



2024:KER:6757

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

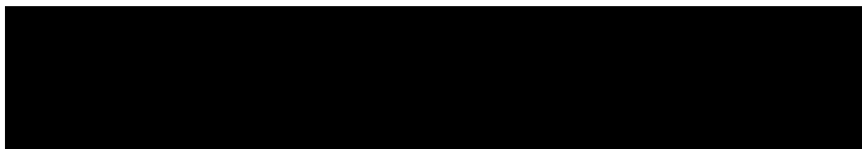
THE HONOURABLE MR.JUSTICE K. BABU

TUESDAY, THE 23RD DAY OF JANUARY 2024 / 3RD MAGHA, 1945

WP(CRL.) NO. 1028 OF 2023

PETITIONER/S:

ABDUL KABEER P.U



T,,

BY ADVS.
ABRAHAM MATHAN
P.P.HARRIS

RESPONDENT/S:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, PIN - 682031
- 2 DIRECTOR GENERAL OF POLICE
STATE POLICE HEAD QUARTERS, VELLAYAMBALAM,
THIRUVANANTHAPURAM,, PIN - 695010
- 3 SUPERINTENDED OF POLICE
PALAKKAD, QMH3+XFC, PARAKKUNNAM, VIDYUT NAGAR,
PALAKKAD, KERALA, PIN - 678001
- 4 STATION HOUSE OFFICER
CHALISSERY POLICE STATION, P3MP+542, CHALISSERY
- KALLUMPURAM RD, CHALISSERY, KERALA, PIN -
679536
G SUDHEER, PP

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR
ADMISSION ON 23.01.2024, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:



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K. BABU, J

W.P.(Crl) No.1028 of 2023

Dated this the 23rd day of January, 2024

JUDGMENT

The prayers in the Writ Petition are as follows:-

- I.Call for the records leading to Ext.P3 order.
- II.Issue writ in the nature of certiorari or any other writ order or direction and quash Ext.P3 order.
- III.Issue a direction to the 4th respondent to release the petitioner on bail in the event of his arrest in Crime No.407 of 2022 of Chalissery Police Station, Palakkad District.
- iv.To issue any writ order or direction as the Honourable Court is pleased to meet the ends of justice in the circumstances of the case.

2. The petitioner is accused No.2 in Crime No.407 of 2022 of Chalissery Police Station. He along with accused Nos.1 and 3 are alleged to have committed offences punishable under Sections 366A, 376, 376(2)(n), 376(3), 506 r/w Section 34 of IPC and Sec.4(1) r/w



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Sec.3(a), Sec.6(1) r/w Sec.5(1) and Sec.12 r/w Sec.11(v) of POCSO Act.

3. The prosecution allegations are the following:-

Between December 2021 and June 2022, accused No.1, pretending love, induced a minor girl and had sexual intercourse with her. The petitioner along with accused No.3 captured those visuals on a mobile phone. They further threatened the minor girl saying that those visuals would be circulated on social media, if she refused to succumb to their demands also.

4. Based on the statement filed by the victim, the Police proceeded with the investigation. In the course of investigation, the victim approached this Court by filing W.P.(Crl) No.868 of 2022 seeking a relief to hand over the investigation to a Superior Officer. This Court in W.P.(Crl) No.868 of 2022 after perusing the report filed by the Investigating Officer observed thus:-

“6. A detailed report has been filed by the investigating officer narrating the investigation being



conducted so far. It would show that as part of the investigation, the statement of the victim under section 161 of Cr.P.C as well as under section 164 of Cr.P.C was recorded. Altogether 15 witnesses were questioned. The CDR of the phone call between the victim and the first accused as well as between the first and second accused were also examined. The victim was subjected to medical examination. As per the case of the victim, she was subjected to penetrative sexual assault on several times. The victim is aged 15 years. However, the medical examination report would show that hymen of the victim was intact. On investigation, the investigating agency also found material contradictions in the statement given by the victim. That apart, the definite case of the victim was that there was telephonic conversation between her and the first accused. However, on examination of the CDR, it was found that there was no such conversation. Four instances of sexual assault were specifically mentioned by the victim. Those four instances were investigated by the investigating agency and it was found that the case set up by the prosecution appears to be not correct."

5. The petitioner approached the Sessions Court seeking anticipatory bail by filing Crl.M.C.No.81/2023. The Sessions Judge rejected the application seeking pre-arrest bail, but made the following observations:-



“12. Before parting with the application for pre-arrest bail, this Court is at loss to understand as to why the investigating agency has not invoked the provisions of Sec.16 r/w Sec.17 of the POCSO Act and resorted to Sec.34 of IPC. The Investigating Officer shall explore the possibilities of invoking Sec.16 r/w Sec.17 of the POCSO Act in the light of materials collected during the investigation.”

6. The petitioner challenges the above order passed by the Sessions Judge and *inter alia* prayed for releasing him on bail in the event of arrest. The petitioner also seeks to quash the observations in the order passed by the Sessions Judge.

7. Heard the learned counsel for the petitioner and the learned Public Prosecutor.

8. The learned Public Prosecutor raised a contention that the petitioner cannot in a routine course approach this Court under Article 226 of the Constitution seeking anticipatory bail.

9. The learned counsel for the petitioner



submitted that this Court can be called upon to secure the liberty of the accused under Article 226 of the Constitution. The learned counsel further submitted that the petitioner essentially challenges an unwarranted observation by the Sessions Court in an application seeking anticipatory bail for which he can approach this Court under Article 226 of the Constitution.

10. The petitioner challenges the direction of the Sessions court to the investigating officer while considering an application under Section 438 Cr.P.C. to explore the possibility of invoking Sections 16 and 17 of the POCSO Act against the petitioner/accused. The Court, while dismissing the application, raised the concern as to why the investigating agency has not invoked those provisions against the petitioner and the other accused. While considering an application for bail, it was not appropriate for the Sessions Court to pass the above said directions. While considering the bail application, the Sessions Court concerned ought not to



travel beyond considering the specific issues, whether to grant bail or reject bail to an accused.

11. In ***Prashant Dagajirao Patil v. Vaibhav @ Sonu Arun Pawar*** [LL 2021 SC 39] the Supreme Court considered the direction of the Bombay High Court Bench at Aurangabad in an application for bail to the Investigating Officer to examine the CC TV footage and submit a report before the Court. When the challenge to the said direction came before the Supreme Court, the Court held that when only the limited issue of grant of regular bail to the accused is pending consideration before the High Court, it was not appropriate for it to pass the afore said direction which will have a direct bearing upon the trial.

12. In ***Sanjay Dubey v. The State of Madhya Pradesh and another*** [2023 LiveLaw (SC) 435], the Supreme Court observed that the Court of Sessions while considering a petition under 439 of Cr.P.C. ought not to travel beyond considering the issues whether to grant



bail or reject bail to an accused in custody.

13. The legal principle emerges from the above discussion is that, when a Sessions Court is concerned with a limited question of grant of bail under Section 439 or 438 to the accused, it is not appropriate for the Court to make observations or directions travelling beyond the consideration of grant of bail to the accused. I am of the considered view that observations/directions passed by the Sessions Court in the impugned order is not sustainable. The direction issued by the Sessions Court in paragraph 12 of the order therefore stands quashed.

14. I shall now consider the objection raised by the Public Prosecutor as to the power of the Court to consider an application for bail exercising jurisdiction under Article 226 of the Constitution. I am conscious of the fact that the jurisdiction under Article 226 when called upon to secure the liberty of an individual cannot be a substitute for recourse to the remedy of bail under Section 438 or 439 of Cr.P.C.. In the present case,



direction issued by the Sessions Court in 'paragraph12' of the order had a direct bearing on the liberty of the petitioner. The learned counsel for the petitioner submitted that the principles being applied regarding the grant or refusal of bail evolved over a period of time from the various precedents are applicable to the exercise of jurisdiction under Article 226 of the Constitution when the High Court is called upon to secure the liberty of the accused. The learned Counsel for the petitioner relied on ***Arnab Manoranjan Goswami v. The State of Maharashtra and others*** [Manu/SC/0902/2020]. In ***Arnab Manoranjan Goswami***, the Supreme Court observed thus:-

"56. The petition before the High Court was instituted Under Article 226 of the Constitution and Section 482 of the Code of Criminal Procedure. While dealing with the petition Under Section 482 for quashing the FIR, the High Court has not considered whether prima facie the ingredients of the offence have been made out in the FIR. If the High Court were to have carried out this exercise, it would (as we have held in this judgment) have been



apparent that the ingredients of the offence have not prima facie been established. As a consequence of its failure to perform its function Under Section 482, the High Court has disabled itself from exercising its jurisdiction Under Article 226 to consider the Appellant's application for bail. In considering such an application Under Article 226, the High Court must be circumspect in exercising its powers on the basis of the facts of each case. However, the High Court should not foreclose itself from the exercise of the power when a citizen has been arbitrarily deprived of their personal liberty in an excess of state power.

57. While considering an application for the grant of bail Under Article 226 in a suitable case, the High Court must consider the settled factors which emerge from the precedents of this Court. These factors can be summarized as follows:

- (i) The nature of the alleged offence, the nature of the accusation and the severity of the punishment in the case of a conviction;
- (ii) Whether there exists a reasonable apprehension of the Accused tampering with the witnesses or being a threat to the complainant or the witnesses;
- (iii) The possibility of securing the presence of the Accused at the trial or the likelihood of the Accused fleeing from justice;



(iv) The antecedents of and circumstances which are peculiar to the Accused;

(v) Whether prima facie the ingredients of the offence are made out, on the basis of the allegations as they stand, in the FIR; and

(vi) The significant interests of the public or the State and other similar considerations.

58. These principles have evolved over a period of time and emanate from the following (among other) decisions: Prahlad Singh Bhati v. NCT, Delhi MANU/SC/0193/2001 : (2001) 4 SCC 280; Ram Govind Upadhyay v. Sudarshan Singh MANU/SC/0203/2002 : (2002) 3 SCC 598; State of UP v. Amarmani Tripathi MANU/SC/0677/2005 : (2005) 8 SCC 21; Prasanta Kumar Sarkar v. Ashis Chatterjee MANU/SC/0916/2010 : (2010) 14 SCC 496; Sanjay Chandra v. CBI MANU/SC/1375/2011 : (2012) 1 SCC 40; and P. Chidambaram v. Central Bureau of Investigation¹¹.

59. These principles are equally applicable to the exercise of jurisdiction Under Article 226 of the Constitution when the court is called upon to secure the liberty of the Accused. The High Court must exercise its power with caution and circumspection, cognizant of the fact that this jurisdiction is not a ready substitute for recourse to the remedy of bail Under Section 439 of the Code of Criminal Procedure. In the backdrop of these principles, it has become necessary to



scrutinize the contents of the FIR in the case at hand. In this batch of cases, a prima facie evaluation of the FIR does not establish the ingredients of the offence of abetment of suicide Under Section 306 of the Indian Penal Code. The Appellants are residents of India and do not pose a flight risk during the investigation or the trial. There is no apprehension of tampering of evidence or witnesses. Taking these factors into consideration, the order dated 11 November 2020 envisaged the release of the Appellants on bail.”

15. In the present case, the petitioner has approached this Court not as a substitute for recourse to the remedy of bail under Section 438 of the Cr.P.C.. While seeking a relief of bail in a petition under Article 226 of the Constitution, the High Court has to exercise its power conscious of the fact that the petitioner has an alternate remedy and in exceptional cases like this a party can seek relief to secure his liberty in a petition under Article 226 of the Constitution,

16. The learned Public Prosecutor submitted that after completing investigation in the case, the investigating agency submitted a final report concluding



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that the allegations are false and the trial Court has accepted the same and things being so, the petitioner has no apprehension of arrest. The learned counsel for the petitioner submitted that the victim has filed a protest complaint before the the Special Court. The learned counsel for the petitioner sought liberty to the petitioner to seek a remedy in this Writ Petition in the event he is advised so in future.

17. The petitioner is given liberty to approach the Court in the event he is advised so.

The Writ Petition is disposed of accordingly.

Sd/-
K.BABU, JUDGE

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APPENDIX OF WP(CRL.) 1028/2023

PETITIONER EXHIBITS

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|-------------|---|
| Exhibit-P1 | TRUE COPY OF THE INTERIM ORDER DATED 29.09.2022 IN W.P.(CRL).NO.868 OF 2022 |
| Exhibit -P2 | TRUE COPY OF THE JUDGMENT DATED 05.12.2022 IN W.P.(CRL).NO.868 OF 2022 |
| Exhibit -P4 | TRUE COPY OF THE NEWSPAPER ARTICLE PUBLISHED IN MANAGALAM NEWSPAPER ON 05.11.2018 BY THE PETITIONER |
| Exhibit -P5 | TRUE COPY OF THE F.I.R IN CRIME NO. 272 OF 2019 OF ERUMAPETTY POLICE STATION DATED 15.06.2019 |
| Exhibit -P6 | TRUE COPY OF THE F.I.R DATED 06.02.2022 IN CRIME NO. 134 OF 2022 OF ALUVA POLICE STATION |