, the bail application dated 03.08.2022 passed by the learned JMFC, Imphal West-I in Cril. Misc. (B) Case No. 35 of 2022 is set-aside and the respondent/accused be taken into custody. Accordingly, the present petition is allowed. No cost. However, it is clarified that the court below may consider the bail application, if any, filed by the accused as per law in terms of the settled principles as discussed above. Nothing stated herein shall prejudice the merits of the case.

[14] Send a copy of this order to learned JMFC, IW-I for information and the O.C., Women P.S., Imphal West, for information and necessary action.

JUDGE

FR/NFR

Indrajeet