

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM; NAGALAND; MIZORAM AND ARUNACHAL PRADESH)

ITANAGAR PERMANENT BENCH

Crl. Petn. No. 89(AP)/2017

Shri Tobjen Danggen,
S/o. Lt. Duggeng Danggen Aged about 60 years
Permanent resident of Village Jedo under Tuting Sub-
Division P.O. /P.S. Tuting, Upper Siang District,
Arunachal Pradesh.

... Petitioner

-VERSUS-

1. The State of Arunachal Pradesh represented by
Public Prosecutor.

2. Shri Dunge Apang, S/o. Shri Lamno Apang
permanent village of Ramsing, P.O. /P.S. Jenging,
Upper Siang District, Arunachal Pradesh.

... Respondents

BEFORE
HON'BLE MR. JUSTICE KALYAN RAI SURANA

Advocates for the petitioner	: Ms. N. Danggen.
Advocates for the Respondents	: Mr. A. Apang, Sr. Adv. : Ms. N. Anju, Ms. M. Tang.
Date of hearing	: 18.05.2018.
Date of order	: 20.06.2018.

JUDGMENT AND ORDER (CAV)

Heard Ms. N. Danggen, the learned counsel for the petitioner. Also heard Ms. M. Tang, the learned A.P.P., for the State and Mr. A. Apang, the learned Senior Counsel, assisted by Mr. N. Anju, the learned counsel for the respondent No.2.

2) By this petition filed under Section 439(2) read with Section 482 Cr.P.C., the petitioner has prayed for cancellation of bail granted to the respondent No.2 vide

order dated 08.12.2017, passed by the learned Addl. District & Sessions Judge, East Siang Dist., Passighat in Bail Application No.77/2017 in connection with Yingkiong P.S. Case No. 25/2017 under Section 376 IPC read with Section 4/6 of Protection of Children from Sexual Offences Act, 2012 ("POCSO Act" for short).

3) The petitioner herein is the minor victim, represented by her natural grandfather and guardian. The accused is husband of sister of victim's father. Hence, a close relative.

4) The issue raised is very short. It is projected that the victim is a student of Class-VIII and stays in a residential school. On 26.09.2017, during Durga Puja vacations, the accused came to school and took her for a walk and then raped her and threatened her with dire consequences. She ran away to the house of elder sister of her father and informed her everything. Finding her without clothes and covering herself with a towel, some clothes were lent. On the next day by hiring a vehicle, the minor victim was sent to her native village. FIR was lodged at Tuting P.S. on 01.10.2017, which was forwarded to Yingkiong P.S., where Yingkiong P.S. Case No. 25/2017 under Section 376 IPC read with Section 4/6 of POCSO Act was registered.

5) The accused was granted interim anticipatory bail, which was dismissed on 27.10.2017. After about 3 (three) days, the accused was arrested. Thereafter, the accused was granted bail by order dated 08.12.2017.

6) By referring to the order granting bail, the learned counsel for the victim-petitioner has submitted that as per the bail order, on 21.11.2017, Charge Sheet was filed against the accused. The learned Addl. Sessions Judge, Eastern Zone, Passighat had directed the DMO Yingkiong to constitute a Board and examine the accused, who was sick, but no report was sent. As PP was absent, considering the submissions made by the learned defence counsel, bail was granted to the accused.

7) It is submitted that absence of report by DMO could not be a ground to enlarge the accused of such heinous crime on bail. Moreover, as bail was granted without hearing the Public Prosecutor (PP for short), the order of bail was in violation of the fourth proviso to Section 439(1) Cr.P.C. It is submitted that in the present case, granting of bail was a procedural lapse, this was a fit case for cancellation of bail. In support of her submissions, the learned counsel for the victim- petitioner has placed reliance on the following cases:-

- a. Puran Vs. Rambilas & Anr., (2001) 6 SCC 338;*
- b. Brij Nandan Jaiswal Vs. Munna Jaiswal & ors., (2009) 1 SCC 678;*
- c. Subodh Kr. Yadav Vs. State of Bihar & Ors., (2009) 14 SCC 638;*
- d. Gulabrao Baburao Deokar Vs. State of Maharashtra, (2013) 16 SCC 190.*

8) Per contra, the learned Senior Counsel has vehemently objected to the instant petition. It is submitted that the respondent No.2 had suffered jail custody for about 38 days and therefore, there was no illegality in granting bail to the respondent No.2 after charge-sheet was submitted in Court. It is further submitted that for about 6 months now, there is no instance that the respondent No.2 had misused his liberty or that he has threatened the victim or any witness in the case and that he has not mis-used his liberty in any manner whatsoever. Hence, no case was made out for grant of bail. It is further submitted that the case was from Upper Siang, but the trial of the respondent No.2 was taking place at Pasighat, which is at East Siang District and it takes about 2 days to travel to attend trial. Hence, the liberty of bail was essentially a manifestation of Article 21 of the Constitution of India, and such a valuable right of the respondent No.2 cannot be curtailed merely because the PP was absent and the DMO did not send his medical report to the Court, as directed. Hence, the learned senior counsel for the respondent No.2 prays for dismissing the instant petition.

9) It is seen that as under Section 32 of the POCSO Act, 2012 the State is required to appoint Special PP by notification in the Official Gazette. Section 31 of POCSO Act, 2012 provides that Code of Criminal Procedure, 1973 would apply to

proceedings before a Special Court notified under the said POCSO Act. Therefore, in this regard, the provisions of Section 439(1) is quoted below:-

"S.439. Special powers of High Court or Court of Session regarding bail.

(1) A High Court or Court of Session may direct-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in subsection (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing a person on bail be set aside or modified: Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody".

10) Thus, before granting bail, the provisions of fourth proviso to section 439 requires that the court should hear the PP. Moreover, on a perusal of the impugned order it is not discernible whether any requisition was actually served on the DMO, Yingkiong to examine the respondent No.2- accused and to submit his report on the next date fixed. Therefore, the learned trial court had passed the impugned order to release the respondent No.2 on bail without arriving at a satisfaction that the accused was actually suffering from any ailment and that it was expedient to enlarge the respondent No.2 on bail without waiting for the DMO's report to arrive. It would be pertinent to remember that a statement was made by the learned Senior Counsel for the respondent No.2 at the Bar that it takes 2 (two) days for one to reach Pasighat from Yingkiong. Moreover, the learned trial has also not recorded its satisfaction why it was necessary to enlarge on bail without hearing the Special P.P. appointed for prosecuting the accused in POCSO cases.

11) It would be relevant to quote paragraph 25 & 26 of the case *Gulabrao Baburao Deokar (supra)*:-

"25. The appellant and the accused have been charged for an offence which may result into the punishment for imprisonment for life. It is a serious charge supported by a detailed charge-sheet running into over 268 pages. It is stated therein that the Jalgaon Municipal Corporation had illegally given more than 30 contracts to Jalgaon Construction Company belonging to the appellant as a beneficiary in the conspiracy. Obviously the prosecutor required time to interrogate the accused, and the custodial interrogation in such a situation, for at least two days, could not have been denied. It could have aided the investigation by unearthing relevant information. The bail order was however passed on the same day, there and then. We are conscious of the fact that the liberty of a citizen even if he is an accused is undoubtedly important, but at the same time when the prosecutor had pointed out to the Court that the role of the appellant was no less than that of the three others whose bail had been rejected, the learned Judge ought to have considered these circumstances, justifying custodial interrogation, with due diligence.

26. Thus it could certainly be said that the order passed by the Sessions Judge was an order passed in breach of the mandatory requirement of the proviso to Section 439(1) of Cr.P.C. It is also an order ignoring the material on record, and therefore, without any justification and perverse. As held by this Court in *Puran Vs. Rambilas* (supra), the High Court does have the power under Section 439(2) of Cr.P.C. to set aside an unjustified, illegal or perverse order granting bail. This is an independent ground for cancellation as against the ground of accused mis-conducting himself".

12) The respondent No.2 is a close relative of the minor victim and the offence is a serious crime, which has the effect of taking away the childhood of a minor girl, who is studying in Class-VIII. It appears that while granting bail, the learned trial court had failed to take note of the provisions of Section 29 of the POCSO Act, 2012, which reads as follows:-

"29. Presumption as to certain offence. – Where a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved".

13) Keeping the above facts, circumstances and the provisions of Section 29 of POCSO Act in mind, this Court is of the view that the grant of bail to the accused in the present case by the learned trial court was a grave error committed by the learned trial court. The learned trial court ought to have recorded a finding as to whether any notice issued by the said learned was actually served on the DMO, Yingkiong to constitute a Medical Board and to examine the accused- respondent No.2 and to submit its report on 08.12.2017, before arriving at a finding that the DMO had not send his report. Moreover, the grant of bail in offence of Section 376 IPC read with Section 4/6 of POCSO Act, 2012 without hearing the Special PP was in violation of the provisions of fourth proviso to Section 439 Cr.P.C. Moreover, in this case, the minor victim has not yet been examined by the court in course of trial.

14) On the issue of personal liberty raised by the learned Senior Counsel for the respondent No.2, it is the opinion of this Court that liberty must be secured through process of law, which is administered by keeping in mind the interest of the accused as well as the interest of the minor victim, who along with her near and dear ones feel helplessness with enlargement of accused because the Special PP was not heard and merely because the DMO, Yingkiong did not send his report.

15) The endeavour of the Court is to ensure that the victims of offence punishable under POCSO Act do not loose faith in the institution by granting bail in violation of fourth proviso to Section 439 Cr.P.C.

16) However, in the instant case, on enquiry made from the Registry of this Court, a very disturbing fact has come to light. It appears that the State of Arunachal Pradesh has not yet made any appointment of a Special Public Prosecutor for dealing with cases under the POCSO Act. There is also no post of Public Prosecutor in the State of Arunachal Pradesh in the Subordinate Judiciary. Therefore, as a matter of practice, the Courts are nominating PP/APP from a panel of lawyers made for this

purpose. This Court is informed that this Court has taken up the matter with the State of Arunachal Pradesh at its highest level to ensure an early appointment of the public prosecutors for subordinate courts exercising criminal jurisdiction for the smooth conducting of criminal cases and prosecution in the State.

17) Faced with the aforesaid situation, as it is seen that the respondent No.2, i.e. the accused is in bail since 21.11.2017, and no instance of misuse of bail has been brought to the notice of this Court, therefore, notwithstanding that in this case the Special PP was not heard, but on finding that Special Public Prosecutor has not been notified by the State of Arunachal Pradesh, this Court is not inclined to direct the respondent No.2 to be taken back into custody because at present his custodial detention is not warranted.

18) Hence, this petition for cancellation of bail of the respondent No.2 stands dismissed. This order has been passed under the circumstances as indicated above because the State Govt. has not appointed Special Public Prosecutor for trying offence under POCSO Act, as such, this order is neither intended to be nor it is to be treated as a precedent for any future case.

19) Though this is not a direction, but it is hoped that the State of Arunachal Pradesh shall take serious notice of the legislative intention of the Country in Code of Criminal Procedure as well as in enacting the POCSO Act, and expedite the process of appointing Special Public Prosecutor for trying offence under POCSO Act within a outer limit of 3 (three) months from today. Hence, the Registry shall send a copy of this order to (i) the Chief Secretary, Govt. of Arunachal Pradesh, (ii) the Commissioner/ Secretary, Home, Govt. of Arunachal Pradesh, and (iii) the Secretary, Law, Govt. of Arunachal Pradesh.

20) It is clarified that this not expressed any observations on merits of the case, and the learned trial court shall decide the case on its own merits after analyzing the evidence that is brought on record during trial.

JUDGE

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