

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 17TH DAY OF FEBRUARY 2023 / 28TH MAGHA, 1944

BAIL APPL. NO. 8129 OF 2022

CRIME NO.261/2022 OF KALLADICODE POLICE STATION, PALAKKAD

PETITIONERS/ACCUSED NOS.1 TO 3:

- 1 PRADEEP
AGED 29 YEARS
S/O. NARAYANANKUTTY , PALAKALAM, KARIMBA POST.,
PALAKKAD DISTRICT, PIN - 678597.
- 2 PRASANT
AGED 27 YEARS
S/O. NARAYANANKUTTY , PALAKALAM, KARIMBA POST.,
PALAKKAD DISTRICT, PIN - 678597.
- 3 UNNIKRISHNAN
AGED 36 YEARS
S/O. SIVARAMAN, PALAKALAM, KARIMBA POST.,
PALAKKAD DISTRICT, PIN - 678597.

BY ADVS.
K.K.DHEERENDRAKRISHNAN
VINOD KUMAR.C
N.P.ASHA

RESPONDENTS/STATE:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031.
- 2 STATION HOUSE OFFICER
KALLADIKKODE POLICE STATION, PALAKKAD, PIN -
678597.

3 MRS. NISHA
AGED 34 YEARS
W/O. MR. HARIDASAN, RESIDENT OF WARD NO. 17,
NADUKKALAM HOUSE, BANDPURA, POST KARIMBA,
DISTRICT PALAKKAD, KERALA, PIN : 678597.
(IMPLEADED AS ADDL.R3 AS PER ORDER DATED
15-11-2022 IN CRLM.A 1/2022)

4 SUSHAMA
AGED 26 YEARS
W/O. MR. SIVADASAN, RESIDENT OF WARD NO. 17,
NADUKKALAM HOUSE, KATTAKALAM, POST KARIMBA,
DISTRICT PALAKKAD, KERALA, PIN - 678597.
(IMPLEADED AS ADDL.R4 AS PER ORDER DATED
15/11/2022 IN CRL.M.A 1/2022)

BY ADVS.
PUBLIC PROSECUTOR
E.SURESH KUMAR NAIR

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON
07.02.2023, THE COURT ON 17.02.2023 DELIVERED THE
FOLLOWING:

“C.R”

A.BADHARUDEEN, J.

=====
B.A.No.8129 of 2022
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Dated this the 17th day of February, 2023

O R D E R

Anticipatory bail plea at the instance of accused 1 to 3 in Crime No.261 of 2022 of Kalladicode Police Station, Palakkad is the subject matter of consideration in this petition filed under Section 438 of the Code of Criminal Procedure.

2. Heard the learned counsel for the petitioners as well as the learned Public Prosecutor. The learned counsel appeared for the defacto complainant also was heard. Perused the case diary and the relevant decisions placed by the contesting parties.

3. The pertinent question arose for determination is, what is the procedure to be followed when accused were released on bail in a crime where initiallyailable offence/offences was/were alleged and subsequently nonailable offence also got incorporated ?

4. The prosecution case is that at 10.15 p.m on 30.08.2022, accused Nos.1 to 3 brought the defacto complainant on the pretext of settling a dispute in relation to the brother of the defacto complainant. Thereafter, the accused assaulted the defacto complainant with intention to murder him, after sharing common intention to do so. The specific allegation is that the 1st accused beat on the head of the defacto complainant by using a lever. When the defacto complainant fell down, the other accused beat and kicked the defacto complainant on his head and thereby the defacto complainant sustained fracture to his neck bone and other parts of the body. On this premise, the prosecution initially registered a crime alleging commission of offences punishable under Section 341, 323, 325 and 294(b) r/w 34 of the Indian Penal Code (hereinafter 'IPC' for short). Subsequently, offence under Section 307 of IPC also was incorporated on the allegation that accused Nos.1 to 3 assaulted the defacto complainant with intention to murder him.

5. It is submitted by the learned counsel for the petitioner thatailable offences alone were alleged to be committed at the

time of registration of FIR, and accordingly the accused were released on bail. The learned counsel for the petitioners would submit further that since non bailable offence under Section 307 of IPC also was incorporated subsequently, the petitioners have the right to approach this Court seeking anticipatory bail, by resorting to Section 438 of Cr.P.C.

6. The learned Public Prosecutor and the learned counsel for the defacto complainant opposed bail on the submission that the police has right to arrest, interrogate and recover the weapon, if any, when non bailable offence/offences also was/were incorporated subsequently on the basis of the materials collected by the investigation team. It is submitted further that, in the case at hand, as a result of attack at the instance of the petitioners herein, the defacto complainant sustained very serious injuries, as could be read out from the discharge certificate of police cases issued from the Medical College Hospital, Thrissur. Thus the allegation of the prosecution that the accused herein, with intention to do away the defacto complainant, attacked and he sustained very serious head injuries. In such a case, incorporation

of Section 307 IPC is very well justified, *prima facie*. That apart, arrest, custodial interrogation and recovery of weapons used by the accused are absolutely necessary to accomplish effective investigation and meaningful prosecution.

7. To be on the crux of the matter, indubitably, initially bailable offences alone were alleged to be committed. Subsequently, offence under Section 307 of IPC also was added based on statements of the defacto complainant, the witnesses, including the Doctor and also based on the treatment certificate showing very serious injuries. On perusal of the case diary, it is discernible that the prosecution rightly incorporated offence punishable under Section 307 of IPC, as contended by the learned Public Prosecutor, since commission of the said offence could be *prima facie* seen from the materials collected. It is relevant to note that in the discharge certificate for police cases it was observed that the defacto complainant sustained the following injuries:

“CT spine showed communitated fracture anterior and posterior on C3 vertebral body.”

8. In the wound certificate also multiple injuries are stated as narrated hereunder:

“Lacerated wound scalp-flap with local bleeding, swelling and odema, bleeding abrasion right great toe, nail, bleeding from left foot, 2nd toe left leg, pain and swelling left side neck, nail injury 1st toe (Rt) foot; wound sutured and patient was sent to DH, Pkd for CT brain and for the treatment.”

9. The legal question poses in this case is, what is the procedure to be followed when accused were released on bail in a crime where initially bailable offence/offences was/were alleged and subsequently non bailable offence also got incorporated ?

10. In this regard the decision of the Apex Court reported in [AIR 2019 SC 3193], ***Pradeep Ram v. State of Jharkhand & anr.*** assumes significance, where initially non bailable offences under Sections 384, 386, 387 of IPC along with other offences were incorporated at the time of registering the crime on 11.01.2016 and accused was granted regular bail. Subsequently, on the prayer made by the investigating officers on 09.04.2017, offences under Sections 16, 17, 20 and 23 of the Unlawful Activities (Prevention) Act, 1957 were added against accused. In the said case, the Apex Court framed the following questions:

“(i) Whether in a case where an accused has been bailed out in a criminal case, in which case, subsequently new offences are added, is it necessary that bail earlier granted should be cancelled for taking the accused in custody?”

“(ii) Whether re-registration of F.I.R No.RC-06/2018/NIA/DLI is a second F.I.R and is not permissible there being already a FIR No.02/2016 registered as P.S. Tandwa arising out of same incident?”

“(iii) Whether N.I.A could conduct any further investigation in the matter when investigation in the P.S. Case No.02/2016 having already been completed and charge sheet has been submitted on 10.03.2016 with regard to which cognizance has already been taken by Chief Judicial Magistrate, Chatra on 11.03.2016?”

“(iv) Whether the order dated 25.06.2018 passed by Judicial Commissioner-cum-Special Judge, NIA, Ranchi remanding the appellant to judicial custody is in accordance with law?”

“(v) Whether the power under Section 167 Cr.P.C can be exercised in the present case, where the cognizance has already been taken by Chief Judicial Magistrate on 11.03.2016 or the accused could have been remanded only under Section 309(2) Cr.P.C?”

11. Thereafter the Apex Court answered the queries in para.29 as under :

“29. In view of the foregoing discussions, we arrive at

following conclusions in respect of a circumstance where after grant of bail to an accused, further cognizable and non-bailable offences are added:-

(i) The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested.

(ii) The investigating agency can seek order from the court under Section 437(5) or 439(2) of Cr.P.C for arrest of the accused and his custody.

(iii) The Court, in exercise of power under Section 437(5) or 439(2) of Cr.P.C, can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The Court in exercise of power under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-cognizable offences which may not be necessary always with order of cancelling of earlier bail.

(iv) In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it need to obtain an order to arrest the accused from the Court which had granted the bail.”

12. As per the ratio of the above decision, after granting bail to an accused, subsequently, cognizable and non bailable offences were added, the procedures that can be followed are as

dealt in para.29(i) to (iv) of the judgment extracted herein above.

13. Even though the learned counsel for the petitioner is aware of the legal position laid in ***Pradeep Ram***'s case (*supra*), according to him, the right provided under Section 438 of Cr.P.C was not considered by the Apex Court in the above decision and, therefore, the right of the accused to move anticipatory bail plea by resorting to Section 438 of Cr.P.C is not taken away as per the ratio held in ***Pradeep Ram***'s case (*supra*). In support of this contention, the learned counsel for the petitioner placed a decision of this Court reported in [2013 4 KHC 58], ***Ahamed Basheer @ Bachu & anr. v. S.I of Police, Kasaragod & anr.***, where this Court held that *where no cancellation or revocation of a bail granted in relation to a bailable offence is needed or called for when the person granted bail is proceeded for an aggravated non bailable offence sub-s.(2) of S.439 of the Code has no applicability at all in a fact situation where a person has been released on bail when proceeded with for a bailable offence alone, adding of aggravated nonbailable offence against him in the crime disentitle him to the liberty granted in respect of the*

minor offence in such a case no question of revoking or cancelling the bail granted earlier for the minor bailable offence is called for.

14. Similarly, another decision of this Court reported in [2019 (1) KHC 133], ***Jeri Cheriyan v. State of Kerala***, also was placed where this Court dealt with the power of the Court in dealing with cancellation of bail.

15. Another decision reported in [2020 (2) KHC 169], ***Rejimon C.B & ors. v. CBI & anr.***, also has been placed where this Court held that when the investigating agency was changed, the subsequent investigating agency (CBI) could not arrest the accused, who was granted bail initially when the case was investigated by the first agency.

16. A latest decision of this Court reported in [2022 KHC 1015], ***Nijam v. State of Kerala*** also has been placed by the learned counsel for the petitioner, wherein this Court appointed an Amicus Curiae to assist the Court to decide the question as to entitlement of anticipatory bail in a case where initially bailable offence alone was incorporated and accused was granted bail and

subsequently non bailable offence was incorporated. In fact, in para.9 of the above decision, the decisions highlighted by the Amicus Curiae have been dealt with and it was held therein that even without cancellation of the earlier bail granted, the petitioner is liable to be arrested when non bailable offences are added subsequently. In the said decision, this Court granted anticipatory bail to the petitioner while holding so. However, in the said decision, this Court not discussed the legal principles as held by the Apex Court's decision *Pradeep's* case (*supra*).

17. Be on the case at hand, the facts are slightly different from one dealt by the Apex Court in *Pradeep Ram's* case (*supra*), were initially also non bailable offences were incorporated, in deviation from the case at hand, where initially bailable offences alone were alleged to be committed. It is relevant to note that in the *Pradeep Ram's* case (*supra*), while laying the principles the Apex Court not considered the impact of Section 438 of Cr.P.C. If so, it has to be held that an accused, who was released on bail, where initially non-bailable offence/offences was/were alleged, has two options. The first option is to follow the procedure laid

down by the Apex Court in *Pradeep Ram's* case (*supra*). The second option is to invoke the relief of pre-arrest bail under Section 438 of Cr.P.C. In such cases also, the Sessions Court and this Court can consider the plea of anticipatory bail. No doubt, the prosecution also can follow the procedure laid in *Pradeep Ram's* case (*supra*).

18. Holding so, when the facts of this case are evaluated, it appears that going by the injuries as per the medical records and the statements of the witnesses including the Doctor, as I have already pointed out, in this matter, commission of offence under Section 307 of IPC also is made out, *prima facie*. Therefore, arrest, custodial interrogation and recovery of the weapons at the instance of the petitioner are absolutely necessary to achieve effective and fair investigation and eventful prosecution. In such a case, grant of anticipatory bail cannot be considered.

19. Before parting, the submission of the learned counsel for the petitioners that 2 among the accused are Army personnels and, therefore, a lenient view required to be taken, also requires consideration.

20. Fervently opposing the submission, the learned counsel for the defacto complainant, who filed strong objection in granting anticipatory bail, placed a decision of the Apex Court reported in [2022 KHC 6702], ***Sadhna Chaudhary v. State of Rajasthan & anr.*** to contend that when the crimes are being committed by responsible officials like police officers and army personnel, law should be very stringent than expected in general, by a common man. In paragraph 16 of the judgment the Apex Court held that *the Respondent no.2 is not a common man, being a law – abiding person, his adherence to law has to be more stringent than expected in general by a common man, which apparently, he failed to observe.* In this connection, I have no hesitation to hold that when heinous offences are alleged to be committed by the responsible officers of the State, viz. Police Officers, Excise Officers, Para military forces, Military persons and persons empowered with observance and implementation of law (list is not exhaustive), the same is an aggravating factor, to be taken note of, in deviation from the general principles, which would not apply to common man. If so, in such cases, leniency is

not the sanction of law, instead rigidity is the rule of law.

21. Epitomizing the discussion, it is held that this is not a fit case for granting anticipatory bail, by exercising the discretion of this Court.

Accordingly, this application stands dismissed, relegating the parties to move before the jurisdictional court, following the ratio in *Pradeep Ram's* case (*supra*).

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/

APPENDIX OF BAIL APPL. 8129/2022

PETITIONERS' ANNEXURES

- Annexure-I A TRUE COPY OF THE CITIZEN COPY OF THE FIR IN CRIME NO. 261/2022 OF KALLADIKKODE POLICE STATION
- Annexure-II A TRUE COPY OF THE REPORT DATED 19.09.2022 INCORPORATING SECTION 307 IPC

RESPONDENTS' ANNEXURES

- Annexure A1 PHOTOGRAPH

Annexure C1	Copies of complaints dated 18.9.2022 and 14.10.2022 submitted by Sushma to DGP are enclosed.
Annexure C2	Copy of complaint dated 14.10.2022 submitted by Sushma to Kalladikode Police Station is enclosed
Annexure C3	Copy of notice received from Judicial Magistrate, Ottapalam is enclosed
Annexure C4	The defacto complainant made complaints dated 18.9.2022 and 14.10.2022 to DGP Kerala and Complainant also made complaint dated 14.10.2022 to Police Station Kalladikode
Annexure C5	Copies of complaints dated 14.9.2022
Annexure C6	Copies of complaints dated 14.10.2022
Annexure C7	Copies of letter dated 4.11.2022
Annexure C8	Copies of complaints dated 14.9.2022
Annexure C9	Copies of complaints dated 14.10.2022
Annexure C10	Copies of letter the dated 4.11.2022
Annexure C11	Copies of injured victim Haridasan photographs are enclosed
Annexure C12	Copies of Hospital records of treatment of Haridasan are enclosed
Annexure C13	Copy of said complaint filed by Citizens of Karimba is enclosed
Annexure C14	Copies of legal notice dated 18.11.2022 addressed to Chief of Army

Annexure C15	Copies of legal notice dated 18.11.2022 addressed to Army unit
Annexure C16	Copies of notice dated 18.11.2022 addressed to Chief of Army
Annexure C17	Copies of notice dated 18.11.2022 addressed to Army Unit