

[Kerala High Court Upholds MLA Eldhose Kunnappilly's Anticipatory Bail In Rape Case](#)

**2022 LiveLaw(Ker) 630**

**IN THE HIGH COURT OF KERALA AT ERNAKULAM  
DR. JUSTICE KAUSER EDAPPAGATH; J.**

2 December 2022

CRL.MC NO. 7656 OF 2022

**STATE OF KERALA versus ELDOSE KUNNAPPILLY**

*Petitioner / Complainant: by Advs. S Ambika Devi - Spl GP (Atrocities against Women and Children)*

*Respondent / Accused: by Advs. S. Rajeev, V. Vinay, Sarath K.P., M.S. Aneer, Prerith Philip Joseph*

CRL.MC NO. 7973 OF 2022

**XXXXXXXXXX versus STATE OF KERALA**

*Petitioner: by Adv Suman Chakravarthy*

*Respondents / Counter Petitioners & Petitioner (1st Accused): by Adv. S Ambika Devi - Spl GP (Atrocities against Women and Children) S. Rajeev for R4*

**ORDER**

Both these Crl.M.Cs have been filed to set aside the order granting pre-arrest bail by the Additional Sessions Court-VII, Thiruvananthapuram (for short, 'the court below) to the first accused in Crime No.983/2022 of Kovalam Police station.

2. Crl. M.C.No.7656/2022 has been filed by the State and Crl. M.C.No.7973/2022 has been filed by the victim. The 1<sup>st</sup> respondent in Crl. M.C.No.7656/2022 and the 4<sup>th</sup> respondent in Crl. M.C. No.7973/2022 is the first accused.

3. The offences alleged are punishable under Sections 376 (2)(n), 307, 354, 354B, 362, 323, 506(i) r/w 34 of IPC.

4. The gist of the prosecution allegation is that on 4 /7/2022 at Somatheeram Resort, Kovalam, on 5/9/2022, in a flat at Kalamasserry, and on 15/9/2022, at the residence of the victim at Petta, the first accused subjected the victim to sexual intercourse without her consent and against her will. It is further alleged that on 14/09/2022 at 10.00 p.m., the first accused went to the residence of the victim at Petta, assaulted her, forcefully took her to Kovalam guest house in his car, and when she did not cooperate to stay in the guest house, she was again assaulted by him in the car and took her to suicide point at Kovalam and threatened to kill her.

5. The first accused moved an application for pre-arrest bail at the court below as Crl.M.C No. 2191/2022. The court below, after hearing both sides, granted pre-arrest bail to him as per the order dated 20/10/2022. The said order is under challenge in these Crl.M.Cs.

6. I have heard Smt.Ambika Devi, the learned Special Public Prosecutor, Sri.Suman Chakravarthy, the learned counsel for the victim and Sri. S. Rajeev, the learned counsel for the first accused.

7. The learned Special Public Prosecutor Smt.Ambika Devi submitted that that court below failed to take notice of the materials on record, especially the statement of the victim recorded under section 161 of Cr.P.C, or to appreciate any of the contentions of the prosecution and without bearing in mind the relevant aspects to be considered in an application for pre-arrest bail and on wrong understanding of facts,

circumstances and the law on the point, granted relief of pre-arrest bail to the first accused by making perverse and unwarranted findings. The learned Special Public Prosecutor further submitted that the court must be cautious and circumspect in exercising power under section 438 of Cr.P.C which is discretionary in nature and that if the discretionary power to grant anticipatory bail was exercised without any valid reason, or on consideration irrelevant or not germane to the determination, such order could not be sustained. According to the learned Special Public Prosecutor, the impugned order suffers from serious infirmities and would prejudicially affect the investigation as well as the trial resulting in serious miscarriage of justice. The first accused is an influential person and there is every likelihood of him influencing the witnesses and tampering with the evidence, added the Special Public Prosecutor. The learned Special Public Prosecutor relied on the decisions of the Apex Court in **State rep. by the CBI v. Anil Sharma** [(1997) 7 SCC 187], **Dr.Narendra K Amin v. State of Gujarat and Another** (2008 KHC 4584) and **Dukhishyam Benupani, Assistant Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria** [(1998) 1 SCC 52], to buttress her contention that pre-arrest bail should not be granted mechanically and it can be granted only when the court is convinced that exceptional circumstances exist to resort to that extra ordinary remedy. Reliance was also placed on the latest decision of the Apex Court in **Sumitha Pradeep v. Arun Kumar C. K and Another** (Crl.Appeal No.1834/2022 decided on 21<sup>st</sup> October, 2022) wherein it was held that even if custodial interrogation is not required or necessitated, that by itself, cannot be a ground to grant pre-arrest bail.

8. The learned counsel for the victim Sri.Suman Chakravarthy submitted that even though the prosecution case is that the first accused committed rape on the victim against her will, the court below viewed the case on the wrong premise that the first accused had sexual intercourse with the victim after obtaining her consent by giving a false promise of marriage. The counsel further submitted that it is settled that detailed discussion on merits and the quality of evidence shall not be considered while considering the bail application, but the court below probed in depth into the merits of the case and allowed the bail application. The learned counsel also submitted that the court below went wrong in granting pre-arrest bail when investigation is only in the preliminary stage and custodial interrogation is necessary to do complete justice. This is a case wherein from the very inception itself, the first accused was abusing his official position as a Member of the Legislative Assembly and as such, there is every likelihood that he would misuse the liberty by influencing the witnesses and tampering with evidence , argued the counsel.

9. Per contra, the learned counsel for the first accused Sri.S.Rajeev submitted that the court below did not commit any error as alleged by the prosecution and the victim and it was only after considering the entire facts and relevant records and on hearing the prosecution as well as the victim, passed the impugned order granting anticipatory bail to the first accused. The counsel further submitted that the bail once granted should not be cancelled in a mechanical manner and very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail already granted. In support of the said submission, the counsel relied on the decisions of the Apex Court in **Dolat Ram and Others v. State of Haryana** [(1995) 1 SCC 349], **Myakala Dharmarajam and Others v. The State of Telengana and Others** (AIR 2020 SC 317), **Rizwan Akbar Hussain Syeed v. Mehmood Hussain and Others** [(2007) 10 SCC 368] and **Chand Nath Yogi and Others v. State of Haryana** (AIR

2003 SC 18). The learned counsel added that the first accused has been all along strictly cooperating with the investigation and did not violate the bail conditions.

10. This is not a petition under section 439(2) of Cr. P.C. seeking cancellation of bail in the strictest sense. It actually calls in question the legality of the order granting bail invoking Section 482 of Cr.P.C. The basic assail is the manner in which the Sessions Court has exercised its jurisdiction under section 438 of Cr.PC while admitting the accused to bail.

11. Section 439(2) of Cr. P.C provides that the High Court or Court of Session may direct that any person who has been released on bail under Chapter XXXIII be arrested and commit him to custody. The said provision empowers the Court concerned to cancel bail though the phrase 'cancel the bail' is not mentioned in it. The inherent power under section 482 Cr.P.C of the High Court is not affected by the provisions under section 439(2) Cr.P.C as the power under section 482 could always be invoked with the aid of an order required to secure the ends of justice and for preventing abuse of the process of any court. If the order granting bail is vitiated by the wrong exercise of discretion by the Court or is patently perverse due to non-consideration of relevant and crucial factors, the superior Courts can definitely set right the illegality. The Apex Court in **Puran v. Rambilas** (2001 KHC 640) held that the High Court in the exercise of power under section 482 can set aside the perverse order granting bail.

12. The considerations that guide the power of the High Court under section 482 of Cr. P.C in assessing the correctness of an order granting bail stand on a different footing from an assessment of an application for the cancellation of bail under section 439(2). The correctness of an order granting bail under section 482 is tested on the anvil of whether there was an improper or arbitrary exercise of discretion in the grant of bail. The test is whether the order granting bail is perverse, illegal or unjustified. In **Puran** (supra), the Apex Court pointed out that where an order granting bail was passed by ignoring material evidence on record and without giving reasons, it would be perverse and contrary to the principles of law and such an order would itself provide a ground for moving an application for cancellation of bail. In **Neeru Yadav v. State of U.P. and Another** (2015 KHC 4650), **Dinesh M. N. (S.P.) v. State of Gujarat** (2008 KHC 4583) and **Narendra K. Amin** (supra), it was held by the Apex Court that when the order granting bail is perverse, due to non-consideration of relevant and crucial factors, the superior Courts can definitely set right the illegality. Thus, if the order granting bail by the Court of Session is patently perverse, illegal, unjustified, suffers from serious infirmities resulting in miscarriage of justice or is vitiated by the arbitrary and wrong exercise of discretion by the Court or if there is manifest impropriety, the same can be set at naught by the High Court under section 482 of Cr.P.C.

13. Now, let me examine whether the impugned order is perverse or is vitiated by the arbitrary and wrong exercise of discretion by the Court below warranting interference by this Court under Section 482 of Cr.P.C.

14. The first accused is a politician and MLA. The victim is a post-graduate, a professional counsellor and a motivational trainer. She worked as a teacher as well. Both the first accused and the victim are married persons and have spouse and children. The first accused and the victim became friends five years ago; eventually, their relationship developed into an intimate one, and they had physical relationship

on several occasions; many of them were admitted being consensual, and few of them were alleged to be non-consensual.

**15.** The crime was originally registered on 11/10/2022 based on the complaint (FIS) given by the victim on 28/9/2022 to the City Police Commissioner, Thiruvananthapuram, under sections 362, 323, 354, 506(i) and 34 of IPC. The allegation in the said complaint was that, on the day before 28/9/2022, the first accused took the victim in a car to Kovalam and caused bodily injuries and criminally intimidated her. The statement of the victim under section 161 of Cr. P.C was recorded on 12/10/2022. Following the said statement, section 376(2)(n) of IPC was incorporated, and an additional report to that effect was submitted to the court on 13/10/2022. Thereafter, the statement of the victim under section 164 of Cr. P.C. was recorded on 14/10/2022. Subsequently, one more additional report was submitted on 18/10/2022, incorporating sections 307 and 354-B of IPC as well.

**16.** Three specific instances of rape were alleged by the victim in her statement under Sections 161 and 164 of Cr.P.C.- on 4 /7/2022, at Somatheeram resort, Kovalam, on 5/9/2022 in a flat at Kalamasserry and on 15/9/2022 at the residence of the victim. It is true that it was specifically alleged that she was subjected to forceful penetrative sexual assault on those days, but the veracity of those allegations must be tested, for the purpose of the pre-arrest bail application, taking into account the previous and subsequent conduct of the parties and attended circumstances.

**17.** The FIS, dated 28/9/2022, was the first complaint ever raised by the victim against the first accused before a legal authority. In the said complaint, the victim admitted that she and the first accused were friends and the said relationship developed into a physical relationship as well. Later, when she came to know that he had relationship with other ladies, she kept a distance from him. However, he kept on following and disturbing her. It is alleged that he used to come to her home consuming alcohol and caused disturbance to her. It is further alleged that, on a day before 28/9/2022, he took her in a car to Kovalam and caused bodily injuries and criminally intimidated her. It is pertinent to note that there were no allegations of sexual assault or rape in the said complaint. The FIR was registered based on the said complaint only on 11/10/2022. The statement of the victim under section 161 of Cr.P.C was recorded on the next day i.e., on 12 /10/2022. A reading of the said statement would show that prior to the registration of the FIR, there was a mediation talk between the first accused and the victim at the Advocate's office of the first accused on 9/10/2022 and in the said mediation talk, the first accused offered `30 lakhs to the victim to compromise the entire issues between them, but she was not agreeable for the same. On the same day, she left the place to Madhurai. On 10 /10/2022, a friend of the victim Mr.Anand Shekhar filed a complaint at the Vanchiyoor police station alleging that the victim was missing from 9/10/2022 onwards. Based on the said complaint, an FIR was registered as Crime No.1057/2022 of Vanchiyoor Police Station under section 57 of the Kerala Police Act. The victim was traced out and produced before the Judicial First-Class Magistrate Court-XI, Thiruvananthapuram by the Vanchiyoor Police on 10/10/2022. The learned Magistrate recorded her statement. As per the statement, she absconded to Tamilnadu due to the frequent threatening and manhandling by the first accused. In the said statement also, there was absolutely no allegation of sexual assault or rape. The records would further show that, on the next day, i.e., on 11/10/2022, the wife of the first accused preferred a complaint against the victim. On the same day, the first accused moved the application for pre-arrest bail before the

court below. The statement under section 161 alleging the commission of the offence of rape was recorded on the next day i.e., on 12/10/2022.

**18.** The first instance of sexual assault alleged by the victim was on 4/7/2022 at Somatheeram resort, Kovalam. According to her, it was a forceful one. However, she admits that thereafter on 14/7/2022 or 15/7/2022, they had consensual sex at a hotel viz. Royal Palace, Pattom, Thiruvananthapuram. She further admits that on 23/7/2022, they had consensual sex at a hotel near the railway station at Kozhikode. On the next day, i.e., on 24/7/2022, they proceeded from Kozhikode to the house of the accused at Perumbavoor where also they had consensual sex. She also admits that on 5/8/2022 they had consensual sex at Kovalam Guest House and on the next day also, they had consensual sex at Somatheeram Resort, Kovalam where she was allegedly sexually assaulted forcefully on 4/7/2022. She further admits that on 1<sup>st</sup> September, 2022 they again had consensual sex at a flat at Kalamassery and thereafter their relationship strained since she came to know that he had illicit relationship with other ladies. The next two sexual assaults, i.e., on 5/9/2022 at the house of the first accused and on 15/9/2022 at the house of the victim were, according to the victim, against her consent. In page 11 of the 161 statement, the victim speaks about the sexual assault made on her by the first accused in the flat at Kalamassery on 1/9/2022. She specifically stated that all the sexual intercourse they had prior to that incident were consensual in nature. Thus, her statement that they had sexual intercourse on 4/7/2022 at Somatheeram Resort cannot be true.

**19.** As already stated, the alleged forceful sexual assault/rape committed by the first accused on 4/7/2022, 5/9/2022 and on 15/9/2022 were not at all stated either in the FIS or in the statement given by her to the Magistrate on 14/10/2022. The victim is a postgraduate and worked as teacher and professional family counsellor. She is also a motivational trainer. The documents produced by the first accused at the court below would show that she was the defacto complainant in three sexual assault crimes – (1) Crime No.805/2017 of Cantonment Police Station, Thiruvananthapuram for the offences punishable under sections 341, 294(b), 354 and 34 of IPC (2) Crime No.683/2017 of Narakal Police Station, Ernakulam for the offences punishable under sections 376, 354D, 341, 323, 109 and 34 of IPC and (3) Crime No.533/2010 of Binanipuram police station for the offences punishable under sections 450, 376(i), 313, 451 r/w 34 of IPC. Her statement was recorded in all the three files. In crime No.805/2017, the police filed a refer report and Crime No.533/2010 ended in acquittal after full-fledged trial. All these facts show that the victim is a person who was well versed as to how a statement is to be given to the police. Still, the alleged sexual assault/rape was conspicuously absent in the FIS and no explanation whatsoever has been given either by the victim or the prosecution why it was not mentioned in the FIS. On the other hand, in the 161 statement as well as in 164 statement, she stated about the FIS given to the police.

**20.** As per the 161 statement of the victim, the last act of sexual assault was on 15/9/2022. However, till 12/10/2022, she did not complaint about the same before any authority. No allegation of assault was also disclosed by the victim to the doctor on 14/9/2022 at 3.30 a.m. at the General Hospital, Thiruvananthapuram where she was allegedly taken after being manhandled by the first accused. The allegation of sexual assault was raised for the first time by the victim on 12/10/2022 after the mediation talk held between the first accused and the victim at the chamber of the Advocate of the first accused on 9/10/2022 failed and a complaint was lodged by the wife of the

first accused against the victim on 11/10/2022 and the pre-arrest bail application was moved by the first accused before the court below on the same day.

**21.** The victim has also alleged that on 4/7/2022, she was sexually assaulted by the first accused giving her false assurance that he will look after her for the rest of her life and that the first accused adorned a chain with a cross on her neck at a church by promising to look after the victim during the rest of her life. At this juncture, it is relevant to note that both the first accused and the victim were married persons. Thus, the victim knew pretty well that a legal marriage between them was impossible.

**22.** There is yet another important aspect. Though victim says that she was raped by the first accused on 4/7/2022 at Somatheeram Resort at Kovalam forcefully and against her will, she admits that after eight days, on 12/7/2022, both happily went to Shangumugham beach together and two days thereafter, both took a room at Royal Palace, Pattom and had consensual sex. The victim further admits that she and the first accused voluntarily went to Somatheeram Resort at Kovalam on 6/8/2022, stayed there and had consensual sex. It is quite unlikely that a lady who was subjected to rape in a particular resort by a person, would again come and stay in the very same resort and would indulge in consensual sexual intercourse with the very same person.

**23.** The only allegation to constitute the offence under section 307 of IPC is that on 14/09/2022 at 10.00 p.m., the first accused went to the residence of the victim at Petta, assaulted her, forcefully took her to Kovalam guest house in his car, and when she did not cooperate to stay in the guest house, she was again assaulted by him in the car and took her to suicide point at Kovalam and threatened to kill her. This allegation is hardly sufficient to attract the ingredients of section 307 of IPC. It was considering all the sequence of events, facts and circumstances mentioned above, the court below granted pre-arrest bail to the first accused.

The cancellation of bail is directly linked with the personal liberty which is one of the cherished constitutional freedoms guaranteed under Article 21 of the Constitution of India and hence it must not be lightly resorted to. When the discretion of the court to grant bail has been exercised on relevant consideration and bail is granted, the High Court would not normally interfere with such discretion under the exercise of the power under section 482 of Cr.P.C. unless it is found that the discretion itself is exercised on extraneous considerations and/or the relevant factors which need to be considered while exercising such discretion are ignored or bypassed. There must be very cogent and overwhelming circumstances that are necessary to interfere with the discretion in granting bail. There is nothing on record to suggest that the impugned order granting bail to the first accused is perverse, unjustified, illegal or is vitiated by the arbitrary and wrong exercise of jurisdiction warranting interference by this court invoking jurisdiction under section 482 of Cr.P.C. Both CrI.M.Cs, accordingly, are dismissed.

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