

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

Case No.: Bail Appln./2075/2021

KANAK G. MOMIN SON OF LATE PRAFULLA G. MOMIN VILL- RONGPIGAON UNDER BAITHALANGSO POLICE STATION IN THE DISTRICT OF WEST KARBI ANGLONG, ASSAM

VERSUS

THE STATE OF ASSAM REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. B M CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE HONOURABLE MR. JUSTICE MANISH CHOUDHURY

<u>ORDER</u>

Date: 08-10-2021

Heard Mr. B.M. Choudhury, learned counsel for the accused-petitioner and Ms. B. Bhuyan, learned Additional Public Prosecutor for the respondent State of Assam.

- 2. By this application under Section 439, Code of Criminal Procedure, 1973 (CrPC), the accused-petitioner viz. Mr. Konak G Momin has prayed for his release on bail in connection with Special POCSO Case No. 02/2021 [arising out of Baithalangsho Police Station Case No. 78/2020], registered under Sections 376(2)(f), Indian Penal Code (IPC) read with Section 6 of the Protection of Children from Sexual Offences [POCSO] Act, 2012.
- 3. When the accused-petitioner had earlier approached this Court by the bail application, Bail Appln. No. 1962/2021, the same was heard and the materials available in the case records of Special (POCSO) Case no. 02/2021 and the concerned case diary were considered. The said application was dismissed by order dated 20.04.2021.
- 4. The relevant extracts of the said order dated 20.04.2021 are as under:
 - "3. The First Information Report (FIR) was lodged on 08.12.2020. In the FIR, the informant who is the father of the victim, had inter-alia alleged that his daughter, aged about 12 years, had been staying in the house of the accused-petitioner for about last 2 years and by staying there, she was also pursuing her studies as a student of Class-VI. It was alleged that during the period of last 2 (two) months prior to lodging of the FIR, the accused-petitioner had committed rapes on the victim for 6/7 times forcefully by intimidating her. It had been stated that such incidents of rape was not disclosed by the victim to anyone out of fear but the victim had ultimately disclosed about the incidents to the parents only on the date of the lodging of the FIR.
 - 4. On receipt of the FIR, the Officer In-charge registered the same as Baithalangsho P.S. Case No. 78/2020 and investigation was initiated. After completion of investigation, a charge sheet under Section 173, CrPC has been submitted on 29.01.2021. It was during the course of investigation the accused-petitioner was

arrested on 03.12.2020 and since then, he is in custody. After submission of the charge sheet, the accused-petitioner had preferred an application for bail before the Court of learned Additional District & Sessions Judge, West Karbi Anglong, Hamren. The said application was rejected by the learned Additional District & Sessions Judge, West Karbi Anglong, Hamren by an order dated 04.02.2021.

- 5. Learned counsel for the accused-petitioner has submitted that the accused-petitioner may be released on bail considering the period of his detention since 03.12.2020 and the fact that the investigation has already been completed resulting in a charge sheet. As the accused-petitioner being a permanent resident of a place under Baithalangsho Police Station there is no chance of his absconding. It has been further submitted that since all the evidence have been collected there is no possibility of hampering or tampering with the evidence. It is submitted that there is no likelihood of completion of the trial within a short period in view of the prevailing situation.
- 6. Learned Additional Public Prosecutor by opposing the prayer for bail, has submitted that there is ample materials against the accused-petitioner which clearly indicate that the offence alleged had been repeatedly committed by the accused-petitioner on the victim, who is admittedly a minor, under threat. The offence had been committed by the accused petitioner while discharging his role as a guardian of the minor.
- 7. I have given due consideration to the submissions advanced by the learned counsel for the parties. A scanned copy of the case diary as well as a status report of the trial in connection with Special (POCSO) Case No. 2/2021 were called for from the Court of learned Special Judge under the POCSO Act, West Karbi Anglong, Hamren. I have also perused the materials available in records.
- 8. The certificate given by the Headmaster of the school where the victim has been studying, indicates that the date of birth of the victim, as per the admission register, is 01.09.2008. As per the opinion given by the doctor on the basis of the examination of the victim, the age of the victim has been stated to be above 10 years but less than 12 years. The medical opinion has further indicated that hymen of the victim girl was not intact. The medical report has further indicated that gestation sac like structure

measuring 21 x 18 x 16 mm corresponding to 4 w 4 d (msd) was seen in the person of the victim.

- 9. The materials on record have further indicated that the family of the victim belongs to the poor strata and in the year 2019, the accused-petitioner had proposed to the family of the victim that the victim could stay in his house and pursue her studies. It was further assured by the accused-petitioner that the victim would be given training to become a nurse and her marriage would also be solemnized by the accused-petitioner. Upon such assurance, the family of the victim had permitted the accused-petitioner to take the victim to his house. The statements of the victim recorded under Section 161, CrPC and Section 164, CrPC are available in the case record. In the statements, the victim had clearly mentioned about the threats and intimidation given to her and use of force to commit the sexual acts in a repeated manner. The materials further indicate that the relationship of the accused-petitioner with his wife also deteriorated because of his behavior towards the victim. From the materials on record it has further emerged that the accused-petitioner who is well established, while acting as a guardian of the minor victim had used such position of authority to commit the alleged sexual acts.
- 10. It is well settled that the matters to be considered in 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 charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behavior, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail. It is no doubt true that while considering an application for bail the aspect of personal liberty of the accused is also to be considered. But at the same time, the interest of free and fair trial of the case, more particularly, when it pertains to an offence of heinous nature is also to be looked into. The discretion vested in the Court for grant of bail or otherwise has to be exercised in a judicious manner and not as a matter of course.

- 11. It has been stated at the bar that the charges against the accused-petitioner are yet to be framed and, thus, none of the listed witnesses, more particularly, the victim has been examined. Upon due consideration of all the relevant considerations required to be considered while considering an application for bail and more particularly, the nature and gravity of the charge along with the materials on record which have provided reasonable grounds to believe that the accused-petitioner had committed the offence by misuse of his position as a person in authority, this Court is of the considered view that the release of the accused-petitioner at a stage when the trial has not commenced and the testimony of the victim is yet to be recorded, is not warranted in the interest of a free and fair trial. The standing of the accused-petitioner vis-à-vis the standing of the family of the victim including the age of the victim has persuaded this Court to take such a view. In the above view of the matter, the present application for bail is found devoid of merit and accordingly, the same is rejected."
- 5. Mr. Choudhury, learned counsel for the accused-petitioner by referring to the documents annexed to the bail application at page nos. 57-60, has submitted that the accused-petitioner is a patient of diabetes and he is heavily dependent on medicines. The eye sight of the accused-petitioner is also being slowly affected by diabetes. In view of his deteriorating health condition, the accused-petitioner has approached this Court again by this present application. The other ground he has urged is that in view of the present situation due to Covid-19 pandemic the trial is likely to be delayed.
- 6. The offences with which the accused-petitioner is charged are serious in nature as the allegations against him are of commission of offences under Sections 376(2)(f), Indian Penal Code (IPC) read with Section 6 of the Protection of Children from Sexual Offences [POCSO] Act, 2012. The accused-petitioner is in custody since 10.12.2020. In crimes of serious nature, the mere

fact that the accused is in custody for a longer period may not be a relevant consideration. It has been observed in *Gobarbhai Naranbhai Singala vs. State of Gujarat, (2008) 3 SCC 775,* and *Ram Govind Upadhyay vs. Sudarshan Singh, (2002) 3 SCC 598* that the period of incarceration by itself could not entitle the accused to be enlarged on bail. In *Anil Kumar Yadav vs. State (NCT of Delhi) and another, (2018) 12 SCC 129,* it has been observed that in case of undertrials, their liberty is a relevant consideration but it is equally important to consider the impact of their release on bail on the prosecution witnesses and also its impact on society. In order to ensure that during trial the material witnesses depose without fear and justice being done to the society, a balance has to be struck.

- 7. In *State of Bihar vs. Rajballav Prasad,* reported in *(2017) 2 SCC 178,* the Hon'ble Supreme Court of India has discussed about relevant considerations for granting of bail in case of offences committed against women and children, more particularly, as regards the offences under the Protection of Children from Sexual Offences (POCSO) Act, 2012. In the said case, the accused was found to have extended threats to the prosecutrix as well as her family members and materials witnesses, including father and sister of the prosecutrix, who were to be examined in the ensuing trial. Therein the Hon'ble Supreme Court of India has observed in the following manner:-
 - "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 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."

- 8. The observations in the previous order dated 20.04.2021 were made after taking note of the materials available in the case record. In such view of the matter, this Court is not inclined to re-consider the case of the petitioner for bail on merits as there is no change in the circumstances. Accordingly, the present application is found bereft of merits and is liable to be dismissed. It is accordingly ordered.
- 9. In so far as the health condition of the accused-petitioner is concerned, Mr. Choudhury has placed copies of an order dated 16.09.2021 and an order dated 23.09.2021 passed by the jurisdictional Special Court in Special POCSO Case No. 02/2021 along with a medical report dated 22.09.2021 of the Senior Medical & Health Officer, Hamren Civil Hospital. It transpires from the order dated 16.09.2021, the jurisdictional Special Court by the said order directed the jail authority to provide all necessary medical treatment to the accused-petitioner as and when necessary and also called for a report regarding health status of the accused-petitioner by 23.09.2021. It appears from the medical

report that the accused-petitioner is a patient of diabetes and hypertension with vision problem. He has been provided treatment in the Civil Hospital, Hamren and has been advised to consult with a cardiologist and at the Gauhati Medical College and Hospital for his eye problem. The said medical report was considered by the jurisdictional Special Court on 23.09.2021 and the jail authority has been directed to take necessary steps as per the report of the Senior Medical & Health Officer, Hamren Civil Hospital. This Court also reiterates the said direction, as has been given by the learned jurisdictional Special Court.

- 10. After completion of investigation, the charge sheet in Baithalangsho Police Station Case No. 78/2020 has already been submitted on 29.01.2021. Thereafter, Special POCSO Case No. 02/2021 was posted on 04.02.2021, 18.02.2021, 04.03.2021, 18.03.2021, 13.03.2021, 08.04.2021, 22.04.2021, 06.05.2021, 20.05.2021, 03.06.2021, 17.06.2021, 01.07.2021, 15.07.2021, 29.07.2021, etc. But on those dates, the trial had not proceeded with as the charges are yet to be framed. From the orders, it transpires that the prime reason for the trial not being proceeded with is the restrictions imposed due to Covid-19 pandemic. The restrictions imposed due to Covid-19 pandemic are being lifted gradually due to improvement in the situation and it is expected that the situation is likely to be returned to normalcy within a short period of time. As a corollary, it is expected that the functioning of the Court will also be returned to normalcy.
- 11. Considering the fact that the accused-petitioner is in incarceration since 10.12.2020 it is expected that the learned jurisdictional Special Court will make the necessary endeavours to complete the trial in an expeditious manner, more

particularly, the recording of evidence of the victim and her relatives on a priority basis. The observation is made by keeping in view the statutory provisions contained in Section 35 of Protection of Children from Sexual Offences [POCSO] Act, 2012.

12. This order disposes of the bail application.

JUDGE

Comparing Assistant