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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

Case Commentary

Hem Kumar Sharma V State Of H.P.

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Facts

BACKGROUND OF CASE

1. Hem Kumar Sharma, a yoga teacher in the Government Girls School, Subathu, was accused of inappropriately touching and massaging his student's private parts under the pretext of improving their posture and increasing body flexibility to reduce the pain caused due to yoga asana.
2. Moreover, he used to force children to look when he performed stretching exercises while wearing torn trousers without undergarments, exposing his private parts to them.
3. His actions were brought to light by the daughter of one Devinder Kumar, who wrote about it to her sister and informed her mother why she wished to avoid yoga classes.
4. In light of the accusations, an F.I.R. [No. 98 of 2022] was lodged at the Dharampur Police Station, H.P., against Hem Kumar, and after the statements of the victims were recorded, charges under sections 354, 376 of I.P.C. and sections 6, 8, 10 of POSCO were attracted.

PRESENT APPEAL

The petitioner (Hem Kumar) has filed an appeal before the High Court of H.P. seeking anticipatory bail under section 438 Cr.P.C. in case F.I.R. No. 98 of 2022.

Contention by the Petitioner

Learned counsel for the petitioner submitted:

1. The petitioner, being a yoga teacher since 1999, nurtured many state and national-level yoga players. Moreover, the Hon'ble Education Minister of H.P. awarded him a state award for his contributions to the student's physical and cultural development. After that, the petitioner chaired many events as a coach and head. The present case was concocted to sully his reputation since,
 - a. The medical examination of the victims shows nothing to implicate the petitioner under section 6 of POCSO or section 376 of I.P.C. There was no sign of penetration or any form of physical maltreatment.
 - b. Further, out of a class of more than 50 students, only 10 made the allegations, and their statements seemed tutored to sully the petitioner's reputation.
2. It was also contended that denial of bail would amount to a breach of the appellant's fundamental right under **article 21**.¹
3. The counsel relied on the following judgments:
 - a. In *Bipinbhai Sheth v State of Gujarat*,² the court held that where a person is applying for anticipatory bail, he does not have to make a special case. Furthermore, he should be considered innocent until proven otherwise, and the sanctity of individual liberty must be considered.
 - b. In *Noor Aga v State of Punjab*,³ the court held that both parties are equally entitled to approach the court, and if the accused can show the court that the complainant was motivated to defame the accused. Then the court ought to protect his liberty.
 - c. In *Netar Singh v State of H.P.*,⁴ the court held that a proper test must be conducted before it exercises its discretion of granting anticipatory bail. It shall not be denied solely based on the gravity of the offence, and further inspection is needed to be conducted because the rule is '*bail, not jail*.'

¹ INDIA CONST. art. 21.

² *Bipinbhai Sheth v. State Gujarat*, AIR 2015 SC 3090.

³ *Noor Aga v. State of Punjab*, (2008) 16SC417.

⁴ *Netar Singh v. State of H.P.*, MANU/HP/0005/2020

Contention by the Respondent

Learned Additional Advocate General (A.D.G.) submitted:

1. Penetration or causing injury is not a necessary ingredient to substantiate the commission of an offence under section 376 or I.P.C. and section 6 of POCSO. Mere touching of the victim's private parts and forcing them to reciprocate the actions with the petitioner is enough to construe that an offence under the said provisions is committed.
2. The matter is sensitive and under investigation. If bail is granted, it might cause unrest in society. Furthermore, past achievement does not provide immunity to the petitioner for committing such an offence. Instead, his claim should be judged based on the material facts of the present case.
3. Furthermore, only ten people stepped forward because not everyone was a part of the yoga class, and not everyone was willing to risk exposing their girl child to the courts.
4. The A.D.G. relied on the following judgment:
 - a. In *State v Anil Sharma*,⁵ the court stated that a person in custody might provide information that might lead to the discovery of material facts. Custodial interrogation is more elicitation-oriented than questioning someone who already has a favourable order under **section 438**.
 - b. In *Jai Prakash Singh v State of Bihar*,⁶ the court stated that anticipatory bail could only be granted in a severe offence if all the parameters were followed. Mainly when the court is prima facie of the opinion that the accused would not misuse his liberty and was entrapped in the crime.

Judgment

The Supreme court observed that,

1. The nature of the offence is serious, and the parameters used for granting bail for such crimes could not be fulfilled. Moreover, based on the facts before the court, it cannot be construed that the allegations were made merely to harm the petitioner's reputation.
2. Since the case is still in the investigation phase, granting bail may hamper the delivery of justice. Therefore, balancing public interest vis-à-vis. private interest, the court has held that no case for a grant of anticipatory bail is made out.

⁵ State v. Anil Sharma, (1997) 7 SCC 187.

⁶ Jai Prakash Singh v. State of Bihar, (2012) 4 SCC 379

Comparative Analysis

The way India relies on anticipatory bail to curtail its misuse of power in matters of arrest reflects many institutional shortcomings, such as weakly constrained power of the police, slow courts, etc. However, things process differently compared to other jurisdictions such as the U.S. and England. These jurisdictions do not use anticipatory bail. However, people have tried and failed, like in the case of *re Sturman*,⁷ the accused received information that he might get arrested on tax charges (though no warrant was issued till that time) and applied for anticipatory bail in Ohio's northern district but was denied. The court stated that bail is not meant to dodge arrest.

In American jurisdiction, the liberty of the defendant is not a factor for consideration until it is infringed upon or threatened. Rather than anticipatory bail, the United States and the United Kingdom rely on a stricter judiciary and legislative supervision of the arrest authority to prevent abuses of the arrest power.

The standards England, the U.S. and Europe for determining matters of arrest and pre-trial detentions differ from that of India. Contrary to India, bail proceedings in the United States and England permit both parties to produce evidence only after an arrest.

Furthermore, unlike the present case, in *Subhash Kashinath Mahajan v The State of Maharashtra*⁸, the court held that, in increasing cases, rape is being used as a weapon to fulfil a personal vendetta and granted anticipatory bail to the accused.

Critical Analysis

The cardinal purpose of the employment of "Anticipatory bail" was to prevent misuse of the law for fulfilling personal vendetta. Anticipator bails play a significant role in curbing false cases lodged to affect an innocent person's reputation or harm their position. It is indispensable while judging non-bailable offences. However, in the present case, the following drawbacks can be made out:

I. NO PRIOR RECORD:

⁷ Re Estate of Sturman, 93 N.C. App. 473

⁸ Subhash Kashinath Mahajan v. State of Maharashtra, AIR 2018 SC 1.

In his entire career, during which he taught hundreds of students, no such complaint was raised, and many ended up as prominent players. Though past achievements are not directly relevant to the case, it provides a testament to his character as an individual and a teacher.

Furthermore, no concrete evidence was available since the case of under investigation. Since the purpose of anticipatory bail is to keep people who might have fallen victim to false charges out of jail, the current judgment works contrary to the objection of section 438 of Cr.P.C. As per the NCRB **report of 2020**⁹, about 11.6% are false and labelled under 'mistake of facts' or 'insufficient evidence.'¹⁰ Though the data itself does not provide any immunity, when read together with the appellant's prior work record, it makes him eligible for the benefit of the doubt.

II. DAMAGE TO REPUTATION/ LIVELIHOOD:

Not granting bail leaves a dent in the appellant's career, even if found not guilty. The aftermath of being charged with an offence as serious as rape is not trifling. It can severely damage a person's reputation and, coupled with the provisions of POSCO, further deteriorates it. The judgment of the present case is equivalent to branding him as paedophilic; even if not explicitly stated, after such judgment, concerned parents would not want the appellant anywhere near their children. It might cause a loss of livelihood and reputation of the appellant in society. Even if held not guilty by society's standards, his career as a teacher would be practically over.

III. He should have been remanded in custody only if he was not ready to comply with the investigation or if there was solid proof that he would misuse his liberty.

Conclusion

The above analysis is merely an output of objective brainstorming. That is not to appear in cahoots with the wrongdoer; however, ensure that no innocent person is sent behind bars without justified reason. As it is quoted, "*it is better to have 10 wrongdoers go free than one innocent being convicted.*" Similarly, the present case was not at a stage where possible speculation could be drawn that the appellant might be guilty and granting bail would obstruct the investigation and disrupt public peace. It would have been better to conclude the investigation before the judgement since the appellant was ready to fully cooperate.

⁹ National Crime Records Bureau, [CII 2021 Volume 1.pdf \(ncrb.gov.in\)](#), (last visited Feb. 2, 2023)

¹⁰ The News Minute, [What the data on 'false rape cases' doesn't tell us | The News Minute](#), (last visited Feb. 2, 2023)

RECOMMENDATIONS

In the present case, the writer firmly believes the following steps would have proven more fruitful, keeping in view both the appellant's interest and public interest:

1. Keeping the appellant 'under surveillance' instead of confining him in jail because jail would still be a viable option if the appellant does not cooperate with the investigation.
2. Ordering the authorities to speed up the investigation to pass judgment on the current matter of granting bail.

The above suggestion would keep the appellant's reputation intact in case it turns out to be a false complaint. Moreover, it would not obstruct the investigation and lead to informed and calculated judgment.

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