

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 09TH DAY OF SEPTEMBER 2020 / 18TH BHADRA,  
1942

Cr1.MC.No.3463 OF 2020 (C)

AGAINST THE ORDER DATED 16.07.2020 IN CRL.M.C.NO.890/2020  
AND CRL.M.P.NO.1559/2020 OF SPECIAL COURT FOR THE TRIAL OF  
OFFENCES UNDER POCSO ACT, THALASSERY

CRIME NO.33/2020 OF CBCID, KASARAGODE

PETITIONER:

X

BY ADV. SRI.SOORAJ T.ELENJICKAL

RESPONDENTS/STATE & ACCUSED:

- 1 STATE OF KERALA  
REPRESENTED BY THE PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, ERNAKULAM - 682031  
CRIME NO. 33/2020 OF CBCID, KASARGODE)
- 2 PADMARAJAN  
AGED 44 YEARS  
S/O. KUNHIKANNAN, KURUNGATT HOUSE,  
TRIPANGOTTOOT AMSOM, KADAVATHOOR, KURUNGATT,  
KASARAGODE - 670 676.

R1 BY SRI.SUMAN CHAKRAVARTHY, SPL. GOVERNMENT  
PLEADER

R2 BY ADVS. SRI.S.RAJEEV  
SRI.K.K.DHEERENDRAKRISHNAN  
SRI.V.VINAY  
SRI.K.ANAND

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON  
25-08-2020, THE COURT ON 09-09-2020 PASSED THE FOLLOWING:

**C.R.**

**P.B.SURESH KUMAR, J.**

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**Criminal M.C. No.3463 of 2020**  
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**Dated this the 9<sup>th</sup> day of September, 2020**

**ORDER**

This is a proceedings challenging Annexure - 4 order passed by the Special Court for Trial of Offences under the Protection of Children from Sexual Offences Act, Thalassery, in terms of which the sole accused in Crime No.94 of 2020 of Panoor Police Station, renumbered as Crime No.33 of 2020 of CBCID, Kasaragode, was enlarged on bail.

2. The petitioner is the mother of the victim in the case. The victim is aged about 10 years. The second respondent who is the accused in the case is a teacher in the school where the victim is pursuing her studies. The accusation in the case is that the accused committed sexual assault on the victim girl on several occasions in between 15.01.2020 and 02.02.2020 at the bathroom of the school. The case was, therefore, registered for offences punishable under Sections 376(2)(f), 376AB and 354B of the Indian Penal Code (the IPC) and Sections 5(f), 5(l) and 5(m) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act).

3. The accused, on his arrest, moved the Special Court for bail on a few occasions and all the applications preferred by him in this regard have been dismissed. The accused, thereupon, moved this court for bail, and this court also declined bail to the accused in terms of Annexure - 3 order. Later, since the final report in the case has not been filed despite the accused being in custody for 90 days, the accused filed Crl.M.C.No.890 of 2020 before the Special Court for bail under Section 167(2) of the Code of Criminal Procedure (the Code). When the said application was pending, the final report in the case has been filed alleging commission of offences punishable under Sections 323 and 324 of the IPC and Sections 75 and 82 of the Juvenile Justice (Care and Protection of Children) Act, 2015. Annexure - 6 is the final report. It is, however, stated in Annexure - 6 final report that the investigation in the case as regards the remaining offences is yet to be completed, and as and when the investigation is completed, supplemental final report would be filed in the matter. When the final report was filed, the accused filed Crl.M.P No.1559 of 2020 in the pending proceedings, praying for orders to treat the proceedings as one instituted under Section 439 of the Code. In the meanwhile, the investigating officer in the case filed an application seeking permission of the court for conducting further investigation in the matter under Section 173(8) of the Code and the Special Court allowed the said application. The Special Court took the view that insofar as the investigation in the case has not been completed despite the accused being in custody for 90 days, the accused is

entitled to bail, and accordingly he was enlarged on bail in terms of Annexure - 4 order. As noted, the petitioner is aggrieved by Annexure - 4 order.

4. Heard the learned counsel for the petitioner, the learned Senior Public Prosecutor as also the learned counsel for the accused.

5. The learned counsel for the petitioner contended that the application for bail preferred by the accused has been dismissed by this court only on 08.07.2020 and the decision of the Special Court in granting bail to him within a week thereafter on 16.07.2020 is vitiated by judicial impropriety. The learned counsel has relied on the decision of this court in **Jayaraj v. State of Kerala**, 2009(3) KLT 653, in support of the said contention. It was also contended by the learned counsel that the offence punishable under Section 376AB of the IPC being one of the offences alleged against the accused, the court below ought to have heard the petitioner also as provided for under Section 439(1A) of the Code for granting bail to the accused and the impugned order being one passed without following the said procedure, the same is vitiated. It was also contended by the learned counsel that in so far as the conclusion arrived at by the investing agency as of now is that the offences punishable under the POCSO Act are not made out, the Special Court established under the POCSO Act lacks jurisdiction to grant bail to the accused and the impugned order is liable to be set at naught on that

ground as well. In addition, the learned counsel has made elaborate submissions to bring home the point that the allegations against the accused are correct and the Special Court, in the circumstances, ought not to have granted bail to the accused.

6. The learned Senior Public Prosecutor submitted that the investigation in the case is still continuing and the investigating agency has not so far ruled out the commission of the serious offences alleged against the accused, including the offences punishable under the POCSO Act. Having regard to the peculiar facts of this case, the learned Senior Public Prosecutor has also submitted that the Special Court ought not to have granted bail to the accused at this stage.

7. The learned counsel for the second respondent submitted that the impugned order is one passed under Section 167(2) of the Code. It was also submitted by the learned counsel that since the accused was enlarged on bail under Section 167(2) of the Code, Section 439(1A) of the Code does not have any application. It was also submitted by the learned counsel that insofar as the second respondent is alleged to have committed offences punishable under the POCSO Act also and the investigation in the case is yet to be concluded, it cannot be said that the Special Court is denude of its powers in granting bail to the accused.

8. In reply to the submissions made by the learned counsel for the second respondent, the learned counsel for the

petitioner asserted that the impugned order cannot be construed as one issued under Section 167(2) of the Code and that the same is one passed on merits invoking the power under Section 439 of the Code and that the Special Court, in the circumstances, would have complied with Section 439(1A) of the Code. Alternatively, placing reliance on the provision in Section 439(1A) of the Code, it was submitted by the learned counsel that the said provision needs to be complied with, even while granting bail to an accused in a case under Section 167(2) of the Code.

9. I have considered the submissions made by the learned counsel for the parties on either side.

10. The concept of setting aside an unjustified, illegal or perverse order granting bail to the accused in a case and the concept of cancelling the bail granted to the accused on the ground that he has misused the freedom granted, are different. In the case on hand, the petitioner seeks orders setting aside the bail granted to the second respondent on the ground that the impugned order granting him bail is unjustified, illegal and perverse. The contentions advanced by the learned counsel for the petitioner need to be considered in the above perspective.

11. This being a proceedings challenging the bail granted to the accused in a case, it may not be appropriate for this court to examine the correctness or otherwise of the allegations levelled against the accused, for while granting or declining bail, the

court is not is expected to make an adjudication as to the correctness of the allegations levelled against the accused. As such, I am not impressed by the arguments advanced by the learned counsel for the petitioner on the premise that the allegations levelled against the accused are correct. Similarly, I do not find any merit in the argument made by the learned counsel for the petitioner that the Special Court lacks jurisdiction to grant bail in a case of the instant nature, for the investigation in the case is yet to be completed and the investigating agency has so far not ruled out the commission of the offences under the POCSO Act by the accused.

12. The next question is as to whether the Special Court was justified in granting bail to the second respondent without compliance of the provision contained in Section 439(1A) of the Code. For considering this question, it is necessary to consider the ancillary question as to whether the accused was entitled to bail in terms of Section 167(2) of the Code, for if it is found that the accused was entitled to bail under that provision, the dispute between the parties as to the power exercised by the Special Court for granting bail to the accused would become irrelevant. True, the investigation in the case relates to offences punishable with imprisonment for a term not less than 10 years. As far as the allegations constituting the said offences are concerned, the final report is yet to be filed and the investigation is still continuing. If that be so, the accused is entitled to bail under Section 167(2) of the Code, unless the court finds that the accused is not entitled to be enlarged on bail in view of the offences disclosed in

the final report already filed. The petitioner has no case that the Special Court was not justified in granting bail to the accused having regard to the materials, on the basis of which the final report has been filed. In other words, it can be concluded that the accused is entitled to bail in the case under Section 167(2) of the Code. If that be so, the question to be examined is as to whether it is necessary for the court granting bail to an accused under Section 167(2) of the Code, to comply with the provision under Section 439(1A) of the Code.

13. Sub-sections (1) and (2) of Section 167 of the Code, which is relevant in the context, read thus:

**“167. Procedure when investigation cannot be completed in twenty-four hours.**

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no 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 of 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 women under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.”

It is evident from the extracted provisions that the investigation in a case ought to be completed ideally within first 24 hours and if the investigation cannot be completed within the said time limit, and if there are grounds for believing that the accusation is well-founded, the officer investigating the case shall forward the accused to the nearest Judicial Magistrate and that Judicial Magistrate may from time to time authorize the detention of the accused in such custody thereafter as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. The proviso to sub-section (2) of Section 167 however, precludes the Magistrate from authorizing detention of the accused under that provision for a total period exceeding ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than ten years and sixty days, where the investigation relates to any other offence and mandates that on the expiry 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. It is also evident from sub-sections (1) and (2) of Section 167 of the Code that

the detention of the accused during the course of investigation ought to be confined to sixty or ninety days, as the case may be, and the custody of the accused thereafter ought not to be guided by the suspicion that he may have committed the offence.

14. Coming to the bail under Section 167(2) of the Code, it is fundamentally different from the bail under Sections 437, 438 and 439 of the Code. The contrast is particularly stark since Section 167(2) grants an indefeasible right to an accused, whereas Sections 437, 438 and 439 do not grant any such right to the accused and grant of bail under those provisions is only a matter of judicial discretion. The right of an accused to seek bail under Section 167(2) accrues upon the default of the investigating officer in concluding the investigation within the requisite time specified in the provision. While considering an application for bail under Section 167(2), a court does not consider the merits of the case, but only considers the question as to whether there is default on the part of the investigating agency in completing the investigation in the case within the prescribed period. If the investigating agency fails to file the final report in the case within the time prescribed, the accused in custody gets an absolute right to bail [**See Rajnikant Jivanlal v. Intelligence Officer, Narcotic Control Bureau, New Delhi**, (1989)3 SCC 532 and **Uday Mohanlal Acharya v. State of Maharashtra**, (2001)5 SCC 453]. As opposed to Section 167(2), a court acting under Sections 437 and 439 are guided by different considerations in exercising its judicial discretion namely (i) the

nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution; (ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; (iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his ascendance; (iv) character, behaviour and standing of the accused and the circumstances which are peculiar to the accused; (v) larger interest of the public or the State and similar other considerations [See **Prahlad Singh Bhati v. NCT, Delhi and another**, (2001) 4 SCC 280]. There is no hard and fast rule also regarding grant or refusal to grant bail under those provisions and the case has to be considered on the facts and circumstances of each case and on its own merits.

15. Section 439(1A) of the Code reads thus:

“The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code(45 of 1860).”

It brooks no argument that Section 439(1A) is mandatory vis-à-vis applications for bail are concerned other than the applications under Section 167(2) of the Code. True, the phraseology of Section 439(1A) favours the section being considered as mandatory for applications for bail under Section 167(2) also. But the phraseology alone cannot be the decisive factor for resolving the question as to whether Section 439(1A) of the Code applies to an application for bail under

Section 167(2) of the Code. The question is whether the legislature intended that provision to be applied for grant of bail under Section 167(2) of the Code. The purpose of Section 439(1A) of the Code is to ensure that a victim or a person acting in the interest of the victim shall also be heard before a decision on a bail application is made. No doubt, such an opportunity is vital as regards applications under Sections 437,438 and 439 of the Code, for the same would certainly aid the court while exercising its discretionary jurisdiction to grant or refuse bail to the accused under those provisions. However, a decision on the application for bail under Section 167(2) of the Code being one taken by the court on the basis of the period of custody undergone by the accused, compliance of the provision contained in Section 439(1A) of the Code does not make any difference. Even if it is held placing reliance on the phraseology used in Section 439(1A) of the Code that the provision therein is to be followed while granting bail under Section 167(2) of the Code, it would be an empty formality. The purpose of Section 167(2) is to protect the liberty of an individual who has been detained and continues to be detained pending investigation in a case. It is trite that in matters relating to personal liberty of an individual, the court must lean in favour of personal liberty [See **Rakesh Kumar Paul v. State of Assam**, 2017(4) KLT 284 (SC)]. In the aforesaid circumstances, I am inclined to hold that the provision contained in Section 439(1A) of the Code does not apply to an application for bail under Section 167(2) of the Code.

16. Coming to the contention taken by the petitioner

that the impugned order is vitiated by judicial impropriety, in so far as the final report in the case has been filed after passing of Annexure – 3 order by this court, according to me, it cannot be said that the order granting bail can be viewed as an act of judicial impropriety, for change of circumstances has been held to be a reason for the accused to seek regular bail before the jurisdictional court though the application for bail has been rejected by the superior courts earlier. In **Jayaraj**, this court observed thus:

“7. When the superior court has refused to grant bail to an accused on merits of the case and that order remained in force, judicial discipline and propriety requires the subordinate criminal court not to entertain an application for bail from such accused unless the superior court has either permitted the accused to move again before the subordinate criminal court or, the case is one covered by the Sub-clause (a) of the proviso to Section 167(2) of the Code.”

The judgment aforesaid has no application to the facts of the present case as it is found that the accused is entitled to bail under Section 167(2) of the Code.

In the light of the discussions aforesaid, the Criminal M.C. is without merits and the same is, accordingly, dismissed.

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Sd/-  
**P.B.SURESH KUMAR, JUDGE.**

**P.B.SURESH KUMAR, J.**

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**Criminal M.C. No.3463 of 2020**  
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**Dated this the 9<sup>th</sup> day of September, 2020**

**ORDER**

It is observed that in several matters instituted before this court where victim anonymity is to be maintained, the identity of the victim is disclosed directly or indirectly. In some matters, identity is disclosed in the pleadings and in some others, identity is disclosed in the documents produced along with the pleadings. It is also observed that though documents revealing the identity of the victim are produced in sealed covers in the light of the decision of the Apex Court in **Nipun Saxena and another v. Union of India and others**, (2019) 2 SCC 703, there is no system in place to maintain victim anonymity, once the sealed covers are opened by the court. In the case on hand, it is observed that the opened cover containing the documents were sent back to the section and brought back from the section to the court on the subsequent hearing dates. It is also observed that there is no system in place for disposal of the documents produced in sealed covers, after the final disposal of the case. Similarly, it is observed that the registry is insisting copies of the documents revealing the identity of the victims to be given to the opposite parties in the matter. There is

no system in place to maintain victim anonymity in such situations. Needless to say, the procedure in place to maintain victim anonymity is against the spirit of Section 228A of the Indian Penal Code, Sections 24(5), 33(7) and 37 of the Protection of Children from Sexual Offences Act, 2012, and the decision of the Apex Court in **Nipun Saxena**. In the circumstances, the following directions are issued for future guidelines for maintaining victim anonymity in the matters instituted before this court:

1. The criteria for deciding the identity of the victim shall include the identity of the family of the victim, the school/college of the victim, the place of work of the victim, the relatives of the victim, the neighbourhood of the victim and all other information from which the identity of the victim would be revealed.

2. In all proceedings instituted by or on behalf of the victim and against them, documents in which the identity of the victim is disclosed, either required in terms of the rules of the court or produced by the parties concerned to substantiate their case, shall be insisted to be filed in a sealed cover.

3. The registry shall designate an officer for the proper custody of documents produced in sealed covers in cases where victim anonymity is to be maintained and shall provide to that officer necessary infrastructure for keeping custody of the documents. Such officer shall be bound by the highest standards of confidentiality.

4. After the matter is numbered, registry shall forward the documents received in sealed covers in a self-sealing bag/envelope

of appropriate size, preferably one having a provision for tamper proof seal as well, or in other similar tamper proof bag/envelope, after affixing on it a label indicating the particulars of the case under the signature of the Filing Scrutiny Officer concerned to the designated officer for custody and that officer shall ensure that the documents are made available to the court as and when the matters are listed for hearing.

5. If the self-sealing bag/envelope in which the documents are kept is opened by the court for perusal of the documents, after the purposes of the court, the same shall be kept in a fresh self-sealing bag/envelope and returned to the designated officer, after affixing on the same a new label indicating the particulars of the case under the signature of the Court Officer concerned. If the self-sealing bag/envelope is opened subsequently by the court, the same procedure directed herein-above shall be repeated.

6. The parties producing documents disclosing the identity of the victims need not have to keep or give copies of the same to the opposite parties and they need only refer to such documents in their pleadings.

7. If the lawyers appearing against the victims require/need to peruse the documents in the sealed covers, they shall peruse the same with the permission of the court and if they are permitted by the court to peruse the documents, the documents shall be preserved in the same manner indicated in the preceding directions.

8. These directions shall be in force until replaced by the

Crl.M.C No.3463 of 2020

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Honourable the Chief Justice by appropriate practice instructions.

Sd/-  
**P.B.SURESH KUMAR, JUDGE**

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