



GAHC010147232021

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

Case No. : CrI.Pet./504/2021

THE STATE OF ASSAM
REP. BY ITS INVESTIGATING OFFICER NAMELY ADITH ORO,
SON OF TRIBENDRA BORO,
RESIDENT OF VILL- BHOGIRAM GAON, P.S. AND P.O. DABOKA
DIST. NAGAON, ASSAM, PIN-782440, ASSAM

VERSUS

MD. DILDAR HUSSAIN @ DILJAR HUSSAIN @ PAGLA DOCTOR
SON OF LATE USHON ALI
R/O VILL- LAHORIGHAT
(BARBORI), P.S. LAHORIGHAT,
DIST. MORIGAON, ASSAM, PIN-782127

Advocate for the Petitioner : PP, ASSAM

Advocate for the Respondent : MR H R A CHOUDHURY

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT

Date : 21-10-2021

This application under Section 482 Cr.P.C., read with section 439 (2) of the Cr.P.C., is preferred by the state of Assam, represented its Investigating Officer, namely Adith Boro, S/o Tribendra Boro, of



Village Bhogiram, Police Station & PO Doboka, District Hojai, Assam for cancellation of impugned bail order, dated **31.08.2021**, passed by the learned Special Judge, (POCSO) Morigaon, in Bail Application No. 209/2021 (**State of Assam Vs. Dildar Hussain @ Diljar Hussain @ Pagla Doctor**), in Laharighat P.S. Case No. 53/2021, under sections 302/201/34 IPC *read with* section 376(1)(2) IPC, *read with* section 6 of the POCSO Act, and section 312/313/314/336/419 of IPC *read with* section 5(2)/5(3)/5(4) of Medical Termination of Pregnancy Act, 1971 read with section 21 of POCSO Act.

2. It is to be mentioned here that vide impugned order, dated 31.08.2021, the learned Special Judge (POCSO) Act, Morigaon has enlarged the accused, Dildar Hussain @ Diljar Hussain @ Pagla Doctor, S/o Late Ushon Ali, of Village Lahorighat, under Police Station Lahorighat, District Morigaon, Assam on interim bail for a period of three months in view of mandate of first proviso of sub-section (1) of section 437 of Cr.P.C., imposing three conditions that he shall appear before the court after three months i.e. on 30.11.2021, he shall not commit similar offence and that he 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 or tamper with the evidence.

3. Heard Mr. M. Phukan, learned P.P. Assam. Also heard Mr. A. Ahmed, learned counsel for the respondent No. 1.

4. The factual background leading to filing of this petition is briefly stated as under:-



"Accused Baharul Islam of Lahorighat is the brother in law of the victim Morgina Khatoon (actual name withheld). He got married with the elder sister of the victim. Accused Baharul Islam stayed in Manipur in connection with his avocation. Then victim girl also went there and stayed with him in Manipur for three months. During that period Baharul Islam committed rape upon the victim on several occasions and impregnated her. Thereafter, on a complaint lodged by his wife, the elder sister of the victim girl, accused Baharul Islam and the victim returned home. After 2 & ½ month, the victim complained of pain over her stomach and bleeding. Then the mother of the victim took her to another accused known as Pagla Doctor who has detected the pregnancy of the victim. Thereafter, the Pagla Doctor got her pregnancy aborted illegally on 22.01.2021. But, after the abortion the condition of the victim got deteriorated. When her condition further deteriorated then as per advice of the Pagla Doctor, the victim was taken to Nagaon Civil Hospital. But, she succumbed on the way to Hospital. Thereafter, her dead body was taken to Fakuli Pathar and on the next day she was laid to rest at Da-Gaon graveyard. Thereafter, on 27.01.2021, Mussabir Alom and one Ikramul Hoque of Dhuniabheti Pathar and Lalung Gaon, respectively, lodged one FIR with the Superintendent of Police, Morigaon, who then forwarded the same to the O/C Lahorighat P.S. The O/C Lahorighat P.S. then registered a Case No. 53/2021, u/s 302/201/34 IPC and endorsed S.I. Eiyin Sinha to investigate the same. During investigation, the I.O. has added several other sections i.e. section 376(1)(2) IPC, read with section 6 of the POCSO Act, and section



312/313/314/336/419 of IPC, read with section 5(2)/5(3)/5(4) of Medical Termination of Pregnancy Act, 1971 read with section 21 of POCSO Act, to the original sections, with the permission of the court. The I.O. also arrested some of the accused and forwarded them to the court. Accused Dildar Hussain @ Pagla Doctor, who conducted abortion on the victim was found absconding but he surrendered before the S.P. Morigaon, after 6 & ½ months, on 18.08.2021. The I.O. the narrested him and forwarded to the court. The Id. Special Judge, under POCSO Act, Morigaon has remanded him to judicial custody. But, at the time of production, and after hearing complaint of physical assault by police and on a petition filed by the wife of the accused, the Id. Court has issued some direction to Jail Doctor, to provide immediate necessary treatment to the accused and if needed be to refer him to Civil Hospital Morigaon or to GMCH, Guwahati for better treatment with intimation to the court. Thereafter on 31.08.2021, the Id. Court, while dealing with the bail petition of the accused, found that the accused is suffering from serious urological problem. Then without going into the merit of the case, instead considering his medical condition, the Id. Court below, enlarged him on interim bail for a period of three months, imposing three conditions.”

5. Being highly aggrieved, the applicant preferred this application under Section 439 (2) of the Cr.P.C., r/w section 482 Cr.P.C. on the following grounds:-

(i) that, the Court below committed grave injustice to the petitioner by enlarging the respondent on interim bail for a period of

three months;

(ii) that, the respondent without having any medical degree and without any authorization to administer medicine performed illegal abortion of a 17 years old girl and he also failed to report the offence of rape rather concealed the same by performing illegal abortion;

(iii) that, the victim was taken from the premises of the respondent and at that time she was bleeding severely and eventually died on her way to Hospital;

(iv) that, after commission of the offence the respondent was absconding for 6 & ½ months and though he was arrested on 17.08.2021 he did not co-operate with the investigating agency at any point of time rather he made several allegation against the agency;

(v) that, along with the bail application no medical document was submitted and it is astounding how the Id. Court below has come to conclusion that the respondent was suffering in serious medical problem;

(vi) that the respondent was habitual offender and is involved in Lahorighat P.S. Case No. 203/2017 under section 25(1-A) Arms Act, read with section 5 of Explosive Substance Act, and he is charge sheeted in the said case;

(vi) that after granting of interim bail he was released from GMCH, Guwahati and roving and moving easily in the Town;



(vii) that the case diary reveals that he has not been co-operating with the investigation;

(viii) that investigation reveals that he made several attempt to hamper/temper the witnesses and tried to influence them with money and muscle power;

(ix) that during the three months interim bail also he tried to demolish the material evidence, but for the sake of investigation the same cannot be disclosed at this stage and if the respondent remained outside the jail then the investigation will be paralyzed;

(x) that there is chance of flight risk or there is likely hood of absconding;

(xi) that the impugned order was passed without appreciating the contention raised by the petitioner;

(xii) that the respondent is a very influential person in that area with status and position and as such he may influence investigation and prosecution;

(xiii) that for effective investigation and prosecution he is required to be kept in judicial custody; and that he may attempt to abscond, influence investigation, temper with evidence, and therefore, it is contended to allow the petition, by cancelling the interim bail.

6. Mr. M. Phukan, the learned P.P. has submitted that the petition under section 439(2) is maintainable. It is apposite to mention here that the Id. Counsel for the respondent has raised the question maintainability of the petition on the previous day of hearing. The Id.

P.P. also reiterated the points, so mentioned in the petition for cancellation of bail. It is further submitted that the impugned order was passed without considering the settled principles of law, and as such, it not at all sustainable. It is further submitted that the respondent is an influential person of the locality and after his release on interim bail he has been roving and moving easily in the Town and that the he has not been co-operating with the investigation and he made several attempt to hamper/tamper the witnesses and tried to influence them with money and muscle power and he has no clean antecedent. It is further submitted that the respondent has been granted interim bail on medical ground and the same stands fulfilled. The Id. P.P. also produced the case diary for perusal of the court and contended to allow the petition and to cancel the interim bail granted by the Id. Court below. The Id. P.P. also *referred following case laws, in support of his submissions:-*

(i) ***Prakash Kadam & Others Vs. Ramprasad Viswanath Gupta & Another (2011) 6 SCC 189;***

(ii) ***State of U.P. Vs. Amarmani Tripathi, (2005) 8 SCC 21;***

(iii) ***Virupakshappa Gouda & Anr vs. State of Karnataka & Anr, (2017) 5 SCC 406;***

7. On the other hand, Mr. A. Ahmed, the learned counsel appearing on behalf of respondent No. 2 submitted that the Id. Court below has granted interim bail to the respondent on medical ground under section 437(1) Cr.P.C. and as such, the petitioner ought to



have preferred this application before the Id. Court below, which granted bail. Mr. Ahmed further submitted that though it is contended by the petitioner that the respondent was absconding, yet, he was very much available there. Mr. Ahmed also submitted some medical documents before the court and submitted that the respondent is still undergoing treatment at Nagaon and also at Patna. Mr. Ahmed also submitted that the impugned order, i.e. Annexure-'F' reveals that the Id. Court below has considered the Advice Slip of Morigaon Civil Hospital and other medical documents including documents issued by Gauhati Medical College Hospital, Department of Microbiology, and as such the contention of the petitioner that the Id. Court below has granted bail to the respondent on medical ground without any medical document being enclosed with the petition. Referring one decision of this court in **the State of Assam, vs. Arup Das & Another, (Crl. Pet. 60/2019)**, Mr. Ahmed submitted that there must be overwhelming circumstances to cancel bail and the same are absent here in this case and therefore, Mr. Ahmed contended to dismiss the petition.

8. *Having heard the submission of learned Advocates of both sides, I have gone through the documents placed on record and also gone through the case diary. Before directing to discussion in to the point, I deemed it appropriate to discuss some of the case laws relating to cancellation of bail so as to deal with the present petition with greater precision. In **Gurcharan Singh Vs. State (Delhi Administration)**, reported in **(1978) 1 SCC 118**, the Hon'ble Supreme Court clarified the position as under:*

'Under Section 439(2) of the new Code, a High Court may commit a person released on bail under Chapter XXXIII by any Court including the Court of Session to custody, if it thinks appropriate to do so. It must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial, after an accused person has been admitted to bail by the High Court. If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a- vis the High Court.'

9. Subsequent judgments have forward this discussion and differentiated between cases where cancellation of bail is sought on the basis of supervening circumstances, which arise from facts which happening after the order granting bail was given, or facts which

were not before the judge while passing order granting bail and cases where cancellation of bail is sought on the ground that order granting bail is illegal or perverse.

10. In Myakala Dharmarajam &Ors. Vs. the State of Telangana & Anr. [(Criminal Appeal Nos. 1974-1975 of 2019) arising out of SLP (Crl.) Nos. 8882-8883 of 2019], Hon'ble Supreme Court held that as under:

“It is trite law that cancellation of bail can be done in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the Court granting bail ignores relevant material indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail.”

11. In Raghbir Singh Vs. State of Bihar, reported in (1986) 4 SCC 481, the Hon'ble Supreme Court held that bail can be cancelled where:

- (i) the accused misuses his liberty by indulging in similar criminal activity,
- (ii) interferes with the course of investigation,
- (iii) attempts to tamper with evidence or witnesses,
- (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation,

- (v) there is likelihood of his fleeing to another country,
- (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency,
- (vii) attempts to place himself beyond the reach of his surety, etc.

It is also held by the Hon'ble Supreme Court that these grounds are illustrative and not exhaustive. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to.

12. Keeping the above principles, so laid down by the Hon'ble Supreme Court in mind, in connection with cancellation of bail, now an endeavor will be made to examine the impugned order dated 31.08.2021, passed by the learned Special Judge,(POCSO) Morigaon, and whether granting of bail to the accused is perverse and suffers from infirmities, and thereby, resulted in miscarriage of justice and whether there arises any supervening circumstances so as to interfere with the impugned order.

13. A careful perusal of the order of the learned Court below, dated 31.08.2021 reveals that the Id. Court below has granted bail to the accused on medical ground considering his serious health condition not on merit of the case. The impugned order also reveals that the Id. Court below has considered the bail petition supported by an Affidavit, and Advice Slip issued by Morigaon Civil Hospital and other Medical Documents, including documents issued by Gauhati Medical College Hospital, Department of Microbiology. Being so, the averment



made by the petitioner that no medical documents were enclosed with the bail petition and that it is astounding how the Id. Court below has come to conclusion that the respondent was suffering in serious medical problem, is without any substance, and is also irresponsible one. The impugned order, however, does not reflect that the Id. Court below has considered the antecedent of the respondent and also the factum of his abscondance after the occurrence. But, the Id. Court below has been clarified that without looking into merit of the case the bail petition is considered on medical ground only and that too for a limited period of three months. Thus, the impugned order cannot be termed as perverse that resulted in miscarries of justice. The petitioner has also failed to establish any other ground so to brand the impugned order as 'perverse'.

14. Now let it be seen how far the petitioner has succeeded in establishing any supervening circumstances. It is averred by the petitioner that after grant of interim bail he was released from GMCH, Guwahati and roving and moving easily in the Town and that he has not been co-operating with the investigation and that he made several attempt to hamper/temper the witnesses and tried to influence them with money and muscle power and that during the three months interim bail also he tried to demolish the material evidence, but, for the sake of investigation, the same cannot be disclosed at this stage and if the respondent remained outside the jail then the investigation will be paralyzed and that there is chance of flight risk or there is likelihood of absconding and that the respondent is a very influential person in that area with status and



position and as such he may influence investigation and prosecution. To ascertain the same I have gone through the Case Diary produced by the Id. P.P. before the court.

15. But, there is inadequacy of material in the case diary to justify any of the above averments made by the petitioner. There is nothing in the case diary to show that the respondent has been roving and moving easily in the Town. Nothing is also there in the case diary, not even a note of the Investigating Officer also, to show that the respondent has not been co-operating with the Investigating Agency after grant of interim bail, and that the investigation could not be carried forward because of the same. None of the witnesses examined by the Investigating officer also whispered any word that the respondent has ever made any attempt to hamper/tamper the prosecution witnesses and tried to influence them with money and muscle power during the period of interim bail and also to show that he ever tried to demolish the material evidence. Though it is averred that there is flight risk yet, the same appears to be in inchoate stage.

16. It is well settled that granting bail is a different matter and cancelling the bail is a different matter. Bail can be cancelled on 2 (two) conditions, when the accused misuse his liberty and due to supervening circumstances. But, here in this case, none of the 2 (two) conditions have been fulfilled so as to cancel the bail. There is no material to show violation of any conditions and arising of any supervening circumstances.

17. There is no doubt that the offence is serious in nature. The punishment prescribed for the same is death or imprisonment for life,



with find also. The materials, collected so far in the case diary by Investigating Officer also reveal complicity of the respondent with the offences alleged in the FIR. But, there is inadequacy of materials in the case diary to support the averments made in the petition. Therefore, this court is of the considered opinion that the case laws referred by the Id. Public Prosecutor i.e. ***State of U.P. Vs. Amarmani Tripathi, (2005) 8 SCC 21; Virupakshappa Gouda & Anr vs. State of Karnataka & Anr, (2017) 5 SCC 406; would help the petitioner any more. In Prakash Kadam & Others Vs. Ramprasad Viswanath Gupta & Another (2011) 6 SCC 189, however, Hon'ble Supreme Court has held that:-***

"18. In considering whether to cancel the bail the court has also to consider the gravity and nature of the offence, prima-facie case against the accused, the position and standing of the accused etc. if there are very serious allegations against the accused his bail may be cancelled even if he has not misused the bail granted to him. Moreover, the above principle applies when the same court which granted bail is approached for cancelling the bail. It will not apply when the order granting bail is appealed against before an appellate/revisional court."

But, the factual matrix of the case in hand is completely different from the above referred case. Besides, it has



already been discussed and held that there appears to be no perversity in the impugned order, as interim bail is granted here in this case on medical ground only. Therefore, non consideration of the principles governing grant of bail by the Id. Court below would have no consequence.

18. Thus, considering the submissions of the Id. Advocates of all the sides, and further considering the principles of law laid down in the cases discussed above, and also referred by the counsels of the concerned parties, and balancing the valuable rights and personal liberty of the respondent with that of the societal interest, this court is of the view that the petitioner has failed to make out even a prima-facie case to recall/cancel the privilege of interim bail granted to the respondent, vide order dated 31.08.2021, by the Id. Special Judge (POCSO) Morigaon, in Lahorighat P.S. Case No. 53/2021.

19. In the result, the petition under section 439(2)Cr.P.C, stands dismissed. The interim bail granted to the respondent will come to an end on 30.11.2021. If, in the meantime, any supervening circumstances arise, then the petitioner will be at liberty to place the same before the Id. Court below, at the time of hearing his bail petition, and in such event, the Id. Court below shall consider the same in accordance with law, without being influenced by any of the observation made herein above, as it is made only in the context of disposing of the present petition. The case diary be sent back along with a copy of this order.

JUDGE



Comparing Assistant