

Ali Hussain vs The State Of Assam And Anr on 7 August, 2024

Author: Malasri Nandi

Bench: Malasri Nandi

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GAHC010109912024

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

Case No. : AB/1480/2024

ALI HUSSAIN
S/O MAFIJ ALI, R/O VILL- BHUTUNI DUBA, P.O. AND P.S.-UDALGURI, DIST-
UDALGURI, BTR, ASSAM, PIN-784509

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:SMTI HAMIDA BEGUM
W/O NOBIUDDIN AHMED
R/O VILL- JANGAL PARA
P.S.-KHARUPETIA
DIST-DARRANG
ASSAM
PIN-78411

Advocate for the Petitioner : MR. A A R KARIM, MS G.PURI, Ms. R. R. BORAH, MD S A
MONDAL, MR S RAHMAN, MR. J HUSSAIN

Advocate for the Respondent : PP, ASSAM, MR DEBARSHI KUMAR BHATTACHARYYA, DR. P
AGARWAL, Amicus Curiae, (R-2)

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 07.08.2024 Heard Mr. A.A.R. Karim, learned counsel for the petitioner. Also heard Mr. B. Sarma, learned Additional Public Prosecutor for the State/respondent Page No.# 2/6 No.1 and Dr. P. Agarwal, learned Amicus Curiae for the respondent No. 2.

2. By this petition filed under Section 482 of the Bharatiya Nagarik Suraksha Sanhita, 2023, the petitioner, namely, Ali Hussain, has prayed for granting pre-arrest bail, apprehending arrest in connection with Udalguri P.S. Case No. 59/2024, under Section 4 of POCSO Act added Section 376/307 IPC.

3. It is submitted by the learned counsel for the petitioner that the petitioner's nephew had love affairs with the victim girl. It is also submitted that on 19.05.2024, the victim girl voluntarily visited the house of the nephew. It is further submitted that the petitioner is no way involved in the instant case. The informant falsely implicated the petitioner in this case. Considering the background of the case and the nature of the offence, benefit of pre-arrest bail may be extended to the petitioner.

4. On the other hand, Mr. Sarma, learned Additional Public Prosecutor has produced the case diary along with the statement of the victim girl recorded under Section 164 Cr.P.C. It is submitted by the learned Additional Public Prosecutor that the victim girl has implicated the petitioner as such, he has opposed in granting the privilege of pre-arrest bail to the petitioner.

5. Dr. Agarwal, learned Amicus Curiae for the respondent No.2 has also submitted that the petitioner had committed such sexual offence to the victim girl for which he is not entitled for the privilege of the pre-arrest bail. She has strongly opposed in granting pre-arrest bail to the petitioner.

6. I have considered the submissions made by the learned counsel for the parties. I have also perused the case diary.

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7. It appears from the statement of the victim girl recorded under Section 164 Cr.P.C. that the victim had been sexually abused by the petitioner. It also appears from the school certificate of the victim that at the time of the incident, the victim was a minor girl.

8. Apparently, consent of a minor victim in a 'love relationship' is not a valid defense in cases under the POCSO Act, and the prima facie case against the accused and the nature of the offense should be the primary considerations in deciding an anticipatory bail application.

9. In the decision of the Apex Court reported in [2022 SCC OnLine SC 1529] Sumitha Pradeep v. Arum Kumar C.K. and Another, when a High Court granted anticipatory bail to an accused, the matter was challenged before the Apex Court, the Apex Court set aside the order granting anticipatory bail, after referring the order with particular mention, as stated in paragraph Nos. 10 to 16 as under:

10. The High Court, while granting anticipatory bail to the respondent No. 1 herein (original accused), observed in para 9 of the impugned order something which has really disturbed us. Para 9 reads thus:-

"9. With the above principle in mind, when the facts of the case are noticed, it is revealed that the petitioner is the maternal uncle of the victim to whose house the victim went in December, 2021. On 14.12.2021, the victim is alleged to have been asked to sit on the lap of the petitioner, who thereafter is alleged to have hugged and Page No.# 4/6 kissed the victim on her cheeks.

Though on the one side, there is a possibility of such hugs and kisses being manifestations of affection by an uncle, one cannot ignore the possibility of such show of 'affections' being coloured by sexual overtones. However, those are all matters for investigation."

11. In our considered opinion, the observations made in Para 9 of the impugned order are totally unwarranted and have been made overlooking the specific allegations contained in the FIR, duly supported with the Statement of the victim - girl child under Section 164 of the Code.

12. In a case containing such serious allegations, the High Court ought not to have exercised its jurisdiction in granting protection against arrest, as the Investigating Officer deserves free-hand to take the investigation to its logical conclusion. It goes without saying that appearance before the Investigating Officer who, has been prevented from subjecting Respondent No. 1 to custodial interrogation, can hardly be fruitful to find out the prima facie substance in the allegations, which are of extreme serious in nature.

13. The fact that the victim girl is traumatized to such a high degree that her academic pursuits have been adversely impacted alone, coupled with the legislative intent especially reflected through Section 29 of the POCSO Act, are sufficient to dissuade a Court from exercising its discretionary jurisdiction in granting pre-arrest bail.

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14. It may be true, as pointed out by learned counsel appearing for Respondent No. 1, that charge-sheet has already been filed. It will be unfair to presume on our part that the Investigating Officer does not require Respondent No. 1 for custodial interrogation for the purpose of further investigation.

15. Be that as it may, even assuming it a case where Respondent No. 1 is not required for custodial interrogation, we are satisfied that the High Court ought not to have granted discretionary relief of anticipatory bail.

16. We are dealing with a matter wherein the original complainant (appellant herein) has come before this Court praying that the anticipatory bail granted by the High Court to the accused should be cancelled. To put it in other words, the complainant says that the High Court wrongly exercised its discretion while granting anticipatory bail to the accused in a very serious crime like POCSO and, therefore, the order passed by the High Court granting anticipatory bail to the accused should be quashed and set aside. In many anticipatory bail matters, we have noticed one common argument

being canvassed that no custodial interrogation is required and, therefore, anticipatory bail may be granted. There appears to be a serious misconception of law that if no case for custodial interrogation is made out by the prosecution, then that alone would be a good ground to grant anticipatory bail.

Custodial interrogation can be one of the relevant aspects to be Page No.# 6/6 considered along with other grounds while deciding an application seeking anticipatory bail. There may be many cases in which the custodial interrogation of the accused may not be required, but that does not mean that the prima facie case against the accused should be ignored or overlooked and he should be granted anticipatory bail. The first and foremost thing that the court hearing an anticipatory bail application should consider is the prima facie case put up against the accused. Thereafter, the nature of the offence should be looked into along with the severity of the punishment. Custodial interrogation can be one of the grounds to decline anticipatory bail.

However, even if custodial interrogation is not required or necessitated, by itself, cannot be a ground to grant anticipatory bail."

10. Going by the ratio in the case of Sumitha Pradeep (supra), this Court is of the view that this is not a fit case to grant the privilege of pre-arrest bail to the petitioner. Therefore, the benefit of pre-arrest bail may not be considered to the petitioner and prayer is rejected accordingly.

11. The pre-arrest bail application stands disposed of accordingly.

12. Return the case diary.

JUDGE Comparing Assistant