

THE HIGH COURT OF MEGHALAYA

CRL.REVN (P) No. 8/2015
(Ref) CRL.PTN.No.21/2015

State of Meghalaya

:::: Petitioner

-vs-

Md. Nurul Islam,
S/o (L) Abdul Jabbar Sarkar,
R/o Vill. Simlabari,
PS Lakhipur,
District: Goalpara, Assam,
Pin Code: 783101.

:::: Respondent

BEFORE
THE HON'BLE MR JUSTICE T NANDAKUMAR SINGH

For the Petitioner	:	Mr. ND Chullai, Sr.PP Ms. NG Shylla, Addl. PP
For the Respondent	:	Mr. K Sunar, Adv
Date of hearing	:	31.08.2015
Date of Judgment & Order	:	11.09.2015

JUDGMENT AND ORDER

This criminal revision petition has a chequered history. Widely circulated local daily "The Shillong Times" in its publication on 26.06.2015 reported news under the caption "Twin court order stunts Nurul's family" wherein, it is reported that the accused Police Officer Md. Nurul Islam (present accused) was granted bail on 24.06.2015, bail bond was accepted and on the same day the bail was cancelled. The said news item was brought to the notice of this Court by the Registry. Accordingly, the report had been called from the Special Judge (POCSO), Shillong, who passed the said bail order for granting bail to the accused Police Officer Md. Nurul Islam. On receipt of the said report for passing the said bail orders, this Court had taken up the matter on judicial side. The learned Special Judge (POCSO),

Shillong to whom the charge sheet No.12/2013 dated 06.11.2013 under Sections 342/354/376 (2)(a)(i)/506 IPC R/w Section 6/10 of the POCSO Act, 2012 was submitted on 06.11.2013, had passed the order dated 24.06.2015 for granting bail to the accused Police Officer Md. Nurul Islam. No reason had been given by the learned Special Judge (POCSO), Shillong for entertaining the bail application on the very day, the accused Police Office Md. Nurul Islam had personally appeared and surrendered before the Court. Later on, on the same day, the said bail order dated 24.06.2015 which was passed in the early hours of the court working hours had been cancelled and allowed the prayer of the Superintendent of Police (City), Shillong to thoroughly interrogate the accused Police Officer Md. Nurul Islam and for that purpose, the accused Police Officer Md. Nurul Islam was remanded to 14 days judicial custody (Sic Police custody) for interrogation. On 08.07.2015, the learned Special Judge (POCSO), Shillong passed the order dated 08.07.2015 for allowing the accused Police Officer Md. Nurul Islam to go on bail. For convenience, the said two orders of the learned Special Judge (POCSO), Shillong dated 24.06.2015 and 08.07.2015 are reproduced hereunder:-

“Order dated 24.06.2015

Seen the application filed by the counsel for the Accused Md. Nurul Islam to bring on record appearance of the Accused after transfer of the case from District & Sessions Judge Court, Tura. The Accused person Md. Nurul Islam has personally appeared and surrendered himself before this Court today. The counsel for the Accused submitted that the instant case has been transferred from the District & Sessions Judge Court, Tura to this Court as per the order of the Hon'ble High Court of Meghalaya. That the Accused person undertakes that he will appear on each and every date fixed by the Court regularly without fail. Also heard Ld. PP who submitted that the instant case has been charge-sheeted on 6.11.2013 and the charges involved in the case are serious in nature. Even though has been charge-sheeted the trial of the case is yet to start. Further, on going through the Hon'ble High Court order dated 15.12.2015, the Hon'ble High Court has allowed the transfer of the case from Tura to Shillong and the Accused to surrender

before this Court. Ld. PP also submitted that the petition filed by the Accused may be allowed with strict conditions.

Perused the Hon'ble High Court's Order dated 15.12.2014 and considering the submissions made by both sides and also that the Accused has surrendered himself before this Court today, the petition filed by the Accused is hereby allowed and as the case has also been registered under the POCSO Act besides other sections of IPC, the trial of the case has to be completed within one year.

Hence, the petition filed by the Accused is allowed on execution of a Bond of Rs. 1,00,000/- with two local sureties of the like amount and also on execution of an undertaking that the Accused person will appear on each and every date fixed by this Court.

Also perused the Case Record received from the Court of District & Sessions Judge, Tura and also the Charge-sheet No. 12/2013 dated 6.11.2013 u/s 342/354/376 (2) (a) (i)/506 IPC R/W Section 6/10 POCSO Act. I take cognizance of the offences and proceed further with the instant case.

Register the case.

Furnish C/D to the prosecution and prepare copies for defence.

Fix 08.07.2015 for copies.

Sd/-
Special Judge (POCSO)
Shillong

Bail Bonds for the Accused person furnished and accepted.

Sd/-
Special Judge (POCSO)
Shillong

Later.

Learned PP along with Shri. V Syiem, S.P (City), Shillong appeared before this Court and submitted letter dtd 24.6.2015. Ld. PP submitted that the Accused person has not been interrogated and his statement u/s 161 CrPC is yet to be recorded and police needs to interrogate the Accused person as he has been inordinately absconding which may not have been possible without the aid and abetment of certain individuals and also for verification of the bailors who project themselves as police personnel.

Perused materials on records and letter dtd. 24.06.2015, it is seen that the Accused has been absconding after the date of incident and look out notice was also issued against the

Accused person. Taking into consideration the nature, gravity and seriousness of the alleged offence involved in the instant case, I am inclined to allow the prayer made by the Superintendent of Police (City), Shillong that the Accused person is to be interrogated thoroughly and as a question has been raised regarding the authenticity of the bailors of the accused. I hereby recall the earlier order passed by this Court today and direct that the Accused person be arrested and remand to 14 days judicial custody for interrogation/investigation and for verification of the bailors. Fix 08.07.2015 for production and report on verification of bailors.

Send the copy of this order to the Superintendent of Police (City), East Khasi Hills, Shillong.

Sd/-
Special Judge (POCSO)
Shillong

Order dated 08.07.2015

Accused Md. Nurul Islam produced today 8th July 2015 from District Jail, Shillong after expiry of 14 days judicial custody.

Seen bail application No. 160 (H) 2015 u/s 439 CrPC on behalf of the accused in connection with Special (POCSO) Case No. 10 of 2014 u/s 342/354/376 (2) (9) (1)/506 IPC R/W Section 6/10 POCSO Act.

Heard the learned counsel for the accused who submits that the accused was a policeman by profession and during his service he was awarded for his outstanding performances. That the accused had earlier surrendered before the Court of CJM and has no intention of absconding and as there is a threat to his life he has approached the Hon'ble High Court. Further, in the FIR there are two dates of occurrence i.e. 13.03.2013 and 31.03.2013 and the FIR lodged after 3 months from the alleged date of occurrence of the incidents. Counsel for the accused further submits that, the accused is suffering from kidney problem and is undergoing medical treatment and being an old man he may be released on bail on health ground. That for the interest of justice this Court has given maximum period of 14 days judicial custody of the accused to the prosecution for interrogation of the accused and verification of the bailors. The Accused has been thoroughly interrogated and his statement has been recorded. Counsel for the accused further submits that the case has been charge-sheeted and charges against the accused are yet to be framed and there is no difficulty in releasing the accused and the petitioner being the wife of the accused undertakes that the accused will not abscond and will appear and face trial regularly to prove his innocence.

Also heard Ld. Spl PP Smti. R. Swer who submits that the accused has been evading arrest for one year and if at all

he is innocent he would have surrendered earlier before the Court. Counsel for prosecution prayed the Court to exercise Section 309 CrPC for speedy trial of the case.

On perusal of the materials available on record and also I/O report dated 7th July 2015 and in consideration of the submissions made by both sides, I am of the view that further detention of the accused will be highly unjustified and he should be given a fair chance to defend himself by allowing him to go on bail with the undertaking that the accused will appear regularly to face trial on each and every date fixed by this Court. Prosecution has been given maximum period 14 days judicial custody of the accused for interrogation and verification of the bailers and since the accused has been interrogated and his statement has also been recorded and moreover the case has already been charge-sheeted, the accused is to be given a fair chance to defend himself. Hence the bail is hereby granted.

Accordingly, the bail petition is allowed on execution of a bond of Rs. 1,00,000/- with two local sureties with the undertaking that the accused shall appear on each and every date fixed by this Court for trial without fail and under the following conditions :

1. The Accused person shall not abscond or hamper tamper with the investigation of the case.
2. The Accused shall not threaten the complainant, victims, witnesses or any person acquainted with the facts and circumstances.
3. The Accused person should not go anywhere near the complainant and victims.
4. The Accused shall not leave the jurisdiction of the Court.

Failure to comply with the above conditions will cancel the bail.

Bail petition is disposed of.

Furnish CD to the prosecution and prepare copies for defence.

Accused remanded back to custody.

Fixed 22.07.2015 for production, appearance and copies.

Sd/-
Special Judge (POCSO)
Shillong

2. This Court by invoking the jurisdiction under Sections 397 and 401 r/w Section 439(2) of the Cr.P.C., the present criminal revision petition

was registered against the said bail orders dated 24.06.2015 and 08.07.2015.

3. Heard Mr. ND Chullai, learned Sr. PP assisted by Ms. NG Shylla, learned Addl. PP appearing for the State and Mr. K Sunar, learned counsel appearing for the respondent-accused Police Officer Md. Nurul Islam.

4. The prosecution story in brief is that on 01.06.2013, one Shri. Renderson Marak of village Chigitchakgre, Ampati lodged an Ejahar to the Ampati P.S. that the accused Police Officer Md. Nurul Islam, the then O/C of Ampati P.S. had molested and raped his two minor daughters (names of the two minor daughters are not disclosed in this judgment and order and their names are available in the Ejahar as well as in the record) inside his office chamber at Ampati P.S. on 13.03.2013 at night, and again on 31.03.2013 at about 12:00 Noon at their residence at Chigitchakgre, Ampati on finding that one of his said two daughters (victims) was alone at home raped her and threatened her with dire consequences should she report the matter to anyone. Ampati P.S. had registered an FIR/criminal case being Ampati PS Case No.34(6) 2013 under Sections 376(2)(a)(i)/506 IPC. Thereafter, machinery of investigation had been started. The accused Police Officer Md. Nurul Islam, who is a responsible Police Officer, was not cooperating the investigating Officer of the said case, rather he evaded arrest. Several attempts had been made by the Investigating Officer to arrest the accused Police Officer Md. Nurul Islam. On the prayer of the Investigating Officer, the learned Magistrate passed the order dated 03.06.2013 for issuing warrant of arrest against the accused Police Officer Md. Nurul Islam (the then O/C of Ampati P.S.) S/o Abdul Gabbar, against whom the said raped case i.e. Ampati PS Case No. 34(6) 2013 under Sections 376(2)(a)(i)/506 IPC had

been registered. Again, on the prayer of the Investigating Officer, the learned Magistrate passed the order dated 04.06.2013 for adding Section 6/10 of the POCSO Act, 2012 in the said case i.e. Ampati PS Case No. 34(6) 2013 under Sections 376(2)(a)(i)/506 IPC. As the accused Police Officer Md. Nurul Islam was absconding, on the prayer of the Investigating Officer, the learned Magistrate passed the order dated 20.06.2013 for declaring proclamation for person absconding under Section 82 of the Cr.P.C. The said order of the learned Magistrate dated 20.06.2013 reads as follows:-

“20/6/13

Seen the Prayer petition submitted by S.I. I.O. S.K. Niar through O.C. Ampati P.S. in connection with Ampati PS Case No. 34(6) 13 under Sections 376(2)(1)(a) IPC R/w section 6/10 Protection of Children from Sexual Offence informing to hon'ble court that on 8.6.13 Non-Bailable Warrant of Arrest received from ADM, Tura, after several attempt was to made arrest accused N. Islam and also send a copy of the Warrant (Xerox) to his home address South Salmara, Assam and P.S. Lakhipur, Assam respectively but all efforts are in vain.

Therefore, under the above facts I.O. is praying to hon'ble court a proclamation order kindly be issue against alleged person Shri. N Islam U/s 82 Cr.P.C. for the interest of the case.

Prayer of I/O is allowed.”

5. The Investigating Officer recorded the statements of several witnesses under Section 161 of the Cr.P.C. and also the statements of the victim girls were recorded. After full length investigation, the Investigating Officer of the said case submitted charge sheet that the allegation against the absconding accused Police Officer Md. Nurul Islam for the offences under Sections 376(2)(a)(i)/506 IPC r/w Section 6/10 of the POCSO Act, 2012 on 06.11.2013 was found well established.

6. This Court vide order dated 29.07.2015 directed the learned Sr. PP appearing for the State to produce the record and also further directed the State to file affidavit containing the circumstances leading to the passing of the said bail orders by the learned Special Judge (POCSO), Shillong and also the report from the concerned Police Station regarding the activities of the accused Police Officer Md. Nurul Islam. As ordered by this Court, the learned Sr. PP produced the record of the said case i.e. Ampati PS Case No.34(6) 2013 under Sections 376(2)(a)(i)/506 IPC r/w Section 6/10 of the POCSO Act, 2012 maintained by the Ampati P.S. and also the charge sheet. This Court also carefully perused the charge sheet as well as the case record of the Ampati PS Case No. 34(6) 2013 under Sections 376(2)(a)(i)/506 IPC r/w Section 6/10 of the POCSO Act, 2012. On such perusal, it appears that there is a prima facie material for establishing the case of the prosecution against the accused Police Officer Md. Nurul Islam. However, it is made clear that this Court is not making any observation on the merit of the case inasmuch as the merit of the case is to be finally decided after full length trial. This Court is making this observation only for the limited purpose of bail matters. It would be pertinent to mention that the said criminal case against the accused Police Officer Md. Nurul Islam is also for the offence under the POCSO Act, 2012. Under Chapter VII of the POCSO Act, 2012, which consists of 5 (five) Sections more particularly Section 29 of the POCSO Act, 2012, there should be presumption as to certain offences. Section 29 of the POCSO Act, 2012 reads as follows:-

“29. Presumption as to certain offences.— Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 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.”

7. Therefore, under Section 29 of the POCSO Act, 2012 there shall be presumption that such person has been committed or abetted or attempted to commit offence, as the case may be, unless the contrary is proved and also under Section 30 of the POCSO Act, 2012, there should be presumption of culpable mental state. It is now fairly settled law that the bail order for granting bail to the accused who involves in heinous offence, cannot be cryptic and reason should be recorded for granting bail after carefully considering the prosecution case as well as the material available on record and also at the same time while passing order for bail, there shall not be consideration on the merit of the prosecution case. Now the questions are; what are the materials to be considered for passing the bail order? and what are the reasons to be recorded in the bail order? Justice H.K. Sema (as then he was) in **State of Manipur v. Vikas Yadav: 2000 (3) GLT 253** held that:-

*“22. In paragraph 31 of the **Gurbaksh Singh Sibbia v. State of Punjab: AIR 1980 SC 1632**, the Supreme Court has laid down the relevant consideration which weights the court’s direction and decision in granting anticipatory bail under Section 438 of the Code of Criminal Procedure. These considerations are:-*

(a) Nature and seriousness of the charges.

(b) Context of the events likely to lead to the making of the charges.

(c) Reasonable possibility of the applicant’s presence not being secured at the trial.

(d) Reasonable apprehension that witnesses will be tampered with and

(e) Larger interest of the public or the State.”

8. It is also fairly settled that once the bail had been granted it should not be cancelled unless there is evidence that the conditions of bail are being infringed. But it is to be kept in mind that the concept of setting

aside the unjustified, illegal or perverse orders is totally different from the concept of cancelling the bail on the ground that the accused had misconducted himself or because of some new facts requiring such cancellation. This position is made clear in **Gurcharan Singh v. State (Delhi Admn): (1978) 1 SCC 118**. It is also fairly settled that the High Court being the superior court under Section 439(2) of the Cr.P.C. has the power to commit the accused to custody in whose favour unjustified, illegal or perverse bail order had been granted. The ratio laid down in **Gurcharan Singh's** case (*Supra*) had been reiterated by the Apex Court in **Puran v. Rambilas & Anr: (2001) 6 SCC 338**. Paras 10, 11 & 13 of the SCC in **Puran** case (*Supra*) read as follows:-

10. 11. Mr. Lalit next submitted that once bail has been granted it should not be cancelled unless there is evidence that the conditions of bail are being infringed. In support of this submission he relies upon the authority in the case of **Dolat Ram v. State of Haryana (1995) 1 SCC 349: 1995 SCC (Cri) 237**. In this case it has been held that rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted have to be considered and dealt with on different basis. It has been held that very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted. It has been held that generally speaking the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. It is, however, to be noted that this Court has clarified that these instances are merely illustrative and not exhaustive. One such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of this nature and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the Society. Therefore, an arbitrary and wrong exercise of discretion by the trial court has to be corrected.

11. Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by

this Court in **Gurcharan Singh v. State (Delhi Admn.): (1978) 1 SCC 118: 1978 SCC (Cri) 41: AIR 1978 SC 179**. In that case the Court observed as under:- (SCC P. 124, para 16)

“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 existing, 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”.

13. Our view is supported by the principles laid down in the case of **Gurcharan Singh vs. State (Delhi Administration): (1978) 1 SCC 118: 1978 SCC (Cri) 41: AIR 1978 SC 179**. In this case it has been held, by this Court, that under Section 439(2), the approach should be whether the order granting bail was vitiated by any serious infirmity for which it was right and proper for the High Court, in the interest of justice, to interfere.”

9. The ratio decidendi of **Puran’s** case (*Supra*) is that the High Court under Section 439(2) of the Cr.P.C. has the power to see as to whether the bail order granted by the court below is unjustified, illegal or perverse or not?. If the bail order is vitiated by serious infirmity, the accused in whose favour an illegal bail order had been granted could be directed to commit to custody. The Apex Court in **Gajanand Agarwal v. State of Orissa & Ors: (2006) 12 SCC 131** held that though detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the Court while passing orders on bail applications, yet a court dealing with the bail application should be satisfied as to whether or not there is a prima facie case? but exhaustive exploration of the merits of the case is not necessary and there should be indication in the order for bail, by giving reason, for prima facie finding in the given case that the bail could be granted to an accused who committed serious offence and also the factors to be

considered before granting bail are considered. Paras 13 & 14 of the SCC in **Gajanand Agarwal's** case (*Supra*) read as follows:-

“13. Even on a cursory perusal the High Court's order shows complete non-application of mind. Though detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the Court while passing orders on bail applications, yet a court dealing with the bail application should be satisfied as to whether there is a prima facie case, but exhaustive exploration of the merits of the case is not necessary. The court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course.

14. There is a need to indicate in the order, reasons for prima facie concluding why bail was being granted particularly where an accused was charged of having committed a serious offence. It is necessary for the courts dealing with application for bail to consider among other circumstances, the following factors also before granting bail, they are:

- 1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;*
- 2. Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;*
- 3. Prima facie satisfaction of the Court in support of the charge.*

*Any order devoid of such reasons suffers from non-application of mind as was noted by this Court, in **Ram Govind Upadhyay v. Sudarshan Singh: (2002) 3 SCC 598: 2002 SCC (Cri) 688, Puran v. Rambilas: (2001) 6 SCC 338: 2001 SCC (Cri) 1124 and Kalyan Chandra Sarkar v. Rajesh Ranjan: (2004) 7 SCC 528: 2004 SCC (Cri) 1977: JT (2004) 3 SC 442.** The above position was highlighted by this Court in **Chaman Lal v. State of U.P.: (2004) 7 SCC 525: 2004 SCC (Cri) 1974: JT (2004) 6 SC 540, and in Anwari Begum v. Sher Mohd.: (2005) 7 SCC 326: 2005 SCC (Cri) 1669.**”*

10. Keeping in view of the ratio decidendi of the cases discussed above and also the guiding principles for granting bail, this Court had given anxious consideration of mind to the said impugned bail orders dated 24.06.2015 and 08.07.2015 and this Court is sorry to say that the learned

Special Judge (POCSO), Shillong did not even make a whisper for consideration of the guiding principles for granting bail propounded by the Apex Court in the cases discussed above in the impugned bail orders and also there is no indication in the impugned bail orders dated 24.06.2015 and 08.07.2015 for considering the materials available on record or the evidence collected by the prosecution against the accused Police Officer Md. Nurul Islam and also no reason for granting bail by referring to the material available on record. In other words, there should be prima facie finding by giving reasons not touching merit of the case in the impugned bail orders dated 24.06.2015 and 08.07.2015 by referring to the material available on record or the prosecution case supported by the material available on record for coming to the conclusion that the bail should be granted to the accused Police Officer Md. Nurul Islam who is charged for committing a serious offence including the offence under Section 29 of the POCSO Act, 2012 where there is a provision for presumption as to certain offences.

11. For the foregoing reasons, this Court has no alternative except to come to the conclusion that the said bail orders dated 24.06.2015 and 08.07.2015 were passed by the learned Special Judge (POCSO), Shillong by non-application of mind and also ignoring the relevant material indicating prima facie involvement of the accused Police Officer Md. Nurul Islam. Thus, the impugned bail orders dated 24.06.2015 and 08.07.2015 are illegal and perverse orders. Accordingly, the impugned bail orders dated 24.06.2015 and 08.07.2015 are hereby set aside and quashed. In the result, the accused Police Officer Md. Nurul Islam be taken into custody (Judicial custody) forthwith and bail bond and surety bonds are cancelled. The concerned Police Officers appearing before this Court are directed to take the accused Police Officer Md. Nurul Islam into custody.

12. The learned trial court is directed to complete the trial of the case expeditiously. [**Ref: *Nishu v. Commissioner of Police, Delhi & Ors: (2014) 12 SCC 546, para 8***]. However, it is made clear that the trial court may consider the bail application of the accused Police Officer Md. Nurul Islam, if necessary, according to laws discussed above and the principles laid down by the Apex Court regarding granting of bail.

13. Criminal revision petition is allowed.

JUDGE

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