

IN THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Jurisdiction)

SINGLE BENCH: BHASKAR RAJ PRADHAN, JUDGE.

Bail Appl. No. 05/2017

Panna Lal Agarwal,
Aged 48 years,
S/o Late Dwarka Prasad Agarwal,
R/o Nayabazar Appellant.

Versus

State of Sikkim
Represented by Shri Jigme Gensapa,
SI, Jorethang/Investigating Officer
Sikkim Police.
Sikkim. Respondent.

**Application for Bail under Section 439 of the
Code of Criminal Procedure, 1973.**

Appearance:

Mr. Jorgay Namka, Advocate with Ms. Panila Theengh and Ms. Tashi D. Sherpa, Advocates for the Appellant.

Mr. Karma Thinlay Namgyal, Learned Additional Public Prosecutor with Mr. S.K. Chettri and Ms. Pollin Rai, Asstt. Public Prosecutors for the State-Respondent.

ORDER
(04.10.2017)

Bhaskar Raj Pradhan, J.

An application for bail under Section 439 of the Code of Criminal Procedure, 1973 (Cr.P.C.) by the accused allegedly involved in Jorethang P.S. FIR No.41/2017 dated 29.07.2017 under Section 363/354/506/34 of the Indian Penal Code, 1860 (IPC) read with Section 8/12/14 of the Protection of Children from Sexual Offences

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Act, 2012 (POCSO Act, 2012) on the ground that the investigation is nearly complete; the allegation in the FIR does not satisfy the ingredients of the alleged offence; the accused is a business man of repute and the only earning member of the family and suffering from accelerated hypertension is vehemently opposed by the State on the ground that the allegation in the FIR makes it evident that the accused, if released on bail may continue to threaten the victim and tamper with vital evidence.

2. The facts necessary for disposal of the present application is lucid in the FIR lodged on 29.07.2017 at the Jorethang Police Station by the prosecutrix, a girl child of 16 years and 4 months. The allegation in the FIR is to the effect that while walking back home after school the accused stopped his red colour i10 car, asked if she was going home and offered her a lift when she replied that she was in fact going home. The prosecutrix thus got into the vehicle of the accused. However, when the accused diverted the vehicle towards Namchi instead of Nayabazar the prosecutrix inquired as to where he was going. The accused replied that he would finish his work and quickly take her back to Nayabazar. The prosecutrix believed the accused and they continued till Karfectar when he stopped the vehicle, took out his small knife from the vehicle's document box and asked the prosecutrix to remove her clothes otherwise he would stab her. The prosecutrix did not comply for a while but when the accused brought the knife next to her nose and threatened her that he would kill her she got frightened and removed her PT dress after which he threatened her more and made her remove even her undergarments. Thereafter, the accused started touching her front body which made her cry. The accused, thereafter, threatened her and made her pose with a smile

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and took photographs of her on his mobile. The accused then told her to wear her clothes and not to tell anybody otherwise he would kill her and upload the photograph on facebook. The accused then took the prosecutrix to Nayabazar after which she went home. Due to the fact that her grandmother had been taken ill and her father had taken her to Siliguri there was much tension at home and the prosecutrix did not relate the story to anybody. Subsequently, the accused once again threatened her by telling her that if she did not get in his car he would upload the photograph on facebook and whatsapp after which the prosecutrix got into the vehicle where again the accused made her undress and took another photograph. Fifteen days prior to the lodging of the FIR, the accused had once again met the prosecutrix in Nayabazar near the shop and asked her to go with him for doing "naramro kam" (dirty act) but she declined and he threatened her that he would circulate the photographs. A day before the lodging of the FIR the prosecutrix's aunt told the prosecutrix's father that she had been shown the prosecutrix's naked photo by a lady who is the co-accused. After that on being asked by the prosecutrix's father, the prosecutrix told him the entire story. Her father had heard that the accused and the co-accused had uploaded her photograph on whatsapp and facebook. Stating all the aforesaid facts in the written complaint dated 29.07.2017, the prosecutrix lodged the aforesaid FIR.

3. The accused thereafter approached the Special Judge, POCSO Act, 2012 at Namchi for bail on three occasions each of which were however, rejected. The last rejection was vide Order dated 15.09.2017.

4. The co-accused, Miss Anjana Sharma, however, was granted bail by the Special Judge vide Order dated 08.09.2017. Mr.

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Jorgay Namka, the Learned Counsel for the accused thus also seeks bail on the ground of parity with the co-accused. The Learned Special Judge vide order dated 15.09.2017 rejected the ground of parity holding, inter-alia, that the facts and circumstances of the present case makes it amply clear that the allegation against the case of the accused compared to the co-accused are different and more grievous. This Court sees no justification to differ with the view taken by the Learned Special Judge.

5. On the date of filing of the application for bail, Mr. Jorgay Namka would argue that the accused has already been in custody for more than 52 days.

6. Prima facie or reasonable ground to believe that the accused has committed the offence alleged, nature and gravity of the accusation, severity of punishment, danger of accused absconding or fleeing, character, behavior, means, position and standing of accused, likelihood of offence being repeated, reasonable apprehension of witnesses being influenced, danger of justice being thwarted by grant of bail are vital considerations in exercise of the discretionary jurisdiction of the Sessions Court and the High Court under Section 439 of the Cr.P.C. which must be exercised judiciously, cautiously and strictly in compliance with the principles provided in Section 439 of the Cr.P.C. and in a plethora of decisions of the Apex Court.

7. On a query raised by this Court, Mr. Karma Thinlay Namgyal, Learned Public Prosecutor, on instruction from the Investigating Officer submits that the investigation is complete and the charge-sheet would be filed as soon as the forensic report sought for would be received. On instructions, the Learned Public Prosecutor also

submitted that the corpus delicti of the crime have also all been seized.

8. At the hearing Mr. Jorgay Namka would cite **Sanjay Chandra v. Central Bureau of Investigation**¹. It is trite that the object of bail is to secure the appearance of the accused persons at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. This was a case of economic offences in which the prosecution had contended that there is a possibility of the appellants therein tampering with the witnesses however, without placing any material in support of the allegation. However, the present case is a case in which the allegation is of the commission of heinous offences under the POCSO Act, 2012 in which the FIR itself alleges three occasions on which the accused had intimidated and threatened the prosecutrix.

9. Mr. Jorgay Namka would also refer to various bail orders passed by different High Courts to contend that even in more serious offences under POCSO Act, 2012 the Courts had granted bail. The order granting bail passed by the Gujarat High Court in re: **Bharatbhai Ranabhai Solanki v. State of Gujarat**² was relating to a case in which the allegation in the FIR indicated a love affair with the accused therein and thus distinguishable in the present case. Similarly the order granting bail passed by the Madhya Pradesh High Court in

¹ (2012) 1 SCC 40

² order dated 01.08.2017 in Criminal Misc. Application (For Regular Bail) No. 18948 of 2017

re: ***Kamlesh Ahirwar v. The State of Madhya Pradesh***³ was relating to a case in which it was contended that the prosecutrix went with the applicant on her own will and she was a consenting party and thus also distinguishable. The order granting bail by the Gujarat High Court in re: ***Dharmeshbhai Manabhai v. State of Gujarat***⁴ was also in the peculiar facts of the said case in which the prosecutrix had on the very next date of lodgment of the FIR stated that no act of sexual intercourse was made by the applicant. However, in her second statement made after four days of the FIR she had made such allegation which the medical certificate did not support. Thus, even this case is distinguishable.

10. The Learned Public Prosecutor would refer to the Apex Court judgment in re: ***Neeru Yadav v. State of Uttar Pradesh***⁵ in which it was held that the factors to be considered while granting bail are (i) nature of accusation and severity of punishment in cases of conviction and nature of supporting evidence; (ii) reasonable apprehension of tampering with witnesses for apprehension of threat to complainant; and (iii) prima facie satisfaction of court in support of charge. The judgment of the High Court granting bail to the accused therein only on the ground of parity was overturned by the Apex Court as the said accused was a history-sheeter.

11. In re: ***State of Bihar v. Rajballav Prasad***⁶ the Apex Court would overturn after examining the legality and propriety of the order granting bail by the High Court after the conclusion of the investigation, in which charge-sheet had been filed and charges

³ order dated 24.08.2017 in MCRC-10582-2017

⁴ order dated 28.07.2017 in Criminal Misc. Application (For Regular Bail) No. 10730 of 2017

⁵ (2016) 15 SCC 422

⁶ (2017) 2 SCC 178

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framed under Section 376, 420/34, 366-A, 370, 370-A, 212, 120-B of the IPC and Sections 4, 6 ad 8 of POCSO as well as Section 4 to 6 of the Immoral Traffic (Prevention) Act, 1956 by observing that presumption of innocence would continue to run in favour of the accused until the guilt is brought home and discussing the merits of the case and holding that there was no material showing that the accused had interfered with the trial by tampering evidence. The Apex Court held:

"24. As indicated by us in the beginning, prime consideration before us is to protect the fair trial and ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully and this Court is convinced that in the present case, that can be ensured only if the respondent is not enlarged on bail. This importance of fair trial was emphasised in Panchanan Mishra v. Digambar Mishra [Panchanan Mishra v. Digambar Mishra, (2005) 3 SCC 143 : 2005 SCC (Cri) 660] while setting aside the order of the High Court granting bail in the following terms: (SCC pp. 147-48, para 13)

"13. We have given our careful consideration to the rival submissions made by the counsel appearing on either side. The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime and if there is delay in such a case the underlying object of cancellation of bail practically loses all its purpose and significance to the greatest prejudice and the interest of the prosecution. It hardly requires to be stated that once a person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent, the accused in order to get away from the clutches of the same indulge in various activities like tampering with the prosecution witnesses, threatening the family members of the deceased victim and also create problems of law and order situation."

26. We are conscious of the fact that the respondent is only an undertrial and his liberty is also a relevant consideration. However, equally important consideration is the interest of the society and fair trial of the case. Thus, undoubtedly the courts have to adopt a liberal approach while considering bail applications of the accused persons. However, in a given case, if it is found that there is a possibility of interdicting fair trial by the accused if released on bail, this public interest of fair trial would outweigh the personal interest of the accused while undertaking the task of balancing the liberty of the accused on the one hand and interest of the society to have a fair trial on the other hand. When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes

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public confidence in the criminal justice-delivery system. It is this need for larger public interest to ensure that criminal justice-delivery system works efficiently, smoothly and in a fair manner that has to be given prime importance in such situations. After all, if there is a threat to fair trial because of intimidation of witnesses, etc., that would happen because of wrongdoing of the accused himself, and the consequences thereof, he has to suffer. This is so beautifully captured by this Court in Masroor v. State of U.P. [Masroor v. State of U.P., (2009) 14 SCC 286 : (2010) 1 SCC (Cri) 1368] in the following words: (SCC p. 290, para 15)

"15. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned. In this context, the following observations of this Court in Shahzad Hasan Khan v. Ishtiaq Hasan Khan [Shahzad Hasan Khan v. Ishtiaq Hasan Khan, (1987) 2 SCC 684 : 1987 SCC (Cri) 415] are quite apposite: (SCC p. 691, para 6)

'6. ... Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution."

12. Keeping the parameters laid down by the Apex Court in mind it is vital to consider the nature of the offences alleged. For the said purpose the following chart would be indicative:-

| Sl. No. | Offence | Term of sentence | Cognizable or Non-cognizable | Bailable or non bailable | By what Court triable |
|----------------|----------------|--|-------------------------------------|---------------------------------|-------------------------------|
| 1. | 363 IPC | May extend to 7 years and also with fine | Cognizable | Bailable | Magistrate of the First Class |
| 2. | 345 IPC | May extend to 2 years in addition to any term of imprisonment to which he may be liable under any other section. | Cognizable | Bailable | Magistrate of the First Class |
| 3. | 506 IPC | May extend to 2 years, or with fine, or with both. | Non-cognizable | Bailable | Magistrate of the First Class |
| 4. | 8 POCSO | Not less than 3 years, may extend to 5 years and also with fine. | Cognizable | Non-bailable | Special Court |

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|----|----------|--------------------------------------|------------|--------------|---------------|
| 5. | 12 POCSO | May extend to 3 years and with fine. | Cognizable | Non-bailable | Special Court |
| 6. | 14 POCSO | May extend to 5 years and with fine. | Cognizable | Non-bailable | Special Court |

13. Sections 363, 354 and 506 IPC are all bailable offences and therefore there is no need to examine the nature of the allegations under IPC at this stage. Section 8, 12 and 14 of the POCSO Act, 2012 are, however, non-bailable offences. The allegation in the FIR does indicate a prima-facie case against the accused under the POCSO Act, 2012.

14. The allegations in the FIR as set out herein above also alleges that the accused had sought to black mail, intimidate, threaten and use his position of power over the prosecutrix to subjugate her into submission on three occasions.

15. As per the Learned Public Prosecutor, although, the investigation is complete the filing of the charge-sheet would be possible only after receipt of forensic opinion which is awaited. On instruction received from the Investigating Officer, the Learned Public Prosecutor indicated that the charge-sheet may be filed within a week or two and all attempts are being made to secure the forensic opinion at the earliest.

16. Trial is yet to begin. As held in re: **Rajballab Prasad (supra)** the prime consideration is to protect the fair trial and ensure that justice is done. This may happen if the witnesses are able to dispose without fear, freely and truthfully. The victim is a child of 16 years and the accused is, as per his own pleadings, a businessman of repute having a standing in the society. It is trite that one of the fundamental considerations for grant of bail is the reasonable apprehension of the accused tampering with evidence. However, it is

not necessary to prove the fact of tampering with mathematical certainty or indeed beyond a reasonable doubt. The test to be adopted in such matters is one of "reasonable apprehension".

17. The offences alleged under POCSO Act, 2012, are heinous offences. Although it is informed that the prosecutrix's statement has been recorded under Section 25 of the POCSO Act, 2012 by the Magistrate, the prosecutrix and material witnesses have not deposed before the Special Court as yet.

18. The accused is an under-trial and his liberty is also relevant. However, while considering bail applications it is incumbent upon the Court to balance this liberty of the accused with interest of the society to have a fair trial. Fair trial would be in danger of peril if there is reasonable apprehension of witnesses being intimidated or compromised. Although there is no cogent evidence brought forth by the prosecution to establish witness intimidation, post arrest of the accused, the very fact that the FIR alleges three incidents of intimidation by the accused on the prosecutrix is perhaps enough to have a "reasonable apprehension" that the accused may again seek to do so to get away from the clutches of the serious and heinous case where the punishment prescribed is both stringent and deterrent. Reasonable apprehension, as rightly pointed out by the Learned Public Prosecutor, can be gauged in the present case from the allegation made in the FIR itself. In the present case, the accused has been in custody for about two months. The minimum punishment prescribed for the alleged offence under Section 8 of the POCSO Act, 2012 is three years which may extend to five years.

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19. In the facts and circumstances of the present case, although conscious of the liberty of the accused in a pre trial case, this Court is of the view that granting bail to the accused at this stage would not serve fair trial. Accordingly, the application for bail is rejected, however, with liberty to the accused to approach the Special Court after material witnesses in the present case are examined, if advised.

20. It is made clear that the observations made herein are solely for the purpose of consideration for grant of bail at this stage. The Special Court, needless to say, shall not be influenced at the trial by any observation made in the present order.

(Bhaskar Raj Pradhan)
Judge
04-10-2017

Avi/to Approved for reporting: yes.
Internet: yes.