

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.64184 of 2021**

Arising Out of PS. Case No.-18 Year-2021 Thana- MAHILA PS District- Gaya

=====

SRI KAMLA KANT PRASAD @ KAMLA KANT PRASAD S/o Vishwanath Prasad The then S.D.P.O., Heard Quarter-3 at present S.D.P.O. Constable sub Selection Board (A) Block, 6th Floor, Sardar Patel Bhawan, District- Patna

... .. Petitioner/s

Versus

1. THE STATE OF BIHAR
2. Sanjay Kumar, S/o Rameshwar Das, R/o Bageya, P.O. Malhari, P.S. Imamganj, District Gaya.

... .. Opposite Party/s

=====

Appearance :

For the Petitioner/s :	Mr. Ramakant Sharma, Senior Advocate Mr. Rajesh Kumar, Advocate Mr. Santosh Kumar Pandey, Advocate Mr. Nilkamal, Advocate
For the Opposite Party/s :	Mr. Usha Kumari 1, Apl. P.P.
For the Informant :	Mr. Amit Srivastava, Senior Advocate Mr. Mirtunjay Kumar, Advocate Mr. Girish Pandey, Advocate

=====

CORAM: HONOURABLE MR. JUSTICE RAJIV ROY
C.A.V. ORDER

7 08-02-2023 Heard Mr. Ramakant Sharma, learned Senior counsel for the petitioner, Mr. Amit Srivastava, learned Senior Counsel, who represent the informant/victim girl as also Mrs. Usha Kumari No. 1, learned Spl. P.P. for the State.

2. Learned counsel for the petitioner is permitted and is granted to delete paragraph Nos. 5, 24 and 26 of the anticipatory bail application in course of the day.

3. The petitioner apprehends his arrest in connection with Mahila P.S. Case No. 18 of 2021 for the offence registered under Sections 6/9 (I) (c) of the POCSO Act, Section 3 (2) (v) of



the SC/ST (POA) Act and Section 376 (2) (a) (iii), 376 (2) (b), 376 (3) of the Indian Penal Code.

4. As per the prosecution story, the informant who is brother of the victim girl 'X' complained that his sister told her that during 2017 'Dussehra' festival, while the petitioner was posted as Dy. S.P., Head Quarter, Gaya forcibly committed rape upon her in his Government quarter in the night where she had stayed for a night prior to coming to Patna to serve as a Maid to the petitioner's wife. The further allegation is that the date of birth of his sister being 16.05.2003, she was minor at the time of occurrence, she narrated her ordeal to her brother followed by the present FIR in 2021.

5. Learned Senior counsel for the petitioner submitted that there is an inordinate delay in lodging of the FIR inasmuch as the alleged occurrence took place in 2017, the FIR was lodged in 2021 and the delay has not been explained.

6. The further submission is that contrary to the claim that she was a minor and her date of birth is 16.05.2003, the Doctor in another FIR lodged by her in 2016 had assessed her age to be seventeen and half years meaning thereby she was more than 18 years in 2017. Thus, POCSO Act is not attracted in the present case.



7. Learned Senior counsel relied on a judgment of the Supreme Court of India in *Prem Shankar Prasad Vs. State of Bihar in Criminal Appeal No. 1209 of 2021*. He further relied on another order by a Bench of this Court in *Usha Mishra Vs. State of Bihar & Anrs.* reported in *2007(3) PLJR 747* and further one more order of a co-ordinate Bench of this Court in *Santosh Yadav @ Santosh Kumar Yadav in Cr. Misc. No. 28750 of 2022*.

8. Since processes under Sections 82 and 83 of the Cr.P.C. have been issued against the petitioner, it is submitted that he needs protection from this Court. The last submission of the learned Senior counsel is that the petitioner is a responsible Police Officer, he will abide by the terms and conditions and in that backdrop, he deserves the relief, he has sought for.

9. Mr. Amit Srivastava, learned Senior Counsel for the victim girl/informant on the other hand submitted that the victim girl was engaged as a maid servant and was to visit Patna to serve the petitioner's wife. For that purpose, her brother took her to the Government Quarter of the petitioner, left her in his campus so that next morning she can be shifted from Gaya to Patna. However, the petitioner despite being a D.S.P. rank officer and was under oath to protect every single



individual as a Police Officer, took this opportunity of her being alone in the quarter and raped the victim girl who was minor at that time.

10. He took this Court to paragraph-35 of the case diary to show that the victim girl fully supported the prosecution story and stated that while she was sleeping in the night, the petitioner forcefully opened the door and thereafter committed rape and further threatened that if she raises alarm, she will be killed. Next day, she came to Patna along with his brother, was continuously crying and when the wife of the petitioner asked her the reason for crying, She narrated everything to her.

11. Further, the wife of the petitioner upon knowledge of the alleged occurrence, called the Police Officer, Meera Kumari posted at Gaya Women Police Station informing her that the girl has been raped by her husband. Thereafter, the lady Police Officer instead of taking note of her allegations chose to stay silent.

12. The further submission of learned Senior counsel is that in paragraph-253 of the case diary, the police recorded the statement of the said Assistant Sub Inspector, Meera Kumari who accepted her fault that when she was deputed at Gandhi Maidan, Gaya during the 2017 '*Dussehra*', she got a call from



Patna and came to know about the alleged rape. She further stated that when she informed the petitioner in his office, he was very angry and stated that he can remove her from job. As she feared losing her job and since no one came forward to lodge FIR, she remained silent. She lastly submitted her apology for not taking cognizance of the information she received at that time.

13. He as such submits that so far as the delay part that has been put forward by the learned Senior counsel, the same stands fully explained.

14. On the point of the age of the victim girl, the learned Senior counsel submits that as per the school certificate, her date of birth is 16.05.2003 and the same will have primacy over and above any medical report that may have been given.

15. His further submission is that police investigated the matter, found the case to be true, charge sheet submitted, cognizance taken and processes under Sections 82 and 83 of the Cr.Pc. have been initiated and in that backdrop, the petitioner is not entitled to any relief.

16. Learned Senior Counsel for the informant further submitted that how the petitioner conducts reflect from the fact that the interim protection was granted to him on 25.08.2021 in



Cr. Appeal (SJ) No. 304 of 2021, was allowed to be withdrawn by the co-ordinate Bench on 07.10.2021 considering the fact that since the order has been passed by the POCSO Court, the appeal is not maintainable.

17. However, from 07.10.2021 when interim protection was vacated till 19.07.2022 when interim protection was again given by a co-ordinate Bench of this Court in the present case, despite being a Police Officer, he chose not to appear before the concerned Court. Thus, when cognizance was taken on 18.02.2022 itself, as he never appeared, he was declared absconder by the concerned Court.

18. Learned Senior Counsel has also relied on the order of the Hon'ble Supreme Court in *Prem Shankar Prasad Vs. State of Bihar* in *Criminal Appeal No. 1209 of 2021* to submit that when the proceedings under Sections 82 and 83 of the Cr.Pc have been issued, the accused cannot be extended the privilege of anticipatory bail.

19. Mrs. Usha Kumari, learned Spl P.P. while fully supporting the case put forward by the learned counsel for the informant also cited a case of Hon'ble Supreme Court of India in *Bachu Das and State of Bihar & others in Cr. Appeal No. 314 of 2014*.



20. Having gone through the rival submissions put forward by the learned Senior Counsels as also learned Spl. P.P. , in the considered view of this Court:

(i) so far as the delay in lodging of the FIR is concerned, from the record/case diary, it is clear that very next day in 2017 itself, the victim girl explained the incident to the petitioner's wife who in turn informed the Officer In-charge of the Women Police Station, Gaya Mrs. Meera Kumari but the lady after her visit to the petitioner's office where she was scolded, chose to remain silent as she waited for the victim girl/her brother to come to lodge FIR and in its absence, she did not proceed further;

(ii) regarding the submissions put forward by the learned Senior Counsel for the petitioner that the girl was not minor at the time of the alleged rape, this Court finds force in the submissions put forward by the learned Senior Counsel for the victim girl/informant that once the school certificate incorporating her date of birth as 16.05.2003 is on record, the same will have primacy over and above any observation/opinion given by the Medical Officer;

(iii) the petitioner being a Police Officer was duty bound to protect the victim girl but he himself became a



predator and in the process, raped her and there was no one in the government quarter to save her from the alleged act of the petitioner;

21. Regarding the citation of ***Prem Shankar Prasad Vs. State of Bihar & Anr. (supra)***, the same does not come to the aid of the petitioner rather it supports the case of the informant. The Hon'ble Apex Court recorded in paragraph nos. 7.1 and 7.2 of the said order observed as follows:-

7.1 "It is required to be noted that after investigation a charge-sheet has been filed against respondent no. 2 – accused for the offences punishable under Sections 406, 420 of the IPC also, Thus it has been found that there is a prima facie case against the accused. It has come on record that the arrest warrant was issued by the learned Magistrate as far as back on 19.12.2018 and thereafter proceedings under Sections 82-83 of Cr.PC have been initiated pursuant to the order passed by the learned Chief Judicial Magistrate dated 10.01.2019. Only thereafter respondent no.2 moved an application before the learned Trial Court for anticipatory bail which came to be dismissed by the learned Additional Sessions Judge, Saran, by a reasoned order. The relevant observations made by the learned Additional Sessions



Judge, Saran, while rejecting the anticipatory bail application are as under :-

“Perused the record. The prosecution case as alleged in the typed application of the informant Prem Shankar Prasad is that the informant is a retailer shopkeeper of medicines in the name of Maa Medical Store, Gandhi Chauk, Chapra and the petitioner is his stockiest who runs his business in the name of Rajnish Pharma, Mauna Pakari. The petitioner and the informant were on good terms, so, the informant gave Rs. 36,00,000/- to the petitioner in case and through cheque for purchase of medicine. When the required were not supplied to the informant, the informant demanded his Rs. 36,00,000/- then the petitioner gave a cheque of Rs. 10,00,000/- bearing cheque no. 137763 dated 25.11.2017 which was in the Canara Bank of the petitioner which was dishonoured by the bank with a note ‘insufficient fund’. Thereafter the informant demanded his money in case. On 20.06.18 but, the brothers of the



petitioner misbehaved with the informant. The brothers of the petitioner also threatened not to contact the police or the consequences will be worst: On this informant Chapra Town PS No. 453/2018 was registered and investigation proceeded.

Perused the case diary from which it transpires that in Para 4 there is a re-statement of the informant in which he has supported the prosecution case. In para 8,9, 10 and 11 witness Amit Kumar Sinha, Awadhesh Kumar, Dhanu Kumar and Uday Shankar Prasad has been examined under Section 161 of Cr.PC in which they have supported the prosecution case. In para 16 there is supervision note of SDPO, Sadar in which prosecution case. In found true under sections 420, 406 of IPC and 138 of NI Act. In para 23 processes under sections 82 and 83 of Cr.PC have been issued against the petitioner in para 38 there is a statement of witness Ashutosh Mishra who is a medical representative and has stated that Rajnish Srivastava,



being stockiest of the medicine used to sell the medicines of his company in course whereof he has borrowed a sum of Rs. 7,10,000/- from him. When he asked to return back the money he has issued a cheque of the aforesaid amount which was dishonor by his bank due to insufficient fund. In para 39 another witness Pramod Kumar Thakur has been examined who has deposed that this petitioner Rajnish Srivastava has borrowed a sum of Rs. 10,00,000/- on the pretext of purchasing a piece of land. When he demanded his money back, Rajnish Srivastava gave a cheque of the aforesaid amount which was dishonored by the bank. The investigation in the case is still going on.

From perusal of the case record I find that the informant has alleged to have given a sum of Rs. 36,00,000/- to this petitioner in order to supply certain medicines which was neither supplied nor the amount was ever returned. Admittedly, the said amount was given to the petitioner on an oral



undertaking as there is nothing on record to substantiate the aforesaid averments, but, the fact remains that the petitioner in order to refund the said amount has issued a cheque of Rs. 10,00,000/- bearing cheque no. 137763 dated 25.11.2017 which was deposited by the informant in the bank, but, the same was dishonored with record I further find that the petitioner is in the habit of borrowing money from different persons and then used to make default in payment inasmuch as by issuing cheques without sufficient balance in his account which transpires from paras 38 and 39 of the case diary.”

7.2 Despite the above observations on merits and despite the fact that it was brought to the notice of the High Court that respondent no.2-accused is absconding and even the proceedings under sections 82-83 of Cr.PC have been initiated as far as back on 10.01.2019, the High Court has just ignored the aforesaid relevant aspects and has granted anticipatory bail to respondent no.2-accused by observing that the nature of accusation is arising out of a business transaction. The specific allegations of cheating, etc. Which



came to be considered by learned Additional Sessions Judge has not at all been considered by the High Court. Even the High Court has just ignored the factum of initiation of proceedings under Sections 82-83 of Cr.PC by simply observing that “be that as it may”. The aforesaid relevant aspect on grant of anticipatory bail ought not to have been ignored by the High Court and ought to have been considered by the High Court very seriously and not casually.”

22. The Hon’ble Apex Court clearly held that when a prima facie case is made out after investigation, charge sheet has been submitted, the learned Court has taken cognizance of the matter and the proceedings under Sections 82 and 83 of the Cr.PC have been initiated, it was not proper to extend the privilege of anticipatory bail to the petitioner.

23. So far as the next case cited by the learned Senior counsel for the petitioner in the case of *Usha Mishra Vs. State of Bihar reported in 2007(3) PLJR 748 (supra)* is concerned, in the said case, the case was registered on 19.05.2005, warrants issued from the Court on 24.05.2005, warrants returned and proclamation under sections 82 of the Cr.PC was issued on 02.06.2005, the same having been returned, the



attachment order under Section 83 Cr.PC was obtained on 09.06.2005 even though the Investigating Officer reported he was sick and could not give the progress of the investigation as such for the purposes of disposal of anticipatory bail application but on the same day he moved an application before the learned C.J.M. for securing attachment order under Section 83 Cr.P.C. with the recommendation of Superintendent of Police.

24. The same was promptly issued by the learned CJM though anticipatory bail of petitioner and her husband was pending consideration before the learned Sessions Judge and the attachment effected on 10.06.2005. It was in these circumstances that the Patna High Court observed that when the anticipatory bail was pending, the Court acted hastily in taking steps which ended with the attachment that was effected on 10.06.2005.

25. In this case, the fact remains that the case was lodged in 2021 and on 07.10.2021, when the Criminal Appeal (SJ) No. 304 of 2021 was dismissed and interim stay vacated, the petitioner was duty bound to appear before the concerned court as there was no order granting interim relief to him. In that background, when the cognizance was taken on 18.02.2022 as he never appeared before the concerned Court, he was declared



an absconder. It is another matter that on 19.07.2022 when the case was taken up by the co-ordinate Bench of this Court, interim protection was granted to him.

26. So far as the order passed by the Co-ordinate Bench of the Court in Cr. Misc. No. 38750 of 2021 (*Santosh Yadav @ Santosh Kumar Yadav Vs. State of Bihar*) is concerned, the Co-ordinate Bench was dealing with the case where it held that even after issuance of processes under section 82 of the Cr.PC, the anticipatory bail application is maintainable. In the considered opinion of this Court, this too does not come to the petitioner's rescue in view of observations of Hon'ble Apex Court in **Prem Shankar Prasad Vs. State of Bihar** (supra).

27. Learned Senior counsel for the informant referred to Hon'ble Apex Court's Order in *Eera through Dr. Manjula Krippendorf Vs. State (NCT OF DELHI) and Another* reported in *2017(15) SCC 133* with special reference to paragraph nos. 22 to 24.

22. *Chapter II of the POCSO Act deals with sexual offences against children. Part A of the said Chapter provides for penetrative sexual assault and punishment therefor. Section 3 stipulates what is the penetrative sexual assault and Section 4 provides punishment for such offence. Part B of*



the said Chapter deals with aggravated penetrative sexual assault and punishment therefor. Section 5 copiously deals with what can constitute aggravated penetration sexual assault. It is extremely significant to note that Section 5(a) enumerates number of circumstances where the offence becomes aggravated one. It includes in its ambit various situations and also certain categories of persons. The provision is quite elaborate. Section 5(k) to which my attention has been drawn reads thus: “(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child;” The aforesaid provision, as is evident, lays stress on the mental disability of the child.

23. Part C of Chapter II deals with sexual assault and punishment therefor. Section 7 lays down about the sexual assault. Part D deals with aggravated sexual assault and punishment therefor. Section 9 deals with aggravated sexual assault which is akinto Section 5. Part E deals with sexual harassment and punishment therefor. The said harassment lays down various acts which will amount to sexual harassment.

24. On a reading of the aforesaid Chapters, it is quite manifest and limpid that the legislature has intended to protect the child from any kind of sexual assault and harassment. It has also laid stress upon the mental and physical disability of the child. The child, as per the definition, is the principal protagonist and the POCSO Act protects the child from any sexual act and also takes into consideration his mental disability. Thus, the legislature was alive to the condition of mental disability.



Chapter III of the POCSO Act deals with using child for pornographic purposes and punishment therefor. Chapter IV deals with abetment of and attempt to commit an offence. Chapter V deals with the procedure for reporting of cases and Chapter VI provides for procedure for recording statement of the child. Sections 24 to 27, which have been pressed into service by Ms. Bhati, relate to recording of statement of a child; recording of statement of a child by Magistrate; additional provisions regarding statement to be recorded and medical examination of a child.”

28. Mrs. Usha Kumari I, learned Spl. PP on the other hand has cited a case of the Hon’ble Supreme Court of India in the case of ***Bachu Das Vs. State of Bihar and others*** reported in 2014(3) SCC 471 in which it has been observed as under:

“It is clear that the learned Magistrate carefully perused the complaint petition, as well as the statement of the complainant and four witnesses examined during enquiry and arrived a prima facie conclusion against the accused persons that offence under Sections 147, 148, 149, 323, 448 I.P.C. and Section 3 of the SC/ST Act, is made out. In such circumstances and in view of the bar under Section 18 of the SC/ST Act, the learned counsel relying on the decision of this Court reported in (2012) 7 SCC 795 [Vilas Pandurang Pawar and Another v. State of Maharashtra and others], submitted that the



High Court is not justified in granting anticipatory bail. In similar circumstances, this Court has considered the offence under Section 3(1), as well as the bar provided under Section 18 of the SC/ST Act and concluded as under:

“Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the SC/ST Act has been prima facie made out. In other words, if there is a specific averment in the complaint, namely insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.

The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no court shall entertain an application for anticipatory bail, unless it prima facie finds that such an offence is made out. Moreover, while considering the application for



bail, scope for appreciation of evidence and other material on record is limited. The Court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence.”

In the light of the factual details, as found in the order of the learned Sessions Judge, Saran at Chapra, dated 28th November, 2008, and in the light of the statutory provisions as interpreted by this Court in the above cited decision, we are satisfied that the High Court has committed an error in granting anticipatory bail. Accordingly, the said order is set aside. The respondent Nos. 2 to 8/accused are granted four weeks time from today to surrender before the appropriate Court and seek for regular bail.”

29. Taking into account all the aforesaid facts as also the judgments cited by the respective counsels, this Court is convinced that the victim girl has fully narrated her ordeal and only because the FIR was not lodged at that particular time due



to inaction on the part of the concerned Police Officer present in the Women Police Station under the influence of the petitioner, that cannot be the ground for brushing aside the contents of the case.

30. The petitioner being a Police Officer misused his official quarter where no staff was present due to 'Dussehera' time and allegedly raped the victim girl who was the age of his daughter and in that background he does not deserve any relief.

31. This Court thus does not find any merit in the anticipatory bail application filed by the petitioner herein which is accordingly rejected.

32. Nothing recorded in the order shall be taken up for consideration at the time of Trial as the same has been observed only for the purpose of considering the anticipatory bail petition of the petitioner.

(Rajiv Roy, J)

Jagdish/-

U		T	
---	--	---	--

