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for

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA,
MANIPUR, TRIPURA, MIZORAM & ARUNACHAL PRADESH)

ITANAGAR PERMANENT BENCH
NAHARLAGUN

CRIMINAL REVISION PETITION NO. 05(AP)2010

The State of Arunachal Pradesh

..... *Petitioner*

-Versus-

1. Sri Chechung Chuku
Son of Late Chuku Nitin, Village - Gumto,
P.O. & P.S. - Doimukh, Papum Pare District,
Arunachal Pradesh.

..... *Respondent/Accused*

2. Smti. Tana Yami,
W/o Tana Nekham,
Rono Doimukh, District - Papum Pare,
Arunachal Pradesh as Intervener.

..... *Respondent/informant/Intervener*

Advocate for the petitioner :

Mr. I. Basar, Addl. Public Prosecutor

Advocates for the Intervener :

Mr. K. Jini
Mr. N. Nyorak
Mr. D. Kamduk
Mr. T. Gadi
Mr. D. Loyi

Advocates for the respondent No. 1 :

Mr. P. Taffo
Mr. R. C. Tok
Ms. N. Danggen
Mr. T. Gyadi

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BEFORE
THE HON'BLE MR. JUSTICE P. K. MUSAHARY

Date of hearing : 11.01.2011
Date of Judgment & Order : 11.01.2011

JUDGMENT & ORDER (ORAL)

Heard Mr. I. Basar, learned Addl. Public Prosecutor, for the petitioner State of Arunachal Pradesh. Also heard Mr. P. Taffo, learned counsel for respondent accused and Mr. K. Jini, learned counsel for Informant Intervener.

2. The short facts, involved in this case, are that a written FIR was lodged by one Smti. Tana Yame with the Doimukh Police Station which was registered as Doimukh P.S. Case No. 18/2010 under Sections 452/352/342 I.P.C.. In the said FIR, an allegation was made to the effect that on 30.04.2010 at 11.30 P.M., the respondent accused entered into her residence and assaulted her including her family members without any provocation. The police investigated the matter and found sufficient incriminating evidence/materials against the respondent accused. A bail petition being B.A. No. 56(AP)2010 was moved by the respondent accused under Section 438 of the Code of Criminal Procedure, 1973, before this court, for granting him pre-arrest bail. While calling for the CD, this court, vide order dated 03.05.2010, granted him interim bail. By another order dated 12.05.2010, this court, on perusal of the CD and

having found sufficient incriminating materials, rejected his Bail Application No. 56(AP)2010. The respondent accused wanted to surrender before the court of Judicial Magistrate concerned and accordingly, on the prayer of his learned counsel, this Court directed him to surrender before the court of learned Judicial Magistrate, First Class, Yupia, within 3 days and file an appropriate application for bail and during the aforesaid period of 3 days, in the event of his arrest in connection with the aforesaid police case, he shall be enlarged on bail on furnishing a bail bond of Rs. 20,000/- with one local surety of like amount to the satisfaction of the arresting authority. Immediately, on the next day i.e. 13.05.2010, a bail application was moved before the court of learned Judicial Magistrate, First Class, Papum Pare District, Yupia, for release of the respondent accused on bail. The learned Judicial Magistrate, on 13.05.2010, passed an order releasing the respondent accused on bail with certain conditions but without recording as to whether the respondent accused surrendered or appeared before his court prior to or at the time of granting him bail.

4. Mr. Basar, learned Addl. Public Prosecutor, Arunachal Pradesh, submits that the respondent accused was not present before the court of learned Judicial Magistrate, First Class, Yupia, and the bail application was moved on 13.05.2010, through a counsel and as such, the respondent accused did not surrender before the court of the said Judicial Magistrate as

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directed by this court vide order dated 12.05.2010. The learned Judicial Magistrate, First Class, granted regular bail to the respondent accused in violation of the order passed by this court and as such, according to Mr. Basar, the said bail order is liable to be cancelled. According to him, under Section 437 of the Code of Criminal Procedure, 1973, there must be physical appearance by the accused before the Magistrate for granting regular bail as per decision of the Apex Court in ***Nirmal Jeet Kaur -vs- State of M.P. & Anr.***, reported in **(2004) 7 SCC 558**.

5. Per contra, Mr. Taffo, learned counsel appearing on behalf of respondent accused, submits that the respondent accused was physically present along with his counsel before the court of learned Judicial Magistrate, First Class, Yupia, on 13.05.2010, and the learned Judicial Magistrate, on being satisfied with his surrender and on perusal of relevant CD, granted regular bail to the respondent accused. To substantiate his submission, learned counsel has drawn the attention of this court to another order dated 13.05.2010 (Annexure-I to the counter affidavit filed by the respondent accused) passed by the said court of learned Judicial Magistrate, First Class, Yupia, wherein it has been recorded that ***"Sri Chichung Chuku surrendered before my court at 1200 hrs with a copy of order from the Hon'ble Gauhati High Court, Itanagar Permanent Bench, Naharlagun, with a direction to surrender him before the Judicial Magistrate, First Class, Yupia, in connection with Doimukh P.S. Case No. 18/2010 under Sections 452/354/324 I.P.C.. Accordingly, taken into custody."*** It,

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therefore, cannot be said or doubted that the respondent accused was not present or did not surrender before the court of learned Judicial Magistrate, First Class, Yupia, prior to or at the time of granting of regular bail. The pre-condition for granting regular bail under Section 439 Cr.P.C., according to Mr. Taffo, has been fulfilled inasmuch as the respondent accused surrendered before the jurisdiction of the court and there is nothing wrong in granting bail to the respondent accused, as has been held in **Niranjan Singh & Anr. -vs- Prabhakar Rajaram Kharote & Ors.**, reported in **AIR 1980 SC 785**.

6. For disposal of this criminal revision petition, the only question that is required to be decided is whether the respondent accused was present or surrendered before the court of learned Judicial Magistrate, First Class, Yupia, on 13.05.2010, as directed by this court vide order dated 12.05.2010. The petitioner State has annexed the order dated 13.05.2010 (Annexure-IV to the criminal revision petition) wherein, as stated earlier, it has, nowhere, been recorded about the physical presence or surrender of the respondent accused before the court of learned Judicial Magistrate, First Class, at Yupia. However, it has been recorded therein that on perusal of medical report, the petitioner was found suffering from Hypertension and there was a need for consultation with Neurologist/ Neurosurgeon at Guwahati, Assam, and in support of the same, the respondent accused through his counsel, produced

prescriptions and medical report from R.K. Mission Hospital, Itanagar. There are other medical documents submitted by the respondent accused which have been furnished along with the counter affidavit, marked as Annexure-V series. One Dr. Taba Nima, Medical Officer, Accupuncture Unit, Government Dispensary, Itafort, issued a certificate dated 13.05.2010, to the effect that Mr. C. Chuku was admitted in Heema Hospital as he was suffering from Hypertension and APD for which he needed emergency medical treatment. From this medical certificate, it is evident that the respondent accused was admitted in Heema Hospital on 13.05.2010. The said Heema Hospital also issued a discharge certificate to the effect that the respondent accused was admitted on 12.05.2010 and discharged on 13.05.2010. These medical documents as submitted by the respondent accused person are contradictory to each other. However, from the aforesaid certificates, it is seen that the respondent accused was infact admitted in Heema Hospital on 13.05.2010 for treatment.

7. Strangely, it is also noticed that there are two orders passed by the court of learned Judicial Magistrate, First Class, Yupia, on the same date i.e. 13.05.2010; one order which has been appended as Annexure-IV to the criminal revision petition and the other one which has been appended as Annexure-I to the counter affidavit filed by the respondent accused. It is, therefore, not understood as to how the Judicial Magistrate

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concerned passed two orders on the same date. However, from Annexure-I order, one thing which is clearly evident is that it was passed at 1500 hrs or thereafter on 13.05.2010 because the learned Judicial Magistrate recorded as under:

“Under the circumstances of medical ground, the hearing of the bail petition is fixed at 1500 hrs. The I.O. of the case who is already in the court with details of the CD of instant case in connection with File No. JUD/MISC-01/2010 be directed to be present with the said CD during the bail petition hearing.”

8. In the Annexure-I order, the learned Judicial Magistrate, First Class, Yupia, at the very outset, mentioned that accused Chichung Chuku surrendered before his court on 13.05.2010 at 1200 hrs. and accordingly, he was taken into custody. If the aforesaid order is taken to be true and correct, then why the Judicial Magistrate concerned did not record the surrender of the respondent accused before his court at 1200 hrs. of 13.05.2010, is beyond comprehension of this court. The learned counsel for the respondent accused tries to explain that this was due to inadvertence or inexperience of the learned Judicial Magistrate, First Class, in passing the judicial order in a proper manner. Such submission is not acceptable to this court inasmuch as the Presiding Officer who passed the order in question, is holding the post of Judicial Magistrate, First Class. It is also to be noted that the respondent accused is also holding the post of Judicial Magistrate-cum-Circle Officer, at Yupia. Moreover, as stated earlier, the respondent accused was admitted in Heema Hospital on 13.05.2010 and there is no

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record to show that he was released from the said Hospital on 13.05.2010 before 1200 hrs.. Under such circumstances, it cannot be accepted that the respondent accused could appear or could have appeared at 1200 hrs. on 13.05.2010, before the court of Judicial Magistrate concerned and hence, there is sufficient room for doubt on the veracity of the aforesaid order dated 13.05.2010(Annexure-I to the counter affidavit filed by the respondent accused) and as such, it is natural to come to a conclusion that the said order was passed subsequent to order dated 13.05.2010(Annexure-IV to the criminal revision petition) after realization of the mistake committed by the said Magistrate and the consequence of passing such order granting bail to the respondent accused without having the said accused person surrendered/appeared before his court.

9. The decision in *Niranjan Singh*(supra) as relied upon by the learned counsel for the respondent accused is of no assistance to him rather it goes against the respondent accused inasmuch as it has been reiterated in the said decision that no person accused of an offence can move the court for bail under Section 439, unless he is in custody. As held therein, custody, in the context of Section 439 Cr.P.C., means physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court. The accused person may be in custody not merely when the police arrest him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial

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custody when he surrenders before the court and submits to its jurisdiction.

10. In the present case, the respondent accused was never arrested by the police and he never surrendered to the jurisdiction of the court and as such, he was never in custody within the meaning of Section 439 of the Code of Criminal Procedure, 1973. The respondent accused having been enlarged on bail by the court of learned Judicial Magistrate, First Class, Yupia, without having him produced or surrendered before the said court, as directed by this court or under the provision of section 439 Cr.P.C., such order granting bail to the respondent accused, cannot be sustained in law. The bail order, in question, as granted by the court of learned Judicial Magistrate, First Class, Yupia, is liable to be cancelled and it is accordingly cancelled.

11. The police shall take necessary steps to have the respondent accused Sri Chichung Chuku arrested immediately. The respondent accused may surrender before the court of learned Judicial Magistrate, First Class, Yupia, within a period of 7(seven) days from today and make appropriate application for granting him bail in accordance with law.

12. The criminal revision petition stands allowed.

13. Send down the LCRs to the court below forthwith.


JUDGE