Serial No. 01
Supplementary
List

HIGH COURT OF MEGHALAYA AT SHILLONG

BA. No. 9 of 2019

Date of Decision: 06.12.2019

Shri. Elbert Shemphang Kharlukhi Vs. State of Meghalaya.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) For the Respondent(s) Mr. K. Ch. Gautam, Adv. Mr. N.D. Chullai, AAG. with Ms. R. Colney, APP.

i) Whether approved for reporting in Law journals etc.:

No

ii) Whether approved for publication in press:

No

ORAL

- 1. This is an application under Section 439 Cr.P.C for grant of bail on behalf of the petitioner/accused Shri. Elbert Shemphang Kharlukhi.
- 2. Heard Mr. K. Ch. Gautam, learned counsel for the petitioner/accused who has submitted that the petitioner/accused has come before this Court for grant of bail for his arrest in connection with Special Sessions Case No. 20 of 2018 under Section 17 of POCSO Act.
- 3. It is the case of the petitioner that an FIR was lodged on 24.12.2016 by the Chairperson of the State Commission for Protection of Child Rights against the then sitting MLA of Mawhati Constituency Shri. Julius Dorphang. The FIR so lodged resulted in registering of a case being Laitumkhrah P.S.

Case No. 239 (12) of 2017, under Section 366 (A) IPC read with Section 3(a) of POCSO Act and Section 5 of the Immoral Trafficking Act.

- 4. The petitioner/accused was called for by the police for questioning in connection with the said Laitumkhrah P.S. Case on 12.01.2017 and was arrested on the same day.
- 5. The petitioner/accused then preferred a bail application before the Court of the learned Special Judge (POCSO) at Shillong. Before the bail application could be taken up, Charge Sheet was filed by the I/O and the petitioner/accused was Charge Sheeted under Section 17 of the POCSO Act. This led to the rejection of his bail application by the learned Special Judge (POCSO) Shillong on the ground that there appears to be a prima facie material against him. Thereafter, the petitioner filed subsequent bail application before the learned Special Judge (POCSO) Shillong which was rejected vide order dated 14.03.2017. The petitioner thereafter approached this Hon'ble High Court for grant of bail, which was rejected vide order dated 07.04.2017 on the ground that he may abscond, if enlarged on bail.
- 6. Vide order dated 29.11.2017 the learned Special Judge (POCSO) Shillong had again rejected another bail application filed by the petitioner herein that the case is serious in nature and the prayer of the Defense Counsel shall be considered only after evidence of the victim is recorded.
- 7. Again, the petitioner had moved another bail application before this Court and vide order dated 05.03.2018, the bail application was again rejected. However, this Court has in the same order, directed the learned Trial Court to dispose of the matter within six months from the date of the said order i.e. 05.03.2018, considering the fact that only two witnesses have been examined till then.
- 8. The petitioner being aggrieved with the slow pace of the proceedings had again approached this Court with another bail application and this Court

vide order dated 16.05.2019 had directed the Trial Court to take up the bail matter as well as to ensure expeditious trial.

- 9. Thereafter, the learned Special Judge (POCSO) Jowai on taking up the bail application of the petitioner had vide order dated 24.05.2019 rejected the same on the ground that no submission was made that the accused person/petitioner herein is not guilty of the offence alleged.
- 10. Learned counsel for the petitioner/accused has reiterated that there is no scope for speedy trial in this case, inasmuch as, only two witnesses have been examined so far, and till date of the forty-three witnesses listed by the prosecution, the rest have not been examined so far. Learned counsel for the petitioner has therefore submitted that the accused/petitioner being charged with the offence of abetment of which he is not at all guilty, being associated with the main accused only to the extent that he is a driver and was directed to reserve and book a room at the Guest House where the alleged crime was said to have been committed by the main accused, not being aware of the reason or purpose for reservation of the said room on behalf of the main accused, the petitioner therefore cannot be accused of being guilty of abetment.
- 11. It is also the submission of the learned counsel for the petitioner that the evidence of the victim has been recorded and on perusal of the same, it is evident that the petitioner is not at all connected with the case as the victim herself has deposed to the extent that she does not know the petitioner herein. Learned counsel also submits that the petitioner being a victim of circumstances, is languishing in jail for more than two years after his arrest. It is therefore prayed that he may be enlarged on bail on any condition that this Court may deemed fit and proper to impose and that he will not abscond or tamper with the evidence, but will abide by the conditions set forth by this Court.
- 12. Mr. K. Ch. Gautam, learned counsel for the petitioner has relied on the

judgment passed by the Hon'ble Supreme Court in the case of *Sanjay Chandra v. CBI:(2012) 1 SCC 40*. Paragraphs 21 and 40 of the judgment which are relevant are quoted herein below:

- "21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person 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 can be 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".
- "40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required".
- 13. Also heard Mr. N.D. Chullai, learned AAG assisted by Ms. R. Colney, learned APP who has vehemently opposed the prayer made by the learned counsel for the petitioner and has submitted that the case which the petitioner herein is involved is very serious in nature. The fact that the petitioner has arranged for the room in which the offence was committed by the main accused would only show that the complicity of the petitioner herein is that of abetment to a crime committed on an innocent minor submits the learned AAG.
- 14. Learned AAG has also submitted that the Trial Court has therefore rightly charged the petitioner for the offence of abetment, for which he has to face trial. To substantiate his submission, learned AAG has placed reliance on

the judgment passed by the Hon'ble Supreme Court in the case of *State of Bihar & Anr. v. Amit Kumar* @ *Bachcha Rai:* (2017) 13 SCC 751 and has pointed out Paragraph 8 in which the Hon'ble Supreme Court has observed thus:

- "8.When the seriousness of the offence is such the mere fact that he was in jail for however long time should not be the concern of the Courts....."
- 15. As far as the gravity and nature of the offence is concerned and the principles to be followed while enlarging the accused on bail, Mr. N.D. Chullai, learned AAG has referred to the case of *Prasanta Kumar Sarkar v. Ashis Chatterjee & Anr: (2010) 14 SCC 496* at Paragraph 9 where the Hon'ble Supreme Court has observed as follows:
 - "9. We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. 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".
- 16. Learned AAG has also placed reliance on the judgment passed by the Hon'ble Supreme Court in the case of *Ram Govind Upadhyay v. Sudarshan Singh & Ors:* (2002) 3 SCC 598 wherein, at Paragraph 3 of the same, the

Hon'ble Supreme Court has opined that "Order for bail bereft of any cogent reason cannot be sustained."

- 17. Learned AAG while referring to the case of *Alakh Alok Srivastava v*. *Union of India: 2018 SCC Online SC 478*, wherein the Hon'ble Supreme Court vide order dated 01.05.2018 passed in Writ Petition (C) No. 76 of 2018 at Paragraph 24 of the said order has passed certain directions as far as prosecution of cases under the POCSO Act are concerned, has also made a prayer before this Court for issuance of similar directions.
- 18. Learned AAG in conclusion has submitted that this instant bail application may be rejected as devoid of merit.
- 19. On the basis of the submission of the learned counsel for the petitioner, what can be understood is that this application has been filed firstly on the ground that the evidence of the witnesses have been recorded, in fact the evidence of the complainant as well as of the victim have been duly recorded and from the list of witnesses appearing in the Charge Sheet, copy of which has been placed before this Court, altogether there are forty three witnesses and apparently another forty one witnesses are to be examined. It is also logical to assume that at the pace in which the trial is proceeding, there is no possibility of expeditious completion of the proceeding within the next few months.
- 20. As submitted by the learned counsel for the petitioner, this Court on perusal of the evidence recorded, particularly that of the victim, it is seen that the victim in her cross-examination has admitted that she does not know the petitioner herein. This would prima facie come to the aid of the petitioner as far as his defense is concerned. However, it is to be noted that the trial has not yet been completed.
- 21. Upon consideration of the submissions and contentions made by the learned counsels for the rival parties, this Court is aware of the fact that a

number of bail applications have been preferred by the petitioner herein both before this court as well as in the Trial Court. However, it is well settled that successive bail applications can be preferred by the accused, for which there is no bar, except to the fact that for each successive bail application, fresh circumstances has to be pointed out by the applicant.

- 22. Be that as it may, this Court is of the considered view that the petitioner has made out a case for grant of bail as the object for bail is to ensure that the accused shall not abscond or tamper with the evidence and in this instant case, since the evidence is already underway and the investigation is apparently completed, therefore the concern of this Court would be that the accused shall not abscond if enlarged on bail. However, there are safeguards to ensure that the accused shall not abscond to the extent that sufficient sureties has to be provided and compliance with conditions imposed has to be fulfilled and even otherwise, if during the period when he is on bail, if required, the Court may cancel the bail or modify any of the conditions to ensure that the accused is cooperating with the process.
- 23. As far as the case of the petitioner herein is concerned, he is to be charged with the offence under Section 17 of the POCSO Act, 2012 which reads as follows:
 - "17. Punishment for abetment. Whoever abets any offence under this Act, if the act abetted is committed in consequence of the abetment, shall be punished with punishment provided for that offence.

Explanation. - An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy or with the aid, which constitutes the abetment".

24. Again, the petitioner is said to have been accused of abetting an offence committed under Section 3 & 4 of the POCSO Act, which entails a punishment of imprisonment of not less than seven years, but which extend to imprisonment for life.

- 25. While weighing the contentions and submission of the learned AAG in the light of the authorities cited and the reliance of the learned counsel for the petitioner in the case of *Sanjay Chandra v. CBI (Supra)* this Court is of the opinion that though the principles enunciated in the authorities cited by the learned AAG are valid, however in this instant case, under the facts and circumstances, the same are not relevant.
- 26. As far as the principles of bail in criminal jurisprudence is concerned, certain aspects of the same has been reflected in a number of judgments and it is worth mentioning the decision of the Hon'ble Supreme Court in the case of *P. Chidambaram v. Directorate of Enforcement* vide order dated 04.12.2019 passed in Criminal Appeal No. 1831 of 2019, the Hon'ble Supreme Court at Paragraphs 20 and 21 of the same has held thus:
 - **"20.** The learned senior counsel for the appellant has also placed reliance on the decision on the decision in the case of **Sanjay Chandra vs. CBI**, (2012) 1 SCC 40 with specific reference to paragraph 39 which reads as hereunder:

"Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two grounds: the primary ground is that the offence alleged against the accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration."

The said case was a case of financial irregularities and in the said circumstance this Court in addition to taking note of the deep-rooted planning in causing huge financial loss, the scope of consideration relating to bail has been taken into

consideration in the background of the term of sentence being seven years if convicted and in that regard it has been held that in determining the grant or otherwise of bail, the seriousness of the charge and severity of the punishment should be taken into consideration".

- **"21.** Thus from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provides so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case to case basis on the facts involved therein and securing the presence of the accused to stand trial".
- 27. In the light of the discussions mentioned above, this Court is of the view that the petitioner/accused is entitled to bail at this juncture.
- 28. In view of the above, this application is allowed with the following directions:

- (i) That the petitioner/accused Shri. Elbert Shemphang Kharlukhi is hereby enlarged on bail on executing of a personal bond of Rs. 50,000/- (Rupees fifty thousand) only with two sureties of like amount to the satisfaction of the Trial Court.
- (ii) That the petitioner/accused shall not abscond or tamper with the witnesses and evidence as the case may be.
- (iii) That the petitioner/accused shall appear before the Trial Court as and when required.
- (iv) That the petitioner/accused shall not leave the State of Meghalaya without prior permission of the Trial Court.
- (v) It goes without saying that violation of any of the conditions set forth above, will result in cancellation of the bail, for which the aggrieved party may approach the Trial Court for the same.
- 29. The learned Trial Court is directed to issue the Release Order on production of the bail bonds and other relevant documents by the petitioner/accused.
- 30. However, before parting with the records, I would like to advert to the prayer of the learned AAG for issuance of necessary direction as far as expeditious trial of POCSO cases are concerned. In this regard, it may be mentioned that the High Court of Meghalaya on the administrative side has issued several directions to the Trial Court below for due compliance as far as expeditious trial of POCSO cases are concerned. One of such direction is found in the Notification dated 19th August, 2019 vide Memo No. HCM.II/148/2015-Estt./49 at Clause A (2) under the heading "Action Plan for Reduction in Pendency of 5(five) year old cases and more in Subordinate Courts in the State of Meghalaya" which reads as follows:

"A. <u>FOR THE COURTS OF DISTRICT & SESSIONS</u> <u>JUDGES:-</u>

2. Cases registered under POCSO Act, 2012 (as amended from time to time) shall be fast-tracked and concerned Special Courts shall ensure that the trial is completed, as

far as possible, within 6 (six) months from the date of filing chargesheet".

- 31. With the above noted directions, this bail application is allowed to the extent indicated and disposed of accordingly.
- 32. Registry is directed to send a copy of this order to the learned Special Judge (POCSO) Jowai for compliance.

Judge

Meghalaya 06.12.2019 "D. Nary, PS"

