

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 20TH DAY OF OCTOBER 2022 / 28TH ASWINA, 1944

CRL.A NO. 855 OF 2022

AGAINST THE ORDER IN CRL.MC 1221/2022 OF SESSIONS COURT,
KOZHIKODE IN CRIME NO.483/2022 OF KOYILANDY POLICE STATION

DATED 02.08.2022

APPELLANT/VICTIM-DEFACTO COMPLAINANT :

XXX

BY ADVS.

K.V.BHADRA KUMARI

K.NANDINI

RESPONDENTS/COMPLAINANT & ACCUSED :

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM,
PIN - 682031
- 2 CIVIC CHANDRAN @C.V.KUTTAN
S/O.LATE VELAPPAN, AGED 73 YEARS,
CHINNANGATH HOUSE, WEST HILL (P.O),
KOZHIKODE - 673005
BY ADVS.
NIRMAL S
VEENA HARI (K/775/2006)
SRI.T.R.RENJITH, SR.PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
27.09.2022, ALONG WITH CRL.A.875/2022, THE COURT ON
20.10.2022 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 20TH DAY OF OCTOBER 2022 / 28TH ASWINA, 1944

CRL.A NO. 875 OF 2022

AGAINST THE ORDER DATED 02.08.2022 IN CRL.M.C.1221/2022 OF
SESSIONS COURT, KOZHIKODE DIVISION

APPELLANT/COMPLAINANT :

STATE OF KERALA

REP.BY THE DEPUTY SUPERINTENDENT OF POLICE,
VATAKARA THROUGH THE ADDITIONAL PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

BY ADVS.

SRI.T.R.RENJITH, SR.PUBLIC PROSECUTOR
SRI.P.NARAYANAN, SENIOR GOVERNMENT PLEADER AND
ADDL.PUBLIC PROSECUTOR
SHRI.SAJJU.S., SENIOR GOVERNMENT PLEADER

RESPONDENTS/ACCUSED & DEFACTO COMPLAINANT :

1 CIVIC CHANDRAN @ C. V.KUTTAN,
AGED 73 YEARS, S/O.LATE VELAPPAN,
CHINNANGATH HOUSE,
WEST HILL (P.O.)
KOZHIKODE - 673005

2 XXX
BY ADVS.
NIRMAL S
K.NANDINI
VEENA HARI (K/775/2006)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
27.09.2022, ALONG WITH CRL.A.855/2022, THE COURT ON
20.10.2022 DELIVERED THE FOLLOWING:

“C.R”

A. BADHARUDEEN, J.

=====
Crl.Appeal No.855 of 2022

and

Crl.Appeal No.875 of 2022
=====

Dated this the 20th day of October, 2022

COMMON JUDGMENT

“DURALEX SEDLEX” – the law is hard but it is the law.”

In these appeals this Court is called upon to address the impact of legal bar in granting pre-arrest bail in cases under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 [hereinafter referred to as 'the SC/ST Act' for convenience].

2. The defacto complainant in Crime No.483/2022 of Koyilandy Police Station is the appellant in Crl.Appeal No.855/2022 and the respondents herein are State of Kerala as well

as the accused in the above crime. The challenge raised in this appeal is against order granting anticipatory bail to the accused, as per order in Crl.M.C.No.1221/2022 dated 2.8.2022 by the learned Special Judge, Kozhikode, under the SC/ST Act .

3. Crl.Appeal No.875/2022 is at the instance of the State of Kerala challenging the same order. In this appeal, the 1st respondent is the accused and 2nd respondent is the defacto complainant.

4. I shall refer the parties in these appeals as 'defacto complainant', 'accused' and 'prosecution', hereinafter for brevity and easy reference.

5. Heard Advocate K.V.Bhadrakumari, the learned counsel for the appellant/defacto complainant in Crl.Appeal No.855/2022, Advocate K.Nandini appearing for the 2nd respondent/the defacto complainant in Crl.A.No.875/2022, the learned Senior Public Prosecutor, Sri T.R.Ranjith, as well as Advocate Nirmal.S, who appeared for the accused and the 2nd respondent in Crl.Appeal

No.855/2022 and the 1st respondent in Crl.Appeal No.875/2022.

6. The case diary produced by the learned Public Prosecutor is perused. The same unfurls the prosecution case. Precisely the allegation as could be read out from the case diary is that at 6.30 a.m on 17.04.2022 the accused (who does not belong to Scheduled Caste or Scheduled Tribe community) forcefully kissed the defacto complainant (who belongs to a Scheduled Caste community) on the rear side of her neck and thereby intentionally touched the defacto complainant, knowing that she belongs to a Scheduled Caste community, without the consent of the defacto complainant and thereby outraged her modesty. On the above facts, the prosecution alleges commission of offences under Sections 354 A(2), 354A(1)(ii), 354 D(2) of the Indian Penal Code (for short 'I.P.C' hereinafter) and under Section 3(2)(va) and 3(1)(w)(i) of the SC/ST Act.

7. The accused, who apprehended arrest at the hands of Koyilandy police, set forth pre-arrest bail plea before the learned

Special Judge. The learned Special Judge appraised the same and passed the impugned order whereby the learned Special Judge granted anticipatory bail to the accused.

8. Before addressing the rival arguments, I am inclined to extract the operative portion of the order of bail as under.

“In the result, the bail application is allowed.

(i) *The accused shall be released on bail on executing a bond for Rs.50,000/- with two solvent sureties for the like sum in case of arrest by the SHO, Koyilandy Police Station.”*

9. While concluding the finding in para.17 of the impugned order, the learned Special Judge observed as under:

“Another important contention raised is that the accused had no knowledge that the victim belongs to a Schedule Caste. For this the learned counsel is relying upon the FI statement. There it is not at all stated that the act of the accused was with knowledge that the victim belongs to a member of schedule caste or schedule tribe. It is further to be noted that the copy of the SSLC book of the accused would reveal that he was a social worker who refuse to put his caste name in the SSLC Book. It is highly unbelievable that the touching or hugging as alleged by the victim that the accused had a knowledge about her caste, the accused is a reformist and is engaged in social activities and he is against the caste system. He is writing and fighting for a casteless society. In such a circumstance it is highly unbelievable that he will touch the body of the victim fully knowing that she is member of scheduled caste. In order to attract the offence under Section

3(1)(w)(i) it has to be established that the act of the accused was with a knowledge that the victim belongs to a member of scheduled caste or schedule tribe community. Here the available materials clearly show that this is an attempt to tarnish the status of the accused in the society. He is fighting against the caste system and is involved in a number of agitations. So offences under Section 3(1)(w)(i) and 3(2)(va) of SC/ST (Prevention of Atrocities) Act will not prima facie stand against the accused and the bar u/s 18 and 18(A) of the Act has no application. So the power u/s 438 can be exercised and the accused can be enlarged on bail.

10. It is argued by the learned counsel for the defacto complainant, Advocate K.V.Bhadrakumari as well as Advocate K.Nandini that in this case the allegation of commission of non-bailable offences under Section 354 of I.P.C as well as offences under Sections 3(1)(w)(i) and 3(2)(va) of the SC/ST Act has been made out *prima facie* and in such a case grant of anticipatory bail is specifically barred under Sections 18 and 18-A of the SC/ST Act. But the learned Special Judge looked across the provisions and without applying his mind properly to the facts of the case, granted anticipatory bail. Therefore, the said order is patently illegal and the same is liable to be set aside. The same contention has been reiterated by the learned Public Prosecutor, while highlighting the

necessity of custodial interrogation and medical examination of the accused.

11. First of all, I am lean to consider the bar to invoke Section 438 of Cr.P.C in cases involving offences under the SC/ST Act, since it is fervently argued by the prosecution as well as the defacto complainant that, if the facts of the given case are read even in a cursory manner, the offences alleged by the prosecution are well made out. Therefore, grant of anticipatory bail is totally barred.

12. Sections 18 and 18-A of the SC/ST Act provide that nothing in Section 438 of the Code of Criminal Procedure shall apply in relation to any case involving the arrest of any person or accusation of an offence committed under this Act.

13. For certainty, Sections 18 and 18-A of the SC/ST Act are extracted hereunder:

“18. Section 438 of the Code not to apply to persons committing an offence under the Act:-- Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of

having committed an offence under this Act.

18-A. No enquiry or approval required:-- (1) For the purposes of this Act,--

(a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or

(b) the investigating officer shall not require approval for the arrest, if necessary, of any person,

against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply.

(2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court.”

14. In the earlier decision reported in [(2012) 8 SCC 795 : MANU/SC/0732/2012], ***Vilas Pandurang Pawar & anr. v. State of Maharashtra & Ors.*** the Apex Court considered how far block off under Section 18 of the SC/ST Act would apply in a case involving offences under the SC/ST Act and it was held as under:

The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no court shall entertain an application for anticipatory bail, unless it prima facie finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. The

court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail Under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence.

15. The orbit of Section 18 of the SC/ST Act was reiterated by the Apex Court in another decision reported in [(2014) 15 SCC 521 : MANU/SC/0407/2013], ***Shakuntla Devi v. Baljinder Singh***, and it was held as under:

*"The High Court has not given any finding in the impugned order that an offence under the aforesaid Act is not made out against the Respondent and has granted anticipatory bail, which is contrary to the provisions of Section 18 of the aforesaid Act as well as the aforesaid decision of this Court in ***Vilas Pandurang Pawar*** case, MANU/SC/0732/2012 : (2012) 8 SCC 795. Hence, without going into the merits of the allegations made against the Respondent, we set aside the impugned order of the High Court granting bail to the respondent."*

16. In fact, after the decision of the Apex Court in [(2018) 6 SCC 454], ***Dr.Subhash Kashi Nath Mahajan v. The State of Maharashtra***, the SC/ST Act was amended and Section 18-A got incorporated. As per Section 18-A(1), for the purpose of this Act, -
(a) preliminary enquiry shall not be required for registration of a

first information report against any person; or (b) the Investigating Officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply. Section 18-A(2) further provides that the provisions of Section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any court.

17. In the decision reported in [2020 (2) KHC 423 : AIR 2020 SC 1036 : (2020) 4 SCC 727 : MANU/SC/0157/2020], ***Prathvi Raj Chauhan v. Union of India(UOI) & Ors.***, a 3 Bench of the Apex Court considered the impact of Section 18-A and it was held that *as far as the provision of Section 18-A and anticipatory bail is concerned, the judgment of Mishra, J. has stated that in cases where no prima facie materials exist warranting arrest in a complaint, the court has the inherent power to direct a pre-arrest bail.* Thus the law is settled by the Apex Court after incorporation

of Section 18-A also that there is no absolute bar in entertaining an application for anticipatory bail in cases alleging commission of offences under the SC/ST Act if the prosecution allegations do not constitute any offence under the SC/ST Act *prima facie* and the court has the power to grant anticipatory bail if the prosecution allegations do not make a *prima facie* case.

18. The learned counsel for the accused argued that the entire case is foisted and the same is the outcome of afterthought with intention to defame the accused, who being a writer, having good reputation in the society, with ulterior motives. The learned counsel submitted further that there is delay in lodging the FIR and there is no proper explanation given by the defacto complainant in the matter of delay. As such, delay itself is a reason to disbelieve the prosecution case and to hold that its genesis is on a wrong plank. He also submitted that since the Special Judge found that the entire case is foisted with ulterior motives, the learned Special Judge granted anticipatory bail and the said order is perfectly

justified. Therefore, no interference is called for in so far as the order impugned.

19. Controverting this contention, the learned counsel for the defacto complainant as well as the learned Public Prosecutor argued that in the F.I statement, the delay has been properly explained. Therefore, the submission of the learned counsel for the accused that no proper explanation given in the matter of delay in lodging the FIR is false.

20. While alleviating the controversy in the matter of delay in lodging the F.I.R, I have perused the F.I statement forming part of the case diary. In the last portion of the F.I.S, it has been stated that the defacto complainant was under mental trauma after the occurrence on 17.04.2022 and her father died immediately, the said events caused shock to her. This is the reason for the delay stated in the F.I.S. In this context, it is argued by the learned counsel for the defacto complainant that the delay in lodging F.I.R in sexual offences has to be considered with a different yardstick. In cases of

sexual offences, the criteria may be a different one.

21. In this connection, the learned counsel for the defacto complainant Advocate Nandini placed decision of the Apex Court in [(2010) 8 SCC 714], **Satpal Singh v. State of Haryana**. In para.10 to 18 of the judgment, the Apex Court considered the delay in lodging F.I.R in a case involving offence under Section 376 of I.P.C and it was held relying on the decision reported in [(1995) 5 SCC 518 : 1995 SCC (Cri) 977 : AIR 1995 SC 2472], **Karnel Singh v. State of Madhya Pradesh** and [(1996) 2 SCC 384 : 1996 SCC (Cri) 316 : AIR 1996 SC 1393], **State of Punjab v. Gurmit Singh** in para.14 as under:

“14. In a rape case the prosecutrix remains worried about her future. She remains in traumatic state of mind. The family of the victim generally shows reluctance to go to the police station because of society's attitude towards such a woman. It casts doubts and shame upon her rather than comfort and sympathise with her. Family remains concerned about its honour and reputation of the prosecutrix. After only having a cool thought is it possible for the family to lodge a complaint in sexual offences.”

22. In para.16 of the above judgment it was observed that *no straitjacket formula can be laid down in this regard. In case of*

sexual offences, the criteria may be different altogether. As honour of the family is involved, its members have to decide whether to take the matter to the court or not. In such a fact situation, near relations of the prosecutrix may take time as to what course of action should be adopted. Thus, delay is bound to occur. This Court has always taken judicial notice of the fact that:

“ordinarily the family of the victim would not intend to get a stigma attached to the victim.

Delay in lodging the first information report in a case of this nature is a normal phenomenon.”

23. In this case the trauma alleged to be confronted by the defacto complainant, after the incident as stated by her in the FIS could be considered *prima facie* along with her father’s death on 10.05.2022 as the reasons for the delay. However, it is argued by the learned counsel for the accused that though the defacto complainant alleges that she was under mental trauma, as per the facebook post published by the defacto complainant, on

18.04.2022, i.e, on the next day of occurrence, in the evening, no iota of trauma to be inferred. The learned counsel for the accused would urge that the text in the above facebook post runs on the premise that the accused as well as the defacto complainant assembled at a function for the release of a book written by the defacto complainant with title “enikku ninte paniyakanam” with all praise to the functionaries including the accused participated at the meeting and the said text does not suggest any mental trauma as stated in the FIS. He would submit further that the lengthy facebook post, on any stretch of imagination would go to show that the defacto complainant is in no way under either emotional or physiological trauma or she was not in a mind set without capacity of response. Further, the text does not suggest that the defacto complainant is in a depressed state of mind after the occurrence on 17.04.2022.

24. Dispelling this argument, it is argued by the learned counsel for the defacto complainant Advocate Bhadra Kumari that

the facebook post was written by the defacto complainant, who admittedly is a writer and sociolinguist and the function itself was for publishing one of the literary contributions of the defacto complainant. Therefore, the standard of the language used by a writer should not be given emphasis to hold that the said language is an obvious obstacle to hold that the defacto complaint, who written the post, was free from trauma or mental instability, as stated in the F.I.S, after the occurrence on 17.04.2022.

25. As regards to the delay in lodging the F.I.R is concerned, it has to be held that the victim of sexual offences may carry trauma in her mind because of the untoward incident happened in her life. The social stigma in disclosing the overt acts, its unfortunate aftermath and ordeals definitely would also persuade the victim not to divulge the occurrence and to subside the same. Sometimes even after the victim disclosed the overt acts, the family of the victim also would generally reluctant in setting the law in motion since the occurrence definitely would have a

contra effect on the life of the victim and her family. Therefore, delay in lodging the F.I.R in sexual assault cases should be considered in a different yardstick and with extreme liberal approach, as held by the Apex Court in *Satpal Singh's* case (*supra*). No doubt, the question of delay is a matter to be agitated during trial. As far as the case on hand is concerned and as of now since the court is considering only question of bail at the investigation stage, there is no reason to disbelieve the explanation of delay offered by the defacto complainant. Therefore, I am not inclined to hold that the delay in lodging the F.I.R as explained in the FIS is insufficient in the facts of this case, *prima facie*. But I leave the question to be decided by the trial court during evidence stage, independently.

26. Reverting the discussions as to grant of anticipatory bail in this particular case, the law is settled in cases involving offences under Sections 3(2)(va) and 3(1)(w)(i) of the SC/ST Act that anticipatory bail cannot be granted in cases where *prima facie* case

is made out. Therefore, it is necessary to venture as to whether a *prima facie* case is made out from the prosecution allegations in this case. In this connection, I am inclined to refer the F.I statement given by the defacto complainant. The defacto complainant would say that she has been working as a teacher at Government Higher Secondary School. Further she is a member of Scheduled Caste community. There was a function on 16.04.2022 at about 6.30 p.m at the house of one Noorudheen by name 'Kadavu Veedu' in Nandi, Ayyappankavu under the banner "Bavul Sangeetha Nisha" in which Smt.Santhipriya, a singer, also was participated among others. The book written by the defacto complainant was announced to the public at the said function. The participants were Civic Chandran (the accused), the Editor of 'Padabhedam' magazine and also the members of 'Nilanadatham', a poets' group. Her father and mother also participated at the function. After the function, she stayed at the house, where Civic Chandran and some other persons also were stayed. She laid in a sofa at the first floor. In the late

morning at 6.30 a.m on 17.04.2022 Civic Chandran (the accused) reached the room and gave a wake up call to her and then he said “I have published your 2 books without the expense of at least Rupee one”. Then the defacto complainant felt shocked. Then she found hunch of lust on the face of the accused. Soon he said that he would kiss on the back of her neck and immediately he forcefully kissed on the back of her neck. Soon she escaped therefrom and at the time of occurrence nobody was present at her room. Her further statement is that she became panic and she was mentally shocked after the occurrence. Then she informed the house owner Noorudhin regarding the occurrence and he assured that he would give more attention in future. According to her, earlier Civic Chandran introduced a publisher to publish her book and thereafter on 19.12.2021 when the camp of poets was organised, Civic Chandran proffered liking request to her and she refused the same. Then Civic Chandran replied that he had sweet hearts, aged 23, 25 years. Later the accused informed the defacto complainant that he

had appointed her as the 'Readers Editor' in the 'Padabhedam' magazine and when she raised hesitation to accept the same, the accused compelled her to hold the post. Thereafter, the accused began to chat with the defacto complainant in Whats app, as a sweet heart and she had resisted the same through telephone. Later when the accused requested her to come with her sweet heart to the house of the accused and the defacto complainant informed that she had no sweet heart, the accused requested that she should not come to his house along with her husband. Precisely, the version of the defacto complainant is that the accused, who does not belong to Scheduled Caste and Scheduled Tribe, kissed on the rear side of her neck without the consent and with the knowledge that she is a member of Scheduled Caste community.

27. It is argued by the learned counsel for the accused that though the F.I statement was lodged at a belated stage with allegations as herein above narrated, the same could not find a place in the ICC report. ICC report produced as document No.13

before the Special Court has given emphasis in this regard. The opening words of the report would go to show that “the defacto complainant faced sexual harassment and mental trauma at the hands of Civic Chandran, the Editor ‘Padabhedam’ magazine and “Me too” also was published in the Whats app. Dr.Khadeeja Mumtaz, Mrudula Devi.S and P.U.Usha were the members of ICC. The reference in the ICC report could not be found as the actual Whats app message given by the defacto complainant since the same is written without reference that the same is the exact text in first person. The allegations are stated as the summary in the words of the ICC committee. According to the learned counsel for the accused, in the ICC report the words spoken by the accused before the alleged occurrence is written, as one, without any compulsion and in the ICC report, no overt act as to kissing on the backside of the neck is stated, despite a statement that the accused touched on the body of the defacto complainant with lust and in an unwelcoming manner. Therefore, the learned counsel for the

accused would argue that there is no whisper as per the statement referred in the ICC report that the accused forcefully done the overt acts alleged in the FIS or there is no whisper that the accused kissed on the back of her neck. According to him, ICC report is prior to lodging of FIR and therefore the allegation regarding forceful kissing in the F.I.S is an improved version of the defacto complainant in the F.I.S and, therefore, the same cannot be given emphasis to find commission of offences alleged by the prosecution, *prima facie*.

28. Resisting this contention, the learned counsel for the defacto complainant would submit that the ICC report itself is without any authority and the so-called members of the ICC, by a Whats app group discussion addressed the grievance of the defacto complainant and the real occurrence as stated in the F.I.S as such was stated by the defacto complainant before the committee. But the committee changed the version of the defacto complainant according to their whims and fancies and therefore, the ICC report

as well as the version of the defacto complainant therein cannot be the verbatim version of the defacto complainant. It is submitted further that Annexure-VI appeal was filed by the defacto complainant against the ICC report before the Regional Joint Labour Commissioner, Kozhikode under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and the same is posted for hearing. Apart from this submission, it is specifically pointed out by Advocate Bhadra Kumari appearing for the defacto complainant that the improper behaviour and the lust that have been continued by the accused against the defacto complainant could be read out from the Whats app messages already produced before the Special Court as well as from Ext.R2(h) produced along with the statement filed by the defacto complainant before this Court. As per which, when the accused knew about the seriousness of the occurrence and the grievance of the defacto complainant, he apologised to the defacto complainant and another lady, and he left out from the Whats app

group itself.

29. On perusal of the counter affidavit along with Ext.R2(h), the submission appears to be convincing, *prima facie*. That apart, it is pointed out by the learned counsel for the defacto complainant that when the defacto complainant filed counter to Crl.M.C.No.1221/2022 before the Special Court, she had produced Whats app chats between the defacto complainant and the accused and the same would reveal the nature and attitude of the accused towards the defacto complainant with thirst of lust on the premise of romance. The Whats app messages would go to show further that whenever the accused shared messages transpiring lust, the same was resisted by the defacto complainant.

30. Appraising the rival arguments regarding the ICC report, it has to be held that the formation of ICC, its authority and the finding of the ICC are under challenge before the appellate forum. In this context, it is not fair to act upon the same against the signed statement of the defacto complainant lodged before the

police.

31. Before having discussion on the Whats app chats in between the accused and the defacto complainant, it is relevant in the context to be on ordinary messages and messages with erotic love and romantic sting. 'Sringara', (means romantic love, erotic love) is one of the nine 'Rasas' (flavour). The theory of 'Rasa' revolves around the relationship between a man and a woman. The romantic relationship between sweet heart and sweet heart, ie. lover and beloved, is a metaphor of the said relationship. One could notice that love with veritable caliber characterizes, romantic, emotional, mental and spiritual connection accompanied some times by sexual or physical connection and the same can be experienced without lust. But when libido is behind the pretext of erotic love, the same is always sexual and physically driven without trace of love with veritable caliber. In the former category, there may be consensus arose out of erotic love, but in the latter, particularly when the other side objects, then also, the propounder

may go with his remarks with thirst of lust and libido without consent of the other. The Whats app messages relied on by the learned counsel for the defacto complainant would depict the latter form of approach on the part of the accused, *prima facie*. Further, on perusal of the Whats app messages in between the defacto complainant and the accused produced along with the counter, it is easy to gather that when the accused sent messages under the latter category, the same was timely opposed and resisted by the defacto complainant. That shows that the defacto complainant never intended to have any sort of relationship either of the above categories with the accused and she intended to maintain a decent relationship as both were litterateur.

32. It is submitted by the learned counsel for the accused that since in the ICC report there is no mention as to forceful kiss by the accused on the back side of the neck of the complainant, no offences under Section 354 of I.P.C and under Section 3(1)(w)(i) of SC/ST Act are made out.

33. Whereas the learned counsel for the defacto complainant Smt.Bhadrakumari, Advocate Nandini and the learned Public Prosecutor vehemently opposed this contention on urging that the statement given by the defacto complainant in the FIS shall be given emphasis, since the same alone is her admitted statement and the report of the ICC does not contain either the Whats app post or any signed statement given by the defacto complainant. Therefore, the same cannot be given emphasis in any manner, that too, at this stage (the stage of investigation).

34. Coming to Section 354 of I.P.C, it is provided that *Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine.* Thus using criminal force to any woman intending to outrage or knowing to be likely that he will thereby outrage the modesty is an

offence punishable upto 5 years and less than one year and liable to fine. Offence punishable under Section 354 of IPC is cognizable as well as non bailable.

35. Coming to offences under Section 3(1)(w)(i) of the SC/ST Act, it is provided that *intentionally touches a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient's consent* is an offence.

36. As per Section 3(2)(va), it is provided as under:

"3. *Punishments for offences of atrocities:--*

(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,--

xxxx xxxx xxxxx

(2) (va) commits any offence specified in the Schedule, against a person or property, knowing that such person is a member of a Scheduled Caste or Scheduled Tribe or such property belongs to such member, shall be punishable with such punishment as specified under the Indian Penal Code (45 Of 1860) for such offences and shall also be liable to fine.

xxxx xxxx xxxxx"

37. Reading Section 3(2)(va) it is emphatically clear that commission of offences specified in the schedule would attract an offence under Section 3(2)(va) of the SC/ST Act. In order to attract the said offence, commission of the offences punishable under the I.P.C, shown in the schedule appended to the SC/ST Act to be committed by the accused against a member of the Scheduled Caste or Scheduled Tribe "knowing that such person is a member of a Scheduled Caste or Scheduled Tribe". In this case, offence alleged to be committed by the accused under Section 354 of I.P.C is one in the schedule and therefore commission of offence under Section 354 of I.P.C would attract offence under Section 3(2)(va) of the SC/ST Act, if the knowledge is foreseeable.

38. Therefore, it is clear that while considering the question as to whether an accused committed offence under Section 3(2)(va) of the SC/ST Act after trial, the word "knowing" or 'knowledge', has to be found on the basis of the evidence tendered. When considering the question of *prima facie* case for the purpose of

considering plea of bail during investigation and the period before trial, the knowledge shall be understood and inferred from the prosecution records. In this matter, the accused and defacto complainant are very familiar to each other as could be discernible from the prosecution records and other materials. Therefore, the required *knowledge* of the accused that the defacto complainant is a member of Scheduled Caste is well discernible from the materials available as ascribed in Section 3(2)(va) of the SC/ST Act.

39. In this matter, the copy of SSLC book of the accused has been produced to establish that the accused has no caste and he has no belief in caste. It is pointed out that in the SSLC book, the caste and religion of the accused kept blank and he has been struggling to uplift the weaker sections of the society. The attempt made by the accused is that he is not a member of any caste. However, the prosecution produced certificate issued by the Tahsildar stating that the accused and his family are members belonging to Ezhava community. Therefore, there is no reason to

hold prima facie that the accused is a person who belongs to 'Scheduled Caste or Scheduled Tribe' community to go outside the ambit of Section 3 of the SC/ST Act. Therefore, the said contention also cannot be considered at this stage.

40. Having appraised the facts of the case with a view to find whether a *prima facie* case is made out alleging commission of offences under Section 3(2)(va) and 3(1)(w)(i) of the SC/ST Act, the said case is specifically made out. That apart, a non bailable offence under Section 354 of IPC also is made out. In such a case, the finding entered into by the Special Judge giving a clean chit to the accused at the investigation stage itself cannot be justified so as to annul the entire prosecution even before completing the investigation. To sum up, in this matter, prima facie, commission of offences under Sections 3(1)(w)(i) and 3(2)(va) of the SC/ST Act is well made out. Therefore, in the matter of grant of anticipatory bail, the specific bar under Sections 18-A of the SC/ST Act would apply. In such a case, grant of anticipatory bail in

derogation to the statutory bar cannot sustain. It is true that in order to cancel a bail once granted, some supervening circumstances to do the said exercise should be established. In the latest decision of the Apex Court reported in [2022 KHC 6496], [AIR 2022 SC 2138] **P. v. State of Madhyapradesh and another** also the said legal position has been reiterated highlighting circumstances when bail granted to the accused can be cancelled, (a) if he misuses his liberty by indulging in similar/other criminal activity to circumstances to (j) referred in the judgment. However, when considering an appeal filed under Section 14-A of the SC/ST Act by addressing the specific bar under Sections 18 and 18-A of the SC/ST Act, if the bar would apply to the facts of the case disclosing a prima facie case, the power of cancellation of bail is on a different footing, since statutory bar is the thrust of consideration. For the reasons above, I am inclined to set aside the observations in para.17 of the impugned order in particular and the impugned order as such.

41. In this case the learned counsel for the accused

produced medical records along with this petition to receive additional documents to prove that the accused is a person suffering from various diseases. Among the documents Ext.R2(a) is an O.P card showing consultation at Government Taluk Hospital, Koothuparamba on 12.09.2022. The observation therein is that he came for certificate of medical ailment and it was issued on cross checking the document and treatment details. In Annexure-R2(a) it has been certified as under :

"This is to certify that Mr. C.V.Kuttan, 73 yrs, Male Suryakantham, West hill, Calicut-5. He is a known case of SYSTEMIC HYPERTENSION with following echocardiography changes CONCENTRIC LVH, GRADE 1 DIASTOLIC DYSFUNCTION, DIALTED LA, MILD AR. Patient had a road traffic accident in 2015 following which he sustained FRACTURE DISTAL TIBIA WITH LATERAL MALLEOLI and he UNDERWENT OPEN REDUCTION AND INTERNAL FIXATION. He is diagnosed with BILATERAL CATARACT and was advised surgery."

42. Ext.R2(b) is the document showing diagnosis of 'cataract both eyes and he was advised left eye cataract surgery with PCIOL implanation under LA'. The certificate was issued

from Amardeep Eye Care Hospital, Kollam on 9.9.2022.

43. Ext.R2(c) is the echo cardiogram report dt.12.10.2019 issued from Department of Cardiology, Upasana Hospital, Kollam.

The following are the impression available in the report.

"IMPRESSION:

HTHD:-

CONCENTRIC LVH

NO RWMA

*ANTERIOR & INTERIOR SEGMENTS SHOWED
ADEQUATE CONTRACTILITY*

NORMAL LV SIZE AND SYSTOLIC FUNCTION

E/O GRADE I DIASTOLIC SYSDYFUNCTION+

NO LV/LA CLOT, NO PFO

NO PAH (RVSP 30mmHg)

DILATED LA, MILD AR, NO AS"

44. It is to be observed that in cases involving serious offences under the SC/ST Act where anticipatory bail is specifically barred by the statute, mere illness of the accused is not a ground for granting anticipatory bail against the mandate of the statute, where custodial interrogation or medical test etc., are necessary in particular. However, the illness, if any, can be considered by the Investigating Officer, if the accused be arrested,

for giving proper medical aid. Therefore, such an order would suffice to address the ailments canvassed by the accused on the basis of the medical documents.

45. In the result, the appeals stand allowed and the impugned order granting anticipatory bail to the accused in this case in derogation of the specific bar under Sections 18 and 18-A of the SC/ST Act stands set aside.

46. Therefore, the appellant/accused is directed to surrender before the Investigating Officer on a day within seven days from today at 9.00 a.m for subjecting himself for interrogation and medical examination, if any, for the purpose of investigation.

47. In the event of his arrest, he shall be produced before the Special Judge on the date of arrest itself. On such production, if regular bail application will be filed, after serving copy of the same to the counsel appearing for the defacto complainant as well as the learned Public Prosecutor in advance, to provide opportunity of hearing, the learned Special Judge shall consider the same on

merits and pass orders as early as possible, preferably on the same day itself or without much delay, since there is no statutory bar in granting regular bail in an appropriate case.

48. It is ordered further that in case the accused will be arrested and he requires medical attention after the arrest, the Investigating Officer shall give proper medical aid to the accused.

49. It is specifically made clear that the observations of this Court in this judgment are meant to see *prima facie* allegations confined in the matter of bail and the same have no binding effect during trial of the case. If the case goes for trial, the evidence tendered during trial shall be appreciated to decide all contentions in the case and the Special Court shall decide the case untrammelled by the observations in this judgment.

50. Before parting, this is to highlight that this Court is mindful of the atrocities and sexual harassment against girl children, women and even against minor children regardless of their gender identity, in the society at large even in work places,

schools and other educational institutions. It is alarming to note that the number of cases in this category are increasing day by day eventhough, there are many legislations to curtail the same. Therefore, it is the need of the hour for all concerned, especially, the Investigating Officers and the Stakeholders to rise to the occasion and bestow their efforts to arrest the crimes and to give insight to the society in this regard. Therefore, it is the duty of all to work together in this endeavour, at the same time, to be vigilant in the matter of false implication also.

Sd/-
(A. BADHARUDEEN, JUDGE)

rtr/

APPENDIX OF CRL.A 855/2022

RESPONDENT ANNEXURES

- ANNEXURE R2 (a)** TRUE COPY OF THE CERTIFICATE OF ALIMENTS ISSUED BY THE JUNIOR CONSULTANT, GENERAL SURGERY DEPARTMENT OF HEALTH SERVICES, GOVT. TALUK HOSPITAL, KOTHUPARAMBA ALONG WITH O.P. RECORD DATED 12/09/2022
- ANNEXURE R2 (b)** TRUE COPY OF THE MEDICAL CERTIFICATE DATED 09/09/2022 ISSUED BY DR.SANITHA SATHYAN, AMARDEEP EYE CARE, KOLLAM
- ANNEXURE R2 (c)** TRUE COPY OF THE ECHO CARDIOGRAM REPORT DATED 12/10/2019 FROM DEPARTMENT OF CARDIOLOGY, UPASANA HOSPITAL, KOLLAM
- ANNEXURE R2 (d)** TRUE COPY OF THE X-RAY EVIDENCING THE INTERNAL FIXATIONS ON THE BONE

APPENDIX OF CRL.A 875/2022

RESPONDENTS' ANNEXURES :

- ANNEXURE-R2 (a) TRUE COPY OF THE NOTICE ON THE SAID BOOK RELEASE**
- ANNEXURE-R2 (b) TRUE COPY OF THE PHOTOGRAPHS OF THE BOOK RELEASE**
- ANNEXURE-R2 (c) TRUE COPY OF THE COVER PAGE OF THE SAID BOOK SHOWING THE NATURE OF TOPIC THEREIN**
- ANNEXURE-R2 (d) TRUE COPY OF THE FACEBOOK POST OF EDITOR PADDA BHEDAM DATED 27/1/2022**
- ANNEXURE-R2 (e) TRUE COPY OF THE WHATSAPP MESSAGE FROM 2ND RESPONDENT TO NOORUDHEEN DATED 17/4/2022**
- ANNEXURE-R2 (f) TRUE COPY OF THE APPEAL FILED BY THE 2ND RESPONDENT CHALLENGING THE INQUIRY REPORT BEFORE REJIONAL JOINT LABOUR COMMISSIONER, KOZHIKODE**
- ANNEXURE-R2 (g) TRUE COPY OF THE RECEIPT FROM REJIONAL JOINT LABOUR COMMISSIONER, KOZHIKODE**
- ANNEXURE-R2 (h) TRUE COPY OF THE WHATSAPP MESSAGES FROM 1ST RESPONDENT IN WHATSAPP.**