



2024/KER/17378

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MRS. JUSTICE SOPHY THOMAS
TUESDAY, THE 27TH DAY OF FEBRUARY 2024 / 8TH PHALGUNA, 1945
CRL.MC NO. 503 OF 2024

CRIME NO.500/2022 OF CHERPULASSERY POLICE STATION, PALAKKAD
SC NO.1238 OF 2022 OF FAST TRACK SPECIAL COURT, PATTAMBI

PETITIONER/ACCUSED:

KHALID,
AGED 50 YEARS,
S/O MUHAMMED, PARAIKKAL, KUTTIKODE, THRIKKADEERI P.O,
PALAKKAD, KERALA, PIN - 679502.

BY ADVS.
VISHNU BHUVANENDRAN
B.ANUSREE
MIRAL K.JOY
ABHILASH C.V.
VARUN JACOB

RESPONDENTS/STATE:

- 1 STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
PIN - 682031.
- 2 XXXXXXXXXXXX
XXXXXXXXXXXX XXXXXXXXXXXX

PUBLIC PROSECUTOR SRI.PRASANTH M.P

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
27.02.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**"CR"****ORDER**

This petition is at the instance of the sole accused in Sessions Case No.1238 of 2022 on the file of Fast Track Special Court, Pattambi, for quashing Annexure-A2 final report in Crime No.500 of 2022 of Cherpulassery police station and the proceedings pursuant thereto.

2. The prosecution allegation is that, in March 2020, the petitioner sexually assaulted the victim girl aged 11 years by touching her private parts. In May 2021, he committed penetrative sexual assault on the minor girl inside his autorickshaw, and again on 09.07.2022, he sexually assaulted the victim by touching her chest.

3. According to the petitioner, he is absolutely innocent and he was falsely implicated without any rhyme or reason. The victim is a close relative of the petitioner, and only out of vengeance, a false complaint was foisted against him. According to him, during the period of alleged sexual assault on the victim girl, he was abroad. He produced Annexures A3 and A4 passports to show that, he was not available in Kerala during the alleged period of assault. So, his prayer is to quash Annexure-A2 final report and



the proceedings in SC No.1238 of 2022 pending against him, before the Fast Track Special Court, Pattambi.

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

5. The petitioner produced Annexures A3 and A4 passports to show that, he left Kerala for Saudi Arabia on 18.05.2015 and came to his native only on 20.11.2016. Thereafter, he returned to Saudi Arabia on 21.10.2019 and came back to Kerala on 26.02.2022. Again he returned to Saudi Arabia on 24.06.2022 and came back to Kerala on 10.09.2023. According to him, on the dates of alleged sexual assault on the victim girl, i.e, 27.03.2020, 29.05.2021, and 09.07.2022, he was not available in Kerala. It is true that, Annexures-A3 and A4 passports will show the travel details of the petitioner on the dates mentioned by him.

6. The victim girl is aged only 11. The petitioner claims to be a close relative of the victim. So, the chances of mistaken identity is very rare. But, regarding the date of assault mentioned by the victim girl, who is aged only 11, we cannot expect that a 11 year old girl will remember all the dates of sexual assault on her, with mathematical exactitude. Moreover, we may not know at this stage regarding the manipulations or malpractices if any done in



his passport or travel documents. So, at present, it is not safe to quash the final report, in which the petitioner is facing charges of serious offences under Sections 376AB, 376(2)(n) of IPC and Sections 3(b), 4, 5(l), 5(m) and 6 (1) of the POCSO Act, 2012.

7. The crime was registered on the basis of the FI Statement given by the victim girl. Police conducted detailed investigation, by questioning witnesses including the Teacher of the school in which the victim girl was studying. The genuineness of the passport, the dates of travel etc. are to be put to strict proof, and the burden of the petitioner is rather heavy while taking a plea of alibi as a defence.

8. Alibi is only a rule of evidence recognized in Section 11 of the Evidence Act, that facts which are inconsistent with the fact in issue become relevant. Plea of alibi is a question of fact. The Latin word alibi means 'elsewhere'. The accused takes that plea as a defence to show that, he was falsely implicated, as he was away from the place of occurrence, when the occurrence took place, and it was extremely improbable that he had participated in that crime.

9. It is the burden of the prosecution to prove the incident, and also the role of the accused in that incident. That burden will not be lessened by the mere fact that the accused had adopted the



defence of Alibi. Only when prosecution succeeds in discharging the burden by proving the incident, and by proving participation of the accused in that incident, the plea of alibi put up by the accused needs to be considered. When the evidence adduced by prosecution is able to create a reasonable doubt in the mind of the court, about the presence of the accused in the scene of crime, at the time of occurrence, the accused is definitely entitled to get benefit of that doubt. In a plea of alibi, it is the burden of the accused to prove with absolute certainty that the presence of the accused at the scene of crime at the time of occurrence was rather an impossibility. He has to adduce positive evidence to prove the plea of alibi, and that opportunity arises only when prosecution discharges its burden to prove the incident, and the participation of the accused in that incident. Plea of alibi is a defence available for the accused, when prosecution establishes the case against him. Hence it has to be used as a shield, and not as a sword. So a plea of alibi taken by the accused need not be entertained, till prosecution establishes its case satisfactorily. Therefore the plea of alibi cannot be entertained, before prosecution is given an opportunity to establish its case.

10. Learned Public Prosecutor also would submit that, the



plea of alibi is a question of fact to be entertained and decided only after prosecution takes its evidence to prove the incident, and the participation of the accused as well.

11. In **Binay Kumar Singh v. State of Bihar [(1997) 1 SCC 283]**, in paragraph 23, the Apex court observed as follows:

“23. The Latin word alibi means “elsewhere” and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required



for establishing the plea of alibi. This Court has observed so on earlier occasions (vide *Dudh Nath Pandey v. State of U.P.* [(1981) 2 SCC 166 : 1981 SCC (Cri) 379] ; *State of Maharashtra v. Narsingrao Gangaram Pimple* [(1984) 1 SCC 446 : 1984 SCC (Cri) 109 : AIR 1984 SC 63]).

12. In **Shaikh Sattar v. State of Maharashtra [(2010) 8 SCC 430]**, the Apex court has observed in paragraph 35 as follows:

35. Undoubtedly, the burden of establishing the plea of alibi lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which would make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. The plea of alibi had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence which has not been led in the present case. We may also notice here at this stage the proposition of law laid down in *Gurpreet Singh v. State of Haryana* [(2002) 8 SCC 18 : 2003 SCC (Cri) 186] as follows: (SCC p. 27, para 20)

"20. ... This plea of alibi stands disbelieved by both the courts and since the plea of alibi is a question of fact and since both the courts concurrently found that fact against the appellant, the accused, this Court in our view, cannot on an appeal by special leave go behind the abovenoted concurrent finding of fact."

It is the prosecution to prove its case by adducing evidence. The petitioner is at liberty to take the plea of alibi as his defence and to establish the same with positive evidence. Before prosecution adduce evidence to establish the incident, and to prove



participation of the accused, there is no scope for entertaining a defence plea of alibi.

13. The dates of travel mentioned in Annexures A3 and A4 passports are not liable to be accepted for quashing the final report in Crime No. 500 of 2022, or the proceedings pending in SC No.1238 of 2022, invoking the inherent jurisdiction of this Court. So, the Crl.M.C is liable to be dismissed. But, dismissal of this Crl.M.C will not be a bar for the petitioner to take the plea of alibi before the trial court at appropriate stage, and to establish the same by adducing positive evidence.

Leaving open all the contentions to be taken up by the petitioner in SC No.1238 of 2022, this Crl.M.C is dismissed.

Sd/-
SOPHY THOMAS
JUDGE

DSV/-



APPENDIX OF CRL.MC 503/2024

PETITIONER'S ANNEXURES :

Annexure-A1 TRUE COPY OF FIR IN CRIME NO.500/2022 OF
CHERPULASSERY POLICE STATION, PALAKKAD.

Annexure-A2 TRUE COPY OF THE FINAL REPORT DATED 05.11.2022
IN CRIME NO.500/2022 OF CHERPULASSERY POLICE
STATION, PALAKKAD.

Annexure-A3 TRUE COPY OF THE PASSPORT BEARING NO. K 7516762
OWNED BY THE PETITIONER.

Annexure-A4 TRUE COPY OF THE PASSPORT BEARING NO. W 5494724
OWNED BY THE PETITIONER.

Annexure A5 TRUE COPY OF THE JUDGMENT DATED 07.07.2023 IN
CRL MC 5267/2023.

RESPONDENTS' ANNEXURES : NIL