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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

TUESDAY, THE 18TH DAY OF AUGUST 2020 / 27TH SRAVANA, 1942

Bail Appl..No.4876 OF 2020

CRIME NO.584/2020 OF Valiyamala Police Station ,
Thiruvananthapuram

PETITIONER/ACCUSED:

VINESH,
AGED 30 YEARS
S/O VISWAMBARAN, THADATHARIKATHU VEEDU,
CHATHANAD, KUTHIRAKULAK,
VELLAND VILLAGE
THIRUVANANTHAPURAM - 695543

BY ADV. SRI.LATHEESH SEBASTIAN

RESPONDENT:

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

SRI.RENJITH.T.R., PP

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
18.08.2020, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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O R D E R

Dated this the 18th day of August 2020

This Bail Application filed under Section 439 of Criminal Procedure Code was heard through Video Conference.

2. The petitioner is the accused in Crime No.584/2020 of Valiyamala Police Station, Thiruvananthapuram. The above case is registered against the petitioner alleging offences punishable under Sections 511 of 376 and 511 of 306 IPC.

3. The prosecution case is that the petitioner is a relative of the husband of the victim. The petitioner used to come to the defacto complainant's house and used to stay in that house occasionally. It is alleged that on 18.6.2020 the petitioner went to the house of the defacto complainant and stayed there till 4 pm. The prosecution's further case is that the petitioner left the house and came back at about 8.30 pm on that day and stayed in the house. On the next morning, at about 7 am when the husband of the defacto complainant left the house for his employment, the petitioner came out of the room and tried to commit rape on the defacto complainant. The victim resisted the same. When the accused continued the attempt, the victim

poured kerosene on her body and set fire. Therefore it is alleged that the petitioner committed the offence under Sections 511 of 376 and 511 of 306 IPC. The petitioner was arrested on 19.6.2020.

4. Heard the counsel for the petitioner and the learned Public Prosecutor.

5. The counsel for the petitioner submitted that the petitioner is entitled statutory bail under Section 167(2)(a)(ii) of Cr.P.C. The counsel submitted that the offence alleged against the petitioner is under Section 511 of 376 IPC. The counsel argued that as per Section 511 of IPC, if no express provision is made by the Code for the punishment of an attempt to commit an offence, the sentence that can be imposed is one half of the longest term of imprisonment for which he can be convicted for the main offence. According to the counsel, the maximum punishment that can be imposed under Section 376 IPC is life imprisonment. The counsel submitted that Section 57 of IPC says that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. The counsel submitted that the petitioner was arrested on 19.6.2020. Now 60 days over. The maximum punishment that can be imposed against the petitioner

under Sections 511 of 376 IPC is ten years, and under Section 511 of 306 IPC is only five years. Therefore, the petitioner is entitled statutory bail under Section 167(2)(a)(ii) of Cr.P.C

6. The learned Public Prosecutor seriously opposed the bail application. Public Prosecutor submitted that the petitioner committed a heinous crime. The Public Prosecutor submitted that the petitioner is not entitled statutory bail. The Public Prosecutor submitted that the sentence that can be imposed under Section 376(2) IPC is rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life. The Public Prosecutor submitted that in Section 376(2) IPC, it is clearly stated that imprisonment for life means imprisonment for the remainder of that person's natural life. When such a specific clause is there under Section 376(2) IPC, the Public Prosecutor submitted that Section 57 of IPC is not applicable in the facts and circumstances of the case.

7. After considering the facts of the case, I am of the considered view that the petitioner is not entitled bail on the basis of the merit of the case. Prima facie, it is clear that the petitioner committed the offence under Section 511 of 376 IPC and under Section 511 of 306 IPC. The manner in which the petitioner committed the offence is also cruel and heinous.

8. The next point to be decided in this case is whether the petitioner is entitled statutory bail under Section 167(2)(a)(ii) Cr.P.C. For a proper consideration of the same, Section 167(2) of the Cr.P.C is extracted hereunder.

“167(1) xxxxxxxx

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:
Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in

the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage.

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail;

Explanation II- If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be:

Provided further that in case of woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognized social institution”

9. From Section 167(2)(a) of Cr.P.C, it is clear that the Magistrate cannot authorise detention of the accused beyond a period of 60 days if the investigation relates to an offence in which the maximum imprisonment is ten years. Therefore the question is whether the maximum punishment that can imposed under Section 511 of 376 and Section 511 of 306 IPC is ten years or not. As far as Section 306 IPC is concerned, the maximum punishment that can be imposed is ten years.

Therefore, if an accused committed an offence under Section 511 of 306 IPC, the maximum punishment that can be imposed is five years.

10. Then the question is, what is the maximum punishment that can be imposed under Section 511 of 376 IPC. The Public Prosecutor submitted that Section 376(2) IPC is applicable in this case. According to the Public Prosecutor, in this case, the offence under Section 376(2)(f) and (k) IPC is attracted. The Public Prosecutor submitted that the petitioner is a relative of the victim. Section 376(2)(f) IPC, is attracted when an accused being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on a woman. Admittedly, the petitioner is a relative of the victim. At this stage, it cannot be said that the offence under Section 376(2) IPC is not prima facie made out against the petitioner. Then the question is what is punishment that can be imposed under Section 376(2)(f) and (k) IPC. For that purpose Section 376(2)(f) and (k) IPC are extracted hereunder.

“376. **Punishment for rape:-**

(1)xxxxxx

(2)Whoever,-

(a) xxxxx

(b) xxxx

(c) xxxx

(d) xxxx

(e) xxxx

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) xxxx

(h) xxxx

(j) xxxx

(k) being in a position of control or dominance over a woman, commits rape on such woman;

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."

11. A reading of the above section, it is clear that the maximum imprisonment that can be imposed under Section 376(2) IPC is imprisonment for life. The sentence that can be imposed under Section 376(1) IPC is also imprisonment for life. But there is a difference in the sentence portion in Section 376(1) and Section 376(2) IPC. In 376(1) IPC, it is only stated that the punishment that can be imposed may extend to imprisonment for life. But in Section 376(2)IPC, it is stated that the punishment may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life. The contention of the Public Prosecutor is that in the light of the difference in Sections 376(1) and 376(2) IPC about the meaning of the imprisonment for life, Section 57 of IPC is not applicable while calculating the period of detention under Section 167(2)(a)

Cr.P.C. The Public Prosecutor also relied the judgment of the Apex Court in **Deepak Gulati v. State of Haryana (AIR 2013 SC 2071)**. The Public Prosecutor submitted that the offence alleged against the petitioner is under Section 376 IPC and the Apex Court observed that the offence under Section 376 IPC is a heinous offence and it is a crime against the society. Therefore, the Public Prosecutor submitted that Section 57 of IPC is not applicable even for computing the period of detention under Section 167 Cr.P.C in the facts and circumstances of the case. I cannot accept the contention of the Public Prosecutor. Section 57 of IPC read like this:

“57. In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.”

12. Section 57 of IPC clearly says that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. Section 511 of IPC is extracted hereunder:

“Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment

provided for that offence, or with such fine as is provided for the offence, or with both." (Emphasis supplied)

13. Section 511 of IPC says that whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both. As far as Section 376(2) IPC is concerned the maximum punishment that can be imposed is life imprisonment. Section 57 of IPC clearly says that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. The contention of the Public Prosecutor is that since there is an explanation in Section 376(2) IPC about the life imprisonment as 'remainder of that person's natural life' Section 57 of IPC cannot be adopted for computing 60 days as per Section 167(2) Cr.P.C. If this contention of the Public Prosecutor is accepted the sentence that can be imposed under

Section 511 of 376(2) IPC and under Section 376(2) IPC will be the same. That will not be a proper interpretation of the provisions. Anyway, in this case, the question is about the computation of the period of detention under Section 167(2)(a) Cr.P.C. Simply because a meaning is given to the 'imprisonment for life' in Section 372(2) IPC, it can't be said that for computing the period of detention under Section 167(2) Cr.P.C, Section 57 of IPC is not applicable. I cannot accept this contention of the prosecution because the Apex Court observed that while interpreting Section 167Cr.P.C a liberal approach is necessary. In **Rakesh Kumar Paul v. State of Assam (2017(4) KHC 470)**, the Apex Court observed like this:

“39. This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the Court frustrates the indefeasible right. Reference was made to Mohammed Iqbal Madar Sheikh v. State of Maharashtra, 1996 KHC 1405 : 1996(1) SCC 722 : 1996 SCC (Cri) 202 : JT 1996(1) SC 114 : 1996(4) KarLJ 29 : 1996(1) SCALE 123: 1996 (1) SCR 183 wherein it was observed that some Courts keep the application for 'default bail' pending for some days so that in the meantime a charge sheet is submitted. While such a practice both on the part of prosecution as well as some Courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for 'default bail' during the interregnum when the statutory period for filing the charge sheet or challan expires and the submission of the charge sheet or challan in Court.

40. Procedure for obtaining default bail

In the present case, it was also argued by the learned counsel for the State that the petitioner did not apply for 'default bail' on or after 4th January, 2017 till 24th January, 2017 on which date his indefeasible right got extinguished

on the filing of the charge sheet. Strictly speaking this is correct since the petitioner applied for regular bail on 11th January, 2017 in the Gauhati High Court – he made no specific application for grant of 'default bail'. However, the application for regular bail filed by the accused on 11th January, 2017 did advert to the statutory period for filing a charge sheet having expired and that perhaps no charge sheet had in fact been filed. In any event, this issue was argued by the learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore, it is not as if the petitioner did not make any application for default bail-such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for 'default bail' or an oral application for 'default bail' is of no consequence. The concerned Court must deal with such an application by considering the statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

41. We take this view keeping in mind that in matters of personal liberty and Art.21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional Courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court." (Emphasis supplied)

14. The Apex Court observed that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The Apex Court also observed that the history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even

on the basis of a letter addressed to the Chief Justice or the Court. The sum and substance of the Apex Court's decision is that the provision of Section 167 Cr.P.C cannot be interpreted by the court in a technical manner. The Apex Court reminded that the question is about the personal liberty of an accused.

15. It is true that in Section 376(2) IPC, it is mentioned that the imprisonment for life means imprisonment for the remainder of that person's natural life. It is a settled position that imprisonment for life means imprisonment for the remainder of that person's natural life. There is no dispute on that. But when there is a specific provision in the Indian Penal Code which says that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years we cannot ignore that provision and interpret that imprisonment for life means imprisonment for the remainder of that person's natural life even while computing the detention period under Section 167(2) Cr.P.C. As observed by the Apex Court the interpretation of the provisions of 167(2) Cr.P.C should be liberal. On a reading of Section 167(2)(a)(ii) Cr.P.C along with 511 of 376 IPC coupled with Section 57 of the IPC, it is clear that an accused who is charged for the offence under Section 511 of 376 IPC can be imprisonment only for a

period of ten years. If that is the case, the petitioner is entitled statutory bail in this case. Admittedly, 60 days is over after the first remand of the petitioner. The petitioner was arrested on 19.6.2020. As on today admittedly the final report is not filed. Therefore, the petitioner is entitled statutory bail under Section 167(2)(a)(ii) Cr.P.C. Therefore, this bail application is allowed with the following stringent conditions.

1. Petitioner shall be released on bail on executing a bond for Rs.50,000/- (Rupees Fifty Thousand only) with two solvent sureties each for the like sum to the satisfaction of the jurisdictional Court.

2. The petitioner shall appear before the Investigating Officer for interrogation as and when required. The petitioner shall co-operate with the investigation and shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer.

3. Petitioner shall not leave India without permission of the jurisdictional Court.

4. Petitioner shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected.

5. The petitioner shall strictly abide by the

various guidelines issued by the State Government and Central Government with respect to keeping of social distancing in the wake of Covid 19 pandemic.

6. The petitioner shall not enter the jurisdiction limit of Valiyamala Police Station till the final report is filed in Crime No.584/2020.

7. If any of the above conditions are violated by the petitioner, the jurisdictional Court can cancel the bail in accordance to law, even though the bail is granted by this Court.

Sd/-

P.V.KUNHIKRISHNAN
JUDGE

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