



BAIL APPL. NO. 1490 OF 2023

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

FRIDAY, THE 14TH DAY OF JULY 2023 / 23RD ASHADHA, 1945

BAIL APPL. NO. 1490 OF 2023

CRIME NO.123/2023 OF KALADY POLICE STATION, ERNAKULAM

PETITIONER/ACCUSED:

XXXXXXXXXX
XXXXXXXXXX XXXXXXXXXXXX
BY ADVS.
AJITH MURALI
MOHANAN M.K.

RESPONDENTS/STATE & COMPLAINANT:

- 1 STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM., PIN - 682031
- 2 XXXXXXXXXXXX
XXXXXXXXXXXX XXXXXXXXXXXX.
BY ADVS.
DEEPU THANKAN
UMMUL FIDA
LAKSHMI SREEDHAR
LEKSHMI P. NAIR
NAMITHA K.M.

OTHER PRESENT:

ADV SEETHA S- SR PP

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
14.07.2023, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ZIYAD RAHMAN, A.A, JBA No. 1490 of 2023Dated this the 14th day of July, 2023O R D E R

The petitioner is the accused in Crime No.123/2023 of Kalady Police Station. The said crime was registered for the offences punishable under Sections 376, 376 (2) (f) and Section 376 AB and also under Sections also Sections 4(2)(d) (b), 6, 5(i), 5(n) and 5 (m) of Protection of Children from Sexual Offences Act.

2. Aforesaid crime was registered on the allegation that the petitioner had committed sexual assault on his daughter, aged 3½ years. The crime was registered based on the complaint submitted by the mother of the victim, who is the wife of the petitioner. Earlier, the child was subjected to examination by a Clinical Psychologist. Initially, it was reported by the clinical Psychologist that the child was well tutored by her mother and grand parents. Thereafter, to get further clarification in the matter, a Medical Board was constituted by the Chief Medical Officer of General Hospital, Ernakulam.



Accordingly, on 29.05.2023, a sitting of the Medical Board was arranged. Even though the mother of the victim was informed by the Board, the child was not produced. Thereafter, on 5.6.2023, the Medical Board further convened a sitting, and the defacto complainant was directed to produce the child before the said Board. However, the defacto complainant informed the authorities concerned that she does not intend to produce the child before the Medical Board. Thereafter, on 12.6.2023, after taking note of these developments, a further order was passed by this court, which reads as follows:

This is an application for anticipatory bail, wherein the offences alleged are under Sections 376, 376 (2) (f) and Section 376 AB and also under Sections also Sections 4(2)(d) (b), 6, 5(i), 5(n) and 5 (m) of Protection of Children from Sexual Offences Act. The allegation is that, the petitioner had committed sexual assault on her daughter aged 3½ years. The crime was registered on the basis of the complaint submitted by the mother of the victim, who is



the wife of the petitioner. Even though the child was subjected to examination by a clinical psychologist, no statement could be taken from the child. Now it is reported that, a panel of child psychologists is to be formed as part of the investigation and steps are to be taken to subject the child for further examination. The crime was registered, as early as on 14.02.2023 and about four months have been elapsed. The application for bail is also pending consideration. Considering the serious nature of allegations, it is absolutely necessary that a report from the team of child psychologists has to be obtained for taking a proper decision in this application as well. The parties are closely related and considering such close relationship, I am of the view that, without a report from a child psychologist or clinical psychologist, it is not proper to take decision on this application.

Therefore, it is directed that, the authorities



concerned shall take necessary steps to expedite the steps for the interaction of the child by the panel of child psychologists. The authorities are directed to take urgent steps to constitute such panel if already not constituted, proceed with the interaction with the child and submit a report before this court expeditiously.

Post on 26.06.2023. Interim order shall continue till then.

3. Today, when the matter came up for consideration, it is reported by the learned Public Prosecutor that, consequent to the interim order passed by this court, a Medical Board was constituted and a further request was made to the defacto complainant on 19.06.2023 for the production of the child. However, the defacto complainant refused to accept that request and reiterated that she does not intend to produce the child before the Medical Board. It is also reported that the defacto complainant has produced a video footage to substantiate the allegations against the petitioner and certain discrepancies were found therein. Therefore, a notice was



given to the defacto complainant under Section 91 of the Cr.P.C for producing the smartphone in which the said video footage was recorded. However, the defacto complainant did not produce the same as well. It is in these circumstances that this court is considering this application for pre-arrest bail submitted by the petitioner.

4. Heard Sri.Ajith Murali, learned counsel appearing for the petitioner, Smt. Seetha S, the learned Public Prosecutor appearing for the State and Sri.Deepu Thankan, learned counsel appearing for the defacto complainant.

5. From the materials placed on record, it is evident that there are serious matrimonial disputes between the petitioner and the defacto complainant, the mother of the victim. The specific case of the learned counsel for the petitioner is that the case is fabricated, and a false complaint was submitted to deny the custody of the child to the petitioner. As observed above, the investigation found certain discrepancies regarding the allegations. The service of a clinical psychologist was availed in such circumstances. The preliminary finding of the clinical psychologist was to the effect



that the child was tutored. Therefore, as part of the investigation of the case, the investigating officer availed the services of experts in this regard by constituting a Medical Board, including experts in this regard, to get clarity on this aspect. However, there was complete non-cooperation on the part of the defacto complainant in this regard. Even though a specific order was passed by this court, highlighting the necessity of such evaluation of the child by a child psychologist or clinical psychologist, the defacto complainant refused to produce the child before the Medical Board constituted in compliance with the said interim order of this court. In such circumstances, the reluctance on the part of the defacto complainant to produce the child before the Clinical psychologist is very conspicuous, which compels this court, to accept the contention of the petitioner regarding the false nature of the allegations, for the purpose of deciding this application.

6. While making these observations, I am conscious of the fact that, by virtue of Sub Section 4 of Section 438 of CR.P.C, in respect of persons accused of offences under section



376 (3), 376 AB, 376 DA and 376 DB, the power of this court under Section 438 Cr. P.C cannot be invoked. However, I am of the view that when the materials placed on the record itself are not sufficient to attract a prima facie case of any of the offences under Sections 376 (3), 376 AB, 376 DA and 376 DB or the false nature of the allegation is evident from the records, nothing would preclude this court from exercising the powers under Section 438 of the Cr.P.C. Merely because of the reason that, among the offences mentioned in the FIR, Sections 376 (3) or 376 AB or Section 376 (376 DA or 376 DB is incorporated, valuable rights of the accused cannot be denied. It is to be noted in this regard that in the decision reported by the Hon'ble Supreme Court in **Prathvi Raj Chauhan v. Union of India [2020(1) KLT 810]**, a similar prohibition under the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, with regard to the offences contemplated therein was considered by the Hon'ble Supreme Court and held that, if a prima facie case is not made out as regards the offences under the Act, nothing will preclude the Court from exercising its powers under section 438 of the Cr.P.C. In



subsection (4) of Section 438, it is stipulated that “ **Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376-AB or section 376-DA or section 376 DB of the Indian Penal Code (45 of 1860).**” In Prathvi Raj Chauhan’s case (supra), a prohibition of similar nature contained in section 18A (ii) of the SC/ST Act was considered, and the above observations were made. Therefore, the expression used is section 438(4) of the Cr.P.C that “**...arrest of any person on accusation of having committed an offence.....**” has to be interpreted to mean that the accusation must be a reasonable one where the court could arrive, after examining the records placed before it, at a finding that there are materials to prima facie establish the offences referred to in the said provision. When there are no convincing reasons to find out such a prima facie case as to the said offences, the prohibition contained in the said provision should not be brought into force automatically, without any application of mind, thereby denying the personal liberty of a person, which is a fundamental right under the



Constitution of India. When there are reasonable and valid grounds to suspect the veracity of the allegations, the court should not hesitate to pass appropriate orders to protect the personal liberty of the person against whom such accusations are made.

7. I am of the view that, In the light of the peculiar facts and circumstances of this case, the principles laid down by the Honourable Supreme Court in **Prathvi Raj Chauhan's case** would be applicable, even though the offences alleged are under the provisions of the Indian Penal Code. In this case, the materials placed on record, particularly the refusal on the part of the defacto complainant to cooperate with the investigation, makes out a strong case to suspect the veracity of the allegations. In such circumstances, some orders to protect the personal liberty of the petitioner are to be passed.

In the result, the application is allowed on the following conditions:-

i) The petitioner shall surrender before the Investigating Officer, within a period of one week from the date of receipt of a copy of this order, for subjecting himself



to interrogation.

ii) After interrogation, the petitioner shall be released on bail on the very same day of surrender upon the petitioner executing a bond for Rs 1,00,000/- (Rupees One Lakh only) with two solvent sureties each for the like sum, to the satisfaction of the Investigating Officer.

iii) The petitioner shall fully co-operate with the investigation, including subjecting himself to the deemed police custody for the purpose of recovery, if any, as and when demanded.

iv) The petitioner shall appear before the Investigating Officer between 10.00 a.m and 11.00 a.m every Saturday until the filing of the final report.

v) The petitioner shall appear before the Investigating Officer as and when required.

vi) The petitioner shall not commit any offence of similar nature while on bail.

vii) The petitioner shall not make any attempt to tamper with the evidence or influence any witnesses or other persons related to the investigation.



viii) The petitioner shall not leave India without the permission of the Jurisdictional Court.

In case of violation of any of the above conditions, the jurisdictional Court shall be empowered to consider the application for cancellation of bail, if any, and pass appropriate orders in accordance with the law.

sd/-

ZIYAD RAHMAN, A.A, JUDGE

R.AV