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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

MONDAY, THE 6TH DAY OF MARCH 2023 / 15TH PHALGUNA, 1944

BAIL APPL. NO. 1023 OF 2023

CRIME NO.297/2017 OF NEDUMBASSERY POLICE STATION, ERNAKULAM
AGAINST THE ORDER IN Bail Appl. 2594/2022 OF HIGH COURT OF
KERALA

PETITIONER:

SUNIL N.S
AGED 33 YEARS
NEDUIVALIKKUDI, ELAMPAKKAPPILLY, VENGOOR, KOOVAPPADY,
ERNAKULAM, PIN - 683544
BY ADV V.V.PRATHEEKSH KURUP

RESPONDENTS:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, PIN - 682031
BY ADVS.
P.NARAYANAN, SENIOR G.P. AND ADDL.PUBLIC PROSECUTOR
SHRI.SAJJU.S., SENIOR G.P.
SRI. T.A SHAJI DGP

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
27.02.2023, THE COURT ON 6.3.2023 DELIVERED THE FOLLOWING:

CR

P.V.KUNHIKRISHNAN, J.

B.A.No. 1023 of 2023

Dated this the 6th day of March, 2023

ORDER

The short point to be decided in this bail application is whether the period of long undertrial detention alone is a ground to grant bail to an accused.

2. The petitioner/accused, Sri. Sunil N.S, herein is the first accused in Crime No.297 of 2017 of Nedumbassery Police Station, Ernakulam. The above case is now pending before the Principal Sessions Court, Ernakulam as Sessions Case No. 118 of 2018.

3. The prosecution case is that in furtherance of a criminal conspiracy by a movie star, who is the 8th accused in the case, the petitioner/first accused along with certain other accused abducted and sexually assaulted the victim in this case in a moving car. The offences alleged against the petitioner/accused and other accused are under Sections 120B, 109, 342, 366, 354, 354B, 357, 376D,

201, 212 read with Section 34 of the Indian Penal Code, 1860 and under Sections 66E and 66A of the Information Technology Act, 2000. The petitioner/accused herein has been custody in connection with the above case from 23.02.2017 onwards. The petitioner/accused has been in judicial custody for the last six years. The petitioner/accused approached this Court earlier by filing a bail application numbered as B.A. No.2594 of 2022, and the same was dismissed by a detailed order on 29.03.2022. That order was challenged by the petitioner/accused before the Supreme Court, and the Apex Court dismissed the bail application with an observation that if the trial is not concluded within a reasonable time, the petitioner/accused is at liberty to renew his application for grant of bail pending trial before the High Court. Based on the above observation of the Apex Court, the present bail application is filed.

4. Heard the counsel for the petitioner/accused and the Director General of Prosecution (hereinafter referred to as the, “DGP”) Shri.T.A.Shaji.

5. The counsel for the petitioner/accused reiterated the contentions raised in the bail application. The counsel submitted that the petitioner/accused has been in custody for about six years, and the trial is not yet been completed. The petitioner/accused also submitted that the main accused were already released on bail and the Trial Court now requested the Apex Court to extend the time to dispose of the sessions case. Under such circumstances, in the light of the observation of the Apex Court in the order rejecting the bail application submitted by the petitioner/accused, he is entitled to bail is the submission.

6. The DGP seriously opposed the bail application. The DGP submitted that the petitioner/accused is the first accused in a sensational case in the State, where a cine artist was sexually harassed in a cruel manner in a running car by the accused in furtherance of a criminal conspiracy by another movie star and grave allegations are raised against the petitioner/accused. The DGP submitted that there is no delay on the part of the Court or on the part of the prosecution in completing the trial. The Court and the prosecution are trying their best to conclude the trial as expeditiously as possible. The DGP submitted that some more

witnesses are there to be examined to prove the prosecution case. He also submitted that the examination of the witnesses is going on and the trial will be completed within a reasonable time. The DGP also submitted that the earlier order rejecting the bail application of the petitioner is confirmed by the Supreme Court and there is no change of circumstance. Hence, this bail application may not be entertained now is the submission.

7. This Court considered the contentions of the petitioner/accused and the learned DGP. When this bail application came up for consideration on 02.02.2023, this Court directed the Registry to get a report about the time required to dispose of the sessions case. Accordingly, the learned Sessions Judge submitted a report on 13.02.2023. It will be better to extract the report dated 13.02.2023.

“The Hon'ble Supreme Court has directed this court vide judgment in Crl. A.1794/19 dated 29.11.2019 to dispose of SC.118/2018 pending before this court expeditiously, preferably within six months from the date of judgment. This court applied for extension of time since the trial could not be completed within the stipulated time. Vide order dated 05.09.2022 in M.A. 1433/2022 and 1434/2022 Hon'ble Supreme court has extended the time for completion of the proceedings and directed to conclude the

trial at the earliest preferably before 31.01.2023. This court has also been directed to send report of progress after four weeks from 05.09.2022. This court on 07.10.2022 sent report to Hon'ble Supreme Court in compliance to the above direction and that report was accepted by the Hon'ble Supreme Court. This Court has further been directed vide reference to send further progress report after six weeks from 20.10.2022. This court had furnished the details till 13.10.2022. In the meantime A8 and accused in SC 1000/22 filed petitions u/s 227 Cr.PC. Petitions were dismissed on 28.10.2022. On 31.10.2022 charge was framed against A8 and newly added accused in SC 1000/22. On 03.11.2022 SC 1000/22 is clubbed with this case and the accused has assigned with rank no. 15. The learned Special Public Prosecutor filed witness schedule citing 36 witnesses. Summons was issued to the witnesses and examination commenced on 10.11.2022 as scheduled. PW1 to PW 237 were examined till this date. Exbts. P 457 to P 590 and Exbts. D 83 to D 119(series) were also marked till 10.02.2023. Eight of the witnesses were recalled and examination completed as they were cited in the supplementary final report. 5 to 8 days were spent for the completion of the examination of some of the witnesses. Though the examination was scheduled till 23.12.2022, it could not be completed on that day as the examination of some of the witnesses took time.

While so prosecution on 19.01.2023 filed additional list of witness citing 41 more witnesses. The person who made revelations led to the further investigation is examined as PW 222. His examination is not completed on medical grounds. The prosecution now filed Crl M.P. No. 257/23 to dispense with the personal appearance of the said witness on medical grounds and sought for the examination through alternate modes. This court is not in a position to complete the examination on or before 31.01.2023 as directed by Hon'ble Supreme Court in the

above circumstances. This court had taken earnest efforts to complete the examination within the stipulated time, but could not be completed for the reasons mentioned herein before. Since the prosecution wants to examine 41 more witnesses, this court sought 6 more months for the completion of trial.

I humbly submit this report for kind perusal and consideration.”

8. In the above report, the learned Sessions Judge informed that six more months is necessary for the completion of the trial. The Apex Court, in Annexure B order, allowed the petitioner/accused to move to the High Court for bail if the trial is not concluded within a reasonable time. It will be better to extract the order of the Apex Court here:

“We have heard the learned counsel for the parties and taking into consideration the statement of the victim, we do not find any reason to interfere in the order impugned, at this stage.

The Special Leave Petition is, accordingly, dismissed.

However, if the trial is not concluded within the reasonable time, the petitioner/accused is at liberty to renew his application for grant of bail pending trial before the High court.

Pending application(s), if any, shall stand disposed of.”

The Apex Court confirmed the order of this Court dismissing the earlier bail application of the petitioner/accused, after considering

the statement of the victim also. But the Apex Court observed that if the trial is not concluded within a reasonable time, the petitioner/accused is at liberty to renew the bail application for grant of bail pending trial before the High Court.

9. After the above report was received, this Court again considered the matter on 16.02.2023. On that day, the counsel for the petitioner/accused reiterated the contentions and submitted that in the light of the order passed by the Apex Court, the bail application may be heard on merit. The counsel for the petitioner/accused also submitted that the petitioner/accused is not allowed to participate in the trial, and that the lawyer who is representing the petitioner/accused in the trial is facing difficulty in consulting him regularly for the conduct of the case, because the petitioner/accused is in jail.

10. Since the Apex Court allowed the petitioner/accused to file this bail application if the trial is not completed within a reasonable time, this Court has to first find out; whether the trial is not concluded even after 'a reasonable time'. What is the reasonable time to conclude a case of this nature? For an

expeditious trial, the Apex Court is monitoring the case regularly and the Trial Court submits the report to the Apex Court about the progress of the case. It is an admitted fact that the Apex Court regularly accepted the report submitted by the Trial Court and extended the time to dispose of the case, of course with a direction to expedite the trial. A perusal of the report dated 13.02.2023 of the Trial Court would show that about 237 witnesses were examined in the case as on that date and additional witness list is also filed by the prosecution for examination. It is an admitted fact that the learned sessions judge is giving priority to this case. It is also an admitted fact that the learned judge is sitting upto 7.30 PM and at some times even upto 8 PM to complete the evidence of the witnesses scheduled for that day. A bare perusal of the report of the learned sessions judge would show that the Court is doing its level best to dispose of the case. The Apex Court also accepted the extension petition submitted by the lower Court. Now the Trial Court only requires an additional 6 months' time. I am of the opinion that there no unreasonable delay in concluding the trial, especially for the reason that the Apex Court has accepted the extension applications submitted by the Trial Court. There cannot

be any straight jacket rule to decide the reasonable time necessary to conclude a trial. Each case is to be decided based on the volume of evidence proposed to be adduced by the prosecution and defense. In this case more than 200 witnesses were already examined. The Apex Court allowed all the extension petitions filed by the Trial Court to complete the trial. Therefore, I am of the considered opinion that, there is no unreasonable delay in the trial. The Apex Court is also monitoring the progress of the trial.

11. Since the petitioner is in jail as an under trial prisoner for about 6 years, this Court decided to consider the bail application on merit also to find whether the petitioner/accused is entitled to bail or not. Since the victim in this case was already examined, this Court decided to go through the evidence adduced by the victim to find out the prosecution case. In all pending trial cases, perusal of the evidence already adduced by the prosecution is not necessary to decide a bail application. The evidence already adduced alone is also not a reason to reject a bail application. The Trial Court has to decide the matter ultimately based on the entire evidence adduced by the prosecution and defence. It is a well accepted principle that in an order passed in a bail application,

there can be only reasons to reject or allow the bail application and there cannot be any finding or even prima facie finding based on the evidence adduced by the prosecution. The findings in the bail order by the superior court may influence the Trial Court while deciding the case finally. Such findings in bail order may also prejudice the prosecution and defence. Therefore, there can only be reasons to reject a bail application and there cannot be finding or even prima facie finding in a bail order.

12. This Court decided to peruse the evidence of the victim only to understand the prosecution case properly. Therefore, this Court directed the Registry to get a readable copy of the deposition of the victim examined in this case in a sealed cover. This Court also directed the Registry to get a report from the lower Court about the reason why the petitioner/accused is not allowed to participate in the trial either virtually or physically because such a grievance was raised by the counsel for the accused. The learned Sessions Judge submitted a report on 24.02.2023. It will be better to extract the same also hereunder:

“With reference to the order cited 1st above and in continuation to the letter cited 2nd above, it is respectfully

submitted that the accused no. 1 is being produced through Video Conference before this court on all hearing dates till 22.02.2023. The evidence now being adduced is in connection with A8. The counsel for A1 also absent in all most all the days. There is no cross examination on the side of A1 at the time of examination of witnesses. Further this court used to conduct sitting upto 7.30 p.m. or 8 p.m. so as to complete the examination of the witnesses scheduled for the day. Since the physical presence of A1 is not required, this court caused the production through Video Conference so as to avoid practical difficulties. The learned Special Public Prosecutor also conceded that physical production of A1 is not required. Moreover it is reported before this court that there is threat to the life of A1. Further it is respectfully submitted that this court ordered the physical production whenever the counsel for A1 sought production of A1 except in one occasion. The said non-production was on account of certain issues happend during the time of examination of mother of A1. This court recorded the reason for that and production was effected on the next day. Moreover the Hon'ble High Court vide Order in Crl M.C. No. 1516/23 dated 21.02.2023 directed this court to ensure the physical production of A1 and this Court complied with the direction. A1 is directed to produce physically from 22.02.2023 onwards.” (sic)

13. I am not in a position to agree with the finding of the learned Sessions Judge that the presence of the petitioner/accused was not necessary because the evidence now being adduced is in connection with the 8th accused. An accused in a trial is entitled to be present throughout the proceedings in light of section 273 Cr.P.C. But the learned Sessions Judge observed in his report that,

in the light of an order passed by another learned Judge of this Court in Crl.M.C No.1516 of 2023, the Court below directed the police to produce the petitioner/accused physically from 22.02.2023 onwards. Therefore, the grievance of the petitioner/accused is already redressed in the light of the order dated 21.02.2023 in Crl.M.C. No.1516 of 2023. No further direction is necessary.

14. As directed by this Court, the learned Sessions Court has already forwarded the legible readable copy of the evidence adduced by the victim in a sealed cover. This Court carefully perused the same to find out the prosecution case. It is not proper to make any observations about the evidence adduced by the victim before the Trial Court at this stage because it may affect the prosecution and the defense case. But after understanding the prosecution case based on the evidence adduced by the victim in this case, I am of the considered opinion that the petitioner/accused is not entitled bail even though he has been in jail for about six years. The prosecution case is very serious. The prosecution case is that, the victim was taken in a car and she was sexually harassed brutally by the petitioner/accused and others

turning a deaf ear to her begging to release her. A conspiracy is also alleged. Whether the victim is a cine artist or not is not at all a factor. The prosecution case is that a lady was brutally attacked. The truth has to come out after the trial. Simply because the petitioner/accused is in jail for six years, it cannot be a ground to release him in such a serious case. The prosecution and the Court are taking every possible effort to conclude the trial as expeditiously as possible. The Apex Court is also supervising the trial and is granting time to the Trial Court to complete the trial. The Trial Court now says that the sessions case itself can be disposed of within six months. I believe that in such a situation this Court need not entertain this bail application. Whether the prosecution succeed in this case or the defence succeed in this case is not a criteria in these types of cases. When there is serious allegation against an accused affecting the conscience of the society, this Court cannot allow bail application solely on the ground of personal liberty. The gravity of the offence alleged against the accused is also a criteria to be considered by the Court while deciding the bail application. That is settled in the light of the decision of the apex court in **P. Chidambaram v. Central**

Bureau Of Investigation [AIR (2019) SC 5272]. It will be better to extract the relevant portions in the above decision hereunder:

“22. The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail:- (i) the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution; (ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; (iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence; (iv) character behaviour and standing of the accused and the circumstances which are peculiar to the accused; (v) larger interest of the public or the State and similar other considerations (vide Prahlad Singh Bhati v. NCT, Delhi and another (2001) 4 SCC 280). There is no hard and fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits. The discretion of the Court has to be exercised judiciously and not in an arbitrary manner.....”

15. After going through the prosecution case and keeping in mind the above principle laid down by the Apex Court, I am of the considered opinion that the petitioner/accused is not entitled bail even though he has been jail for about six years. The petitioner/accused should face trial in custody in the peculiar facts and circumstances of this case.

Therefore, this bail application is dismissed. The registry will return the deposition of the victim in a sealed cover back to the Trial Court forthwith.

Sd/-

**P.V.KUNHIKRISHNAN
JUDGE**

das

APPENDIX OF BAIL APPL. 1023/2023

PETITIONER ANNEXURES

Annexure-1

TRUE COPY OF THE ORDER DATED 29.03.2022 IN
B.A. 2594/2022 OF THIS HON'BLE COURT.

Annexure-2

COPY OF ORDER DATED 13.07.2022 IN SPECIAL
LEAVE TO APPEAL (CRL) NO.3394/2022 OF THE
HON'BLE SUPREME COURT.