

Serial No. 04
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

BA. No. 14 of 2021

Date of Decision: 22.11.2021

Smti. Ephina Khonglah

Vs.

State of Meghalaya.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Ms C.B. Sawian, Adv.
For the Respondent(s) : Mr. B. Bhattacharjee, AAG, with
Mr. S. Sengupta, Addl. Sr. GA.
Mr. A. H. Kharwanlang, GA.

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| i) | Whether approved for reporting in Law journals etc.: | Yes/No |
| ii) | Whether approved for publication in press: | Yes/No |

1. The applicant has approached this Court with an application under Section 439 Cr.P.C. r/w section 31 of the POCSO Act with a prayer for grant of bail to the accused person Shri Silvester Khonglah.

2. Annexure I to this application is the FIR dated 18.12.2020 lodged by Smti Jushila Mawiong before the Officer-In-Charge, Pynursla Police Station, which contents revealed that a complaint was made against the accused person Silvester Khonglah of Iarbamon village who is said to have picked up the minor daughter of the Complainant on 16.12.2020 at about 12.00 am and has taken her to one place called Nongshyrngan near Bri War Resort and there he had sexually assaulted her and dropped her back to her place of stay. The act of sexual assault was also committed on 11.12.2020. This was narrated to the said Complainant by her said minor daughter. However, the said minor daughter has also stated that when the said act was committed, it was with her (minor daughter) consent. The Complainant though has objected to their

relationship as according to her knowledge, underage marriage is illegal.

3. On lodgment of the said FIR, the police of Pynursla immediately took action and the accused person Silverter Khonglah was arrested on 18.12.2020 itself in connection with Pynursla P.S. Case No 70(12) 2020 u/s 5(1)/6 POCSO Act and investigation was launched accordingly.

4. In due course, the investigation was completed, including the recording of statement of the Complainant, the victim and other relevant witnesses under section 161 and 164 Cr. P.C. respectively. The IO then filed the Charge Sheet on 10.03.2021 finding that a prima facie case was duly established against the accused person and prayer was made to put him up for trial. A regular case being Special(POCSO) Case No 10 of 2021 was then registered and the matter is now pending before the learned Special Judge(POCSO), Shillong.

5. Heard Ms. C.B. Sawian, learned counsel for the Applicant who has submitted that from the FIR and the statements of the Complainant, the victim and the Teacher with whom the victim was residing, it can be seen that there is a relationship between the victim and the accused and that both of them are teenagers, the accused person being 19 years old.

6. Ms. Sawian has also submitted that the accused person being a teenager, therefore he is incapable of understanding the consequences of his action and keeping him incarcerated with other inmates, some of whom may be harden criminals will have an impact on his future career.

7. Again, it is submitted that the POCSO Act has been enacted to prevent cases of sexual assault on children, however, the Act does not contemplate punishment of teenagers who are involved in romantic love.

8. Referring to the case of ***“Vijayalakshmi and Anr. v. State represented by the Inspector of Police and Another”*** CrI. O.P. No 232 of 2021 and CrI.M.P. No 109 of 2021, para 11,12 and 18, Ms. Sawian has submitted that many High Courts have taken a lenient view in such cases where the accused involved is a teenager and in this regard, charges under POCSO Act and even conviction was set aside and quashed.

9. Another limb of argument raised by Ms. Sawian is that the accused person is in judicial custody for almost 11 months and the POCSO Act stipulates that cases under this Act has to be disposed of within one year which could not be done so in this case and as such, the accused person may be released on bail with any conditions.

10. Mr. B. Bhattacharjee, learned AAG in his opposition to this application has submitted that the judgment cited by the learned counsel for the Petitioner will have no bearing in this instant case inasmuch as the fact that the accused person is a major, whether he is 19 years or 40 years would make no difference in the eyes of the Law.

11. It is also submitted that the provisions of the POCSO Act does not distinguished the severity of the offence whether it is a result of romantic love or otherwise. The offence committed by the accused person herein is serious in nature and even if it is a consequence of romantic love, it would not entitle the accused to be enlarged on bail. Reference to the order dated 17.11.2021 passed by this Court in the case of ***“Pankaj Kumar Bhardwaj v. State of Meghalaya”*** BA No. 13 of 2021 was made by the learned AAG to highlight the fact that this Court on hearing submission of the parties that the case involves a romantic relationship between the accused therein and the victim, has decline to allow the prayer made for grant of bail.

12. Having heard the learned counsels for the parties, this Court is to consider as to whether under the facts and circumstances of this case the accused person can be enlarged on bail.

13. The facts as stated above need not be repeated but only for the purpose of cross reference with the contents of the records which was duly produced before this Court and has been perused.

14. The learned counsel for the Petitioner has at the outset maintained that the relationship between the accused person and the alleged victim is one of romantic love. There is no denial of the fact that the parties were involved in a physically intimate relationship resulting in the lodging of the FIR by the Complainant who is the mother of the alleged victim. It is a matter of evidence

as to whether the alleged act constitutes sexual assault as per the provision of the POCSO Act.

15. It is also borne out from the record that the investigation has been completed and the charge sheet have been filed. On the Special Court (POCSO) taking cognizance of the said charge sheet, charges were accordingly framed against the accused and the case is now at the stage of evidence.

16. The contention of the learned AAG on the applicability of the relevant provision of the POCSO Act and the severity of the offence involved would be subject to the appreciation of evidence adduced in the case. However, this Court while taking into the account the nature and gravity of the alleged offence has also to consider other aspects as far as consideration for grant of bail is concerned.

17. On perusal of the records, particularly the statement of the victim and the accused, prima facie it is apparent that there is a romantic relationship between the two and that the sexual act involved between them was one of consensual, notwithstanding the fact that in the case of an alleged victim being a minor, consent has no legal validity, however, this aspect of the matter cannot be lost sight of while a plea for grant of bail is being considered by the court.

18. Bail jurisdiction particularly u/s 439 Cr.PC, is one where the power of discretion has been conferred on the Court to exercise the same judiciously under the facts and circumstances of the case. In the case of “**Ram Govind Upadhyay v. Sudarshan Singh**” (2002) 3 SCC 598, at paragraph 3, the Hon’ble Supreme Court has held as follows:-

“ 3. Grant of bail though being a discretionary order- but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the court and facts, however, do always vary from case to case. While placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always to be coupled with other circumstances warranting the

grant of bail. The nature of the offence is one of the basic considerations for the grant of bail- more heinous is the crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.”

19. The Hon’ble Supreme Court while discussing the concept of bail in the case of **“Ash Mohammad v. Shiv Raj Singh”** (2012) 9 SCC 446 at Paragraphs 20 & 21 respectively has observed as follows:-

“ 20. Having said about the sanctity of liberty and the restrictions imposed by law and the necessity of collective security, we may proceed to state as to what is the connotative concept of bail. In Halsbury’s Laws of England ,, it has been stated thus: -

“166. Effect of bail.- The effect of granting bail is not to set the defendant [(accused) at liberty], but to release him from the custody of law and to entrust him to the custody of his sureties, who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law, and he will then be imprisoned....”

21. In Sunil Fulchand Shah v. Union of India¹² Dr. A.S. Anand, learned Chief Justice, in his concurring opinion, observed: (SCCpp.429-30, para 24)

“24 ... Bail is well understood in criminal jurisprudence and Chapter 33 of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word ‘bail’ is surety.”

20. In the case of **“Vijayalakshmi”** (supra) cited by the learned counsel for the Petitioner, this Court is persuaded to respectfully agree with the observation made therein with special reference to the observations made therein at paragraphs 12 & 18 which are reproduced below as: -

“ 12. As rightly recognized by the Learned Single Judge of this Court in

Sabari's Case (cited supra), incidences where teenagers and young adults fall victim to offences under the POCSO Act being slapped against them without understanding the implication of the severity of the enactment is an issue that brings much concern to the conscience of this Court. A reading of the Statement of Objects and Reasons of the POCSO Act would show that the Act was brought into force to protect children from offences of sexual assault, sexual harassment and pornography, pursuant to Article 15 of the Constitution of India, 1950 and the Convention on the Rights of the Child. However, a large array of cases filed under the POCSO Act seems to be those arising on the basis of complaints registered by the families of adolescents and teenagers who are involved in romantic relationships with each other. The scheme of the Act clearly shows that it did not intend to bring within its scope or ambit, cases of the nature where adolescents or teenagers involved in romantic relationships are concerned.

18. In the present case, the 2nd Petitioner who was in a relationship with the 2nd Respondent who is also in his early twenties, has clearly stated that she was the one who insisted that the 2nd Respondent take her away from her home and marry her, due to the pressure exerted by her parents. The 2nd Respondent, who was placed in a very precarious situation decided to concede to the demand of the 2nd Petitioner. Thereafter, they eloped from their respective homes, got married and consummated the marriage. Incidents of this nature keep occurring regularly even now in villages and towns and occasionally in cities. After the parents or family lodge a complaint, the police register FIRs for offences of kidnapping and various offences under the POCSO Act. Several criminal cases booked under the POCSO Act fall under this category. As a consequence of such a FIR being registered, invariably the boy gets arrested and thereafter, his youthful life comes to a grinding halt. The provisions of the POCSO Act, as it stands today, will surely make the acts of the boy an offence due to its stringent nature. An adolescent boy caught in a situation like this will surely have no defense if the criminal case is taken to its logical end. Punishing an adolescent boy who enters into a relationship with a minor girl by treating him as an offender, was never the objective of the POCSO Act. An adolescent boy and girl who are in the grips of their hormones and biological changes and whose decision-making ability is yet to fully develop,

should essentially receive the support and guidance of their parents and the society at large. These incidents should never be perceived from an adult's point of view and such an understanding will in fact lead to lack of empathy. An adolescent boy who is sent to prison in a case of this nature will be persecuted throughout his life. It is high time that the legislature takes into consideration cases of this nature involving adolescents involved in relationships and swiftly bring in necessary amendments under the Act. The legislature has to keep pace with the changing societal needs and bring about necessary changes in law and more particularly in a stringent law such as the POCSO Act.”

21. In the light of the above, this Court is of the considered opinion that at this juncture the prayer of the Petitioner for grant of bail to the accused person Silvester Khonglah can be allowed.

22. Accordingly, the accused person Silvester Khonglah is hereby directed to be released on bail on compliance with the following conditions:-

- i) That he shall execute a personal bond of ₹ 20,000/- (rupees twenty thousand) with two sureties of like amount;
- ii) That he shall not tamper with the witnesses on the case;
- iii) That he shall not abscond or leave the jurisdiction of the Trial court without prior permission if so required and;
- iv) That he shall appear before the court as and when called upon to do so.

23. With the above, this petition is hereby disposed of.

24. Registry is directed to return the case record forthwith.

Judge

Meghalaya
22.11.2021
“N. Swer, Stenographer”