

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

WEDNESDAY, THE 7<sup>TH</sup> DAY OF JUNE 2023 / 17TH JYAISHTA, 1945

BAIL APPL. NO. 2817 OF 2023

CRIME NO.914/2022 OF ARYANADU POLICE STATION, THIRUVANANTHAPURAM

PETITIONER/ACCUSED:

XXXXXXXXXX  
XXXXXXXXXX XXXXXXXXXXXX

BY ADV M.R.SARIN

RESPONDENTS/STATE/DEFACTO COMPLAINANT:

1 STATE OF KERALA,  
REPRESENTED BY PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, PIN - 682031

2 THE STATION HOUSE OFFICER,  
ARYANADU POLICE STATION,  
THIRUVANANTHAPURAM, PIN - 695542

3 XXXXXXXXXXXX  
XXXXXXXXXX XXXXXXXXXXXX

BY ADV PUBLIC PROSECUTOR  
SR PP - ADV SEETHA S

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON  
07.06.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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**ORDER**

The petitioner is the accused in Crime No.914/2022 of Aryanad Police Station. The offences alleged against the petitioner are under Sections 376(2)(f), 376(3) of IPC and also under Section 3(b) read with Section 4(2), Section 9(1)(n) read with Section 10 of POCSO Act, 2012.

2. The aforesaid crime was registered based on the information furnished by a minor girl, aged 13 years, who is none other than the daughter of the petitioner. At the time of the incident, she was studying in the 9<sup>th</sup> standard. The petitioner is residing separately due to a family dispute. One day during the month of December 2021, while the victim was studying in 8<sup>th</sup> standard when no one else was there in the house, the petitioner trespassed into the house, grabbed the child and kissed her lips with sexual intention. It is also alleged that, some months later, when no one else was at home, the accused entered the house, took the child, pulled off her dress, and caught hold of her breast. It is also alleged that he put his hands inside her panties and pressed on her private parts, thereby

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causing pain to the child. A similar incident was repeated on 15.10.2022 as well. The crime was registered in such circumstances. As the petitioner apprehends arrest, this application for anticipatory bail is submitted.

3. Heard Sri.M.R.Sarin, learned counsel appearing for the petitioner and Smt.Seetha S., learned Public Prosecutor for the State. Even though notice of this bail application was furnished to the victim/defacto complainant, there is no appearance as of now.

4. The learned counsel for the petitioner submits that the petitioner is innocent of all the allegations. According to him, certain matrimonial disputes are pending between the petitioner and the mother of the defacto complainant; therefore, a complaint with false allegations was submitted against the petitioner. The learned counsel places reliance upon the various proceedings pending before the Family Court, Nedumangad, such as O.P.(Div) No.656/2022, M.C. No.111/2022, filed by the mother of the defacto complainant for divorce and maintenance before the Family Court, Nedumangad and also M.C. No.36/2019 submitted by the mother

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before the Judicial First Class Magistrate Court – I, Nedumangad, under the provisions of Protection of Women from Domestic Violence Act. It is pointed out that, right from the year 2019, there was a protection order against the petitioner, passed by the Judicial First Class Magistrate Court - I, Nedumangad under the provisions of the Domestic Violence Act and therefore, the acts which were allegedly committed by the petitioner during the year 2021 and 2022 were highly improbable. According to him, he was not at all residing along with the defacto complainant at the relevant time consequent to the order passed by the Judicial First Class Magistrate Court I, Nedumangad in M.C. No.36/2019. The learned counsel also places reliance upon the decision rendered by this Court in **Xxxx v. State of Kerala** [2023 (2) KHC 339], wherein this Court observed that the courts have to adopt a cautious approach while dealing with the matters in respect of the sexual assaults allegedly committed upon the children by their father when serious matrimonial disputes are being fought between the spouses seriously.

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5. On the other hand, the learned Public Prosecutor would oppose the aforesaid application. According to the learned Public Prosecutor, even the application for anticipatory bail is not maintainable because the offence alleged is under Section 376(3) of the IPC, and as per subsection 4 of Section 438 of the Cr.P.C, no anticipatory bail can be granted when such an offence is alleged. Besides the same, it is also pointed out that the victim made specific allegations in the First Information Statement and also in her statement under Section 164 Cr. P.C, against the petitioner. The victim was examined by an expert panel consisting of a Psychiatrist, a Clinical Psychologist and a counsellor. Before the expert panel also, the victim reiterated the said allegations. The opinion expressed by the panel is also to the effect that the evidence the victim gave was voluntary.

6. I have gone through the records. One of the important contentions raised by the learned Public Prosecutor is with regard to the maintainability of this application. Sub Section (4) of Section 438(4) of Cr.P.C. contemplates that nothing in Section 438 shall

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apply to any case involving the arrest of any person on an accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of IPC. Thus, as per the statute, there is a specific bar in entertaining an application for anticipatory bail under Section 438 if the offences mentioned therein are alleged. In this case, one of the offences is under Section 376(3) of the IPC; therefore, there is some force in the contention put forward by the Public Prosecutor in this regard. Of course, in appropriate cases, it may be possible for this Court to entertain an application under Section 438 Cr.P.C., if the materials produced before the Court would not attract the offences mentioned therein.

7. In such circumstances, even though the contention of lack of maintainability has been raised by the learned Public Prosecutor, I considered the contention of the petitioner on merits as well. When going through the victim's statement in this regard, several instances of sexual assault are seen made. In the statement given by the victim under Section 164 Cr.P.C., also, she reiterated

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the aforesaid allegations, even though it is not as elaborate as mentioned in the FIS. In addition to the same, going by the report of the expert panel, it is discernible that, before the said expert panel also, a detailed description of the sexual assaults committed by the petitioner on various instances were clearly mentioned. As per Sub Section 4 of Section 438 of Cr.P.C., the prohibition in entertaining an application in this regard would come into play when there is an accusation against the accused for having been involved in the offences referred to therein. Therefore, what is relevant is the accusation made against the petitioner. In this case, the allegations constituting the offence under Section 376(3) of IPC can be found in the form of various statements made by the victim before the learned Magistrate. The aforesaid accusations would make out a prima facie case. Thus bar contemplated under Sub Section 4 of Section 438 would come into play.

8. Even though the learned counsel for the petitioner places reliance upon the decision reported in **Xxxx v. State of Kerala** [2023 (2) KHC 339], the circumstances under which the

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observations made by this Court, in that case, were different. Moreover, the offences alleged therein were under Sections 7, 8, 10, 9(l), 9(m) and 9(n) of the POCSO Act. No allegation of penetrative sexual assault was also there. Therefore, the said decision of this court cannot be made applicable to the facts of this case.

In such circumstances, I am of the view that this application cannot be entertained. Therefore, the remedy available for the petitioner is to move for regular bail after the surrender. In such circumstances, this application is dismissed, without prejudice to the right of the petitioner to surrender before the court and seek regular bail.

**Sd/-  
ZIYAD RAHMAN A.A.  
JUDGE**

SCS