

THE HIGH COURT OF TRIPURA
AGARTALA

BAIL APPLICATION 07 OF 2015

Sri Jyotilal Das,
S/O. Late Upendra Das,
Of Village-Madhya Bharat Chandranagar,
Chittamara, P.S.-Belonia,
P.O.-Belonia,
District-South Tripura.

..... **Petitioner.**

For and on behalf of:-

Sri Naresh Das,
S/O. Late Bhagaban Das, of
Birchandra Nagar,
P.S.-Santir Bazar,
P.O.-Takmachara,
District-South Tripura.

..... **Accused person.**

- V e r s u s -

The State of Tripura.

..... **Respondent.**

BEFORE
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA

For the petitioner : Ms. R. Purakayastha,
Advocate.

For the respondent : Mr. R.C. Debnath,
Addl. Public Prosecutor.

Date of hearing & judgment : 20.01.2015.

Whether fit for reporting : **YES.**

JUDGMENT & ORDER(ORAL)

This application for bail has been filed by the petitioner Sri Jyotilal Das on behalf of the accused Sri Naresh Das in respect of Santirbazar Police Station case No.58 of 2014 registered under section 304B of the Indian Penal Code (IPC).

2. Briefly stated, the allegations of the prosecution are that the son of the accused Shyamal Das was married to Smt. Mampi Das, daughter of the complainant. It is alleged that dowry was given at the time of marriage but the accused persons including the husband and the father-in-law (the accused), the mother-in-law etc. treated the daughter with cruelty. It is alleged that thereafter the accused persons killed the daughter of the complainant and threw the dead body of the daughter in a rubber garden. The present accused being the father-in-law of the deceased, her husband Shyamal Das, the mother-in-law Smt. Rupali Das and the brother-in-law Tarun Das of the deceased were all made the accused. They were arrested on different dates. Smt. Rupali Das, the mother-in-law, was enlarged on bail vide order dated 19-11-2014 on the ground of the treatment of her granddaughter. As far as the brother-in-law Tarun Das is concerned, he was granted anticipatory bail by this Court. Thereafter, Shyamal Das, the husband of the deceased, was released on bail and on the same day, the prayer made by the present accused for being released on bail was rejected. The only reasons given by the learned Magistrate are as follows:-

“Heard both sides. After hearing both the sides and considering the period of detention of the accd. Shyamal Das, his bail prayer is allowed, and considering the detention period of other accd. Naresh Das his bail prayer is rejected.”

3. As far as the bail granted to Smt. Rupali Das is concerned, there is no error in that order. However, the grant of bail to Shyamal Das and rejection of the bail of Naresh Das has been made on grounds which are totally irrelevant.

4. Repeatedly this Court has held that the Presiding Officers of the Courts in the State of Tripura are not caring to read the provisions of the Bare Act. Answers to most questions which arise in legal proceedings can be found if the bare section is analysed properly. Reference to authorities is made without caring to refer to the sections. Therefore, I propose to issue certain guidelines and directions in this order.

5. Chapter XXXIII of the Code of Criminal Procedure (Cr.P.C.) deals with bail and bonds. Sections 436, 437 and 439 are important for our purpose and read as follows:-

“436. In what cases bail to be taken.—(1)

When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:

Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 or section 446A.

(2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446.

437. When bail may be taken in case of non-bailable offence.—(1) *When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but—*

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be

released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of

1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1) the Court may impose any condition which the Court considers necessary—

(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interests of justice.

(4) An officer or a Court releasing any person on bail under sub-section (1), or sub-section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under sub-section (1), or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without

sureties for his appearance to hear judgment delivered.

439. Special powers of High Court or Court of Session regarding bail.—(1) *A High Court or Court of Session may direct—*

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.”

6. The provisions of bail are dealt with from sections 436 to 439. Reference need not be made to section 438 since the power to grant anticipatory bail is only vested in the Sessions Court or the High Court. In this order, this Court is only dealing with grant of regular bail.

7. A bare perusal of section 436 of the Cr.P.C. shows that when a person other than a person accused of a non-bailable offence meaning thereby that when a person is accused of a bailable offence, he has to be enlarged on bail and there is no choice. In fact, where such person is unable to furnish bail bond within one week, the Court is empowered to presume that he is an indigent person and may release him on his executing a bond without sureties for his appearance.

8. Section 436A provides that no person can be kept behind bars as an under trial prisoner unless he is charged with an offence punishable with death if he has already remained under detention for one-half of the maximum period of imprisonment specified for that offence under the law. Therefore, except in those rare cases where death is one of the sentences prescribed, as soon as a person has undergone detention for more than half of the maximum period prescribed, he is entitled to be enlarged on bail whatever be the nature of the offence.

9. Section 437 is important for our purpose. This deals with the powers of the Magistrate to grant bail. Whenever any person accused of or suspected to have committed a non-bailable offence is produced before the Magistrate or before any Court other than the High Court or the Court of Session, he can be released on bail subject to two conditions:-

(i) That, if such person is charged with an offence punishable with death or imprisonment for life, the Magistrate is

not empowered to release such person on bail if it appears to the Magistrate that there are reasonable grounds for believing that he is guilty of an offence punishable with death or imprisonment for life. At this stage, the investigation may or may not be complete because if investigation is complete and charge-sheet has been filed, then things would be clear. Therefore, one of the main considerations which shall weigh with the Magistrate at this stage is what is the offence with which the accused has been charged at that stage. However, this Court would like to make it clear that merely because the police has added a section in which the punishment prescribed is life imprisonment or death is by itself not a bar to the Magistrate to examine the allegations in the FIR. A duty is cast upon the Magistrate to examine the record and only if he comes to a finding that no case is made out against the accused to proceed against him for an offence punishable with imprisonment for life or death, he is entitled to release that person on bail. However, if the accused is charged with committing such an offence, then the Magistrate cannot release him on bail without himself going through the record and coming to a finding one way or the other whether the allegation is prima facie correct or not. There has to be an application of mind in such cases which are punishable with imprisonment for life or death. A duty is cast upon the Magistrate to satisfy himself that the allegation made by the police is reasonable and unless he comes to a contrary conclusion, he has no jurisdiction to grant bail.

10. Clause (ii) of sub-section (1) of section 437 deals with repeat offenders and where the accused has earlier been convicted of an offence punishable with death or imprisonment for life or for imprisonment exceeding 7 years or had been previously convicted on two or more occasions for imprisonment for more than three years, then also the Magistrate should normally not grant bail whatever be the non-bailable offence with which the accused is charged.

11. The first proviso to sub-section (1), however, empowers the Magistrate to direct that a person even charged with an offence punishable with life or death imprisonment be released on bail if the accused is a woman or is a sick or infirm person. Therefore, if material is brought before the Magistrate that the accused though a male is sick or infirm, the Magistrate after coming to this finding that he is sick or infirm keeping into consideration other factors can enlarge the accused on bail. As far as the persons aged below 16 years are concerned, in my opinion, this part of the section has become otiose in view of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 because now a person under 18 years cannot be arrested. Therefore, the question of grant of bail to him does not arise and such person has to be dealt with under the Juvenile Justice (Care and Protection of Children) Act, 2000.

12. The second proviso empowers the Magistrate even to release repeat offenders on bail if for reasons to be recorded, the

Court is satisfied that there are special reasons to release such person on bail. These reasons will also have to be in the nature of illness, infirmity and the like.

13. The third proviso provides that merely because the presence of the accused person is necessary for the purpose of identification cannot be the sole ground for rejecting bail to him if he is otherwise entitled to be enlarged on bail.

14. The fourth proviso lays down that the Magistrate of the Court cannot grant bail to an accused where the offence alleged to have been committed by him is punishable with imprisonment for 7 years or more unless the Public Prosecutor is heard in the matter.

We are not concerned with section 437(2).

15. As far as section 437(3) is concerned, it casts a duty upon the Magistrate to impose certain conditions at the time of grant of bail when bail is granted to an accused who is alleged to have committed an offence where the imprisonment provided is 7 years or more.

Sub-section (4) of section 437 requires the Magistrate to give reasons and/or special reasons while granting bail.

16. Section 439 empowers the High Court or the Court of Session to grant bail in respect of any offence whatsoever including an offence which is punishable with life imprisonment or death.

17. Section 167 of the Cr.P.C. gives the power of remand to a Magistrate. During investigation the accused has to be

produced before the Magistrate and the Magistrate can order the remand of the accused and direct that he be detained either in police custody or in judicial custody. The maximum period of remand provided for in the Code of Criminal Procedure is 60 days in respect of offences where the maximum punishment is less than 10 years, and 90 days where the offence is punishable with death or imprisonment for life or with imprisonment for 10 years or more. In Tripura, as on date, the said period is 120 days and 180 days respectively and on completion of the said period, an accused is entitled, as of right, to be enlarged on bail.

18. This Court would like to make it clear that the liberty of a human being is the most important right which he has. This liberty which is not only a fundamental right guaranteed under the Constitution of India but is a human right recognised under the various conventions of the United Nations is a right inherent in every human being. No person should be detained or kept behind bars unless it is necessary to do so. The detention of a person can only be ordered in accordance with law by following the procedure prescribed by law. The Courts while granting bail should remember the oft repeated dictum of Justice Krishna Iyer that bail, not jail is the rule. Each case has to be examined in its own facts and the Courts after application of mind must decide whether the accused should be detained or should be enlarged on bail. These orders should not be passed in a routine or cursory manner because civil

liberties are involved and when you keep a person behind bars, his fundamental right to liberty is being affected.

19. At the same time, the Magistrate must balance the rights of the individual with the requirements of public law and order. That is also an important consideration and both must be balanced so that the Court dealing with the bail petition comes to the right conclusion. In heinous offences, if accused are released on bail, then a wrong message is sent to society and bail can be rejected. However, the primary purpose of keeping a person under detention and not granting him bail is not to punish him because punishment can be inflicted only after he is convicted but to ensure that investigation is proper; that the prosecution evidence shall not be tampered with; that the accused shall not try to influence the witnesses; that the trial shall not be unduly delayed and other similar reasons. These factors need to be considered along with the claims of the accused person to be released on bail. Bail cannot be granted or refused only on the ground of length of detention unless we are dealing with the provisions of 167 of the Code where after the maximum period of detention bail has to be granted as a matter of right to the accused.

20. Section 167(1) provides that whenever any person is arrested and detained in custody, he must be produced before the nearest Magistrate within twenty-four hours. Sub-section (1) of section 167 casts a duty upon the police to produce the accused before the nearest Judicial Magistrate and also to transmit to the

Magistrate the copies of the entries in the diary relating to the case. This has been provided so that the Magistrate can examine the case diary and decide whether the accused should be granted bail, whether the accused should be remanded to police custody or whether he should be remanded to judicial custody. There is another salutary reason behind this provision that the case diary is not tampered with at a later stage.

Therefore, henceforth, the police is directed to ensure that in every case where remand of an accused is sought, the copy of the relevant case diaries relating to the case shall be submitted to the Magistrate. This is the legal position and in case, the case diaries are not produced and supplied to the Magistrate within a reasonable period, then the Magistrate will be entitled to draw an inference against the prosecution.

21. As far as the present case is concerned, the Magistrate granted bail to Shyamal Das who was charged with having committed an offence punishable under section 304B of IPC which is punishable with imprisonment which may extend to life. The Magistrate has not said a word whether any case is made out against Shyamal Das or not. As discussed above, the Magistrate was entitled to grant bail to Shyamal Das only if he came to the conclusion that there are no reasonable grounds for presuming the guilt of the accused Shyamal Das. However, I am not interfering with the order of bail which was granted to Shyamal Das because

this order was passed on 28-11-2014 and even the State has not applied for cancellation of the bail.

22. As far as the present accused Naresh Das is concerned, the manner in which his bail application has been rejected shows a totally callous approach on behalf of the Magistrate. He has rejected the bail only on the ground that the period of detention is less. This is no ground for rejecting bail. The Magistrate has not done his duty of examining the case diaries seeing whether a case is made out or not. He has not cared to decide whether the custody of Naresh Das is required for the purposes of investigation or not. Without coming to these conclusions, no order on the bail petition should have been passed.

23. I have examined the case diaries. The main accused Shyamal Das has been released on bail. Smt. Rupali Das and Tarun Das, the other co-accused, have also been released on bail. The investigation is complete and accused Naresh Das has been behind bars for almost two months. He is a permanent resident of Tripura and there is little chance of his absconding. Keeping in view the aforesaid facts, I direct that Naresh Das be enlarged on bail on his furnishing bail bond in the sum of Rs.10,000/- (rupees ten thousand) with one surety in the like amount to the satisfaction of the learned trial Court subject to the following conditions:-

(i) That, the accused is directed not to tamper with or in any manner influence the prosecution witnesses;

(ii) That, the accused shall ensure that no threat directly or indirectly is given to any of the prosecution witnesses ;

(iii) The accused is further directed not to cause any hindrance in the investigation;

(iv) The accused shall not leave Tripura without permission of the appropriate Court;

(v) In case, the accused violates any of the conditions or tries to delay the trial, the prosecution shall be at liberty to apply for cancellation of bail.

24. The bail application is disposed of in the aforesaid terms.

25. A copy of this judgment shall be sent to the Secretary, Home, to the Government of Tripura, the Director General of Police to ensure that it is circulated to all the Officer-in-Charge of Police Stations in the State for further guidance. A copy of this judgment shall also be sent to the Secretary, Law who shall ensure that the same is circulated to all the Public Prosecutors and Additional Public Prosecutors.

26. The Registrar General is directed to send a copy of this judgment to all the Judicial Officers in the State.

CHIEF JUSTICE