

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

WEDNESDAY, THE 22ND DAY OF JUNE 2022 / 1ST ASHADHA, 1944

BAIL APPL. NO.3475 OF 2022

CRIME NO.515/2022 OF ERNAKULAM TOWN SOUTH POLICE STATION,
ERNAKULAM

PETITIONER/ACCUSED:

VIJAY BABU
AGED 45 YEARS, S/O V.SUBASH CHANDRA BABU
SREE LAKSHMI,
LAKSHMI NADA,
KOLLAM, PIN - 691013

BY ADVS.
SRI.S.RAJEEV
SRI.V.VINAY
SRI.M.S.ANEER
SRI.SARATH K.P.

RESPONDENTS/STATE:

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

(CRIME NO.515 OF 2022 OF
E.T.SOUTH POLICE STATION)
- 2 STATION HOUSE OFFICER
E T SOUTH POLICE STATION,
ERNAKULAM, PIN - 682015

(CRIME NO.515 OF 2022 OF
E.T.SOUTH POLICE STATION)
- *3 BUREAU OF IMMIGRATION,
REGIONAL OFFICE AT COCHIN

INTERNATIONAL AIRPORT, 2ND FLOOR,
AIRLINES BULDING, CIAL NEDUMBASERRY,
COHCHIN AIRPORT P.O., PIN -683111

*4 XXXX

*(ADDL.R3 AND R4 ARE IMPEADED AS PER ORDER DATED
31/05/2022 IN CRL.M.A.NO.3/2022 AND
CRL.M.A.NO.6/2022) .

BY ADVS

SRI.GRASHIOUS KURIAKOSE ADDL.DIRECTOR

GENERAL OF PROSECUTION

SRI.M.R.RAJESH

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
17.06.2022, THE COURT ON 22.06.2022 PASSED THE FOLLOWING:

"C.R."

BECHU KURIAN THOMAS, J.

B.A. No.3475 of 2022

Dated this the 22nd day of June, 2022

ORDER

Apprehending arrest in a non-bailable offence, a cine artist cum producer has approached this Court seeking pre-arrest bail under section 438 of the Code of Criminal Procedure, 1973, (for short the Cr.P.C). Petitioner alleges that the ingredients of the offences are not made out and hence his liberty ought not to be curtailed, unless and until he is found guilty in accordance with the procedure established by law.

2. On 22.04.2022, on the basis of information received from an actress alleging several instances of rape committed on her by the petitioner, Crime No.515 of 2022 of Ernakulam Town South Police Station was registered. A statement was also given by the victim under Section 164 Cr.P.C on 23.04.2022. The petitioner is alleged to have committed rape on the victim with the promise of marriage, twice during her menstrual periods and

on other occasions, after causing physical injuries and without her consent. The prosecution further alleges that, on coming to know about the registration of the crime, petitioner went abroad in an attempt to flee from the hands of law and sitting in the comfort of another country, instituted this bail application under section 438 of Cr.P.C.

3. Petitioner, on the other hand, denies the allegation of rape as wholly false and pleaded that the accusation is only a machination of the victim who was upset on getting information that another actress was decided to be cast as a heroine, by the Director of that movie, in a new movie project proposed to be produced by the petitioner. The survivor even expressed her ire at the new heroine in front of many people, on 18-04-2022. It was also pleaded that evidence of the nature of relationship between the petitioner and the survivor is available in plenty, on the mobile phones through WhatsApp messages and Instagram chats and other documents. It is alleged that, by quirky conduct, a consensual relationship is projected as rape.

4. Sri.S.Rajeev, learned counsel for the petitioner contended that though the allegations of rape are alleged to

have occurred between 16.03.2022 to 14.04.2022, the victim never rushed to a police station and on the other hand she gave the complainant only on 22.04.2022. It was submitted that petitioner left for Dubai on a pre-planned trip and that, subsequent to his return under the protection of an order from this Court, he has been subjected to interrogation for more than 38 hours. Petitioner contends that he has voluntarily surrendered the two mobile phones in his possession and has also handed over all documents available with him. On the aforesaid basis, it was urged that further custodial interrogation of the petitioner was not warranted and that he is willing to cooperate with the investigation.

5. The learned Counsel also argued that an acquaintance with the victim from 2018 onwards slowly turned into a relationship with instances of consensual sex. Further, the consensual sexual relationship was done with the knowledge that petitioner was a married man and therefore the offences alleged are not made out at all. On behalf of the petitioner, it was further contended that the numerous WhatsApp messages between the petitioner and the survivor will reveal the nature of their

relationship. The phones having been already handed over to the police, even the deleted messages between 16-03-2022 to 31-03-2022, which were deleted before the present allegations cropped up, can also be retrieved by scientific analysis, for which the mobile phones have already been forwarded.

6. Sri. Grashious Kuriakose, the learned Additional General of Prosecutions vehemently opposed the grant of pre-arrest bail and submitted that the practice of filing applications for bail sitting outside the country, should not be entertained. He further submitted that the investigation has collected evidence against the petitioner and the offences alleged being serious and heinous, grant of pre-arrest bail will not only prejudice the investigation but will also send a wrong signal to the society. The Senior Counsel further contended that the presumption under section 114A of the Evidence Act, 1872 clearly applies to the instant case and hence the principle of presumption of innocence stands superseded. It was urged that the victim is an upcoming film actress who acted in a movie produced by the petitioner, which happens to be the only movie in which she has acted to date, had looked upon the accused as an elder colleague and

implicitly trusted him, but, he misused the trust and exploited her, thereby revealing his true colour of a 'wolf in a sheep's clothing'. According to the prosecution, the cumulative effect of all the above leans against the grant of pre-arrest bail and on the other hand, custodial interrogation of the petitioner is required, still.

7. The learned Additional General of Prosecution further contended that the investigation so far has revealed that the petitioner was in the habit of developing sexual relationships with women in distress. He further contended that though petitioner had surrendered his mobile phone to the investigating team, the messages from 16-03-2022 till 31.03.2022, were completely erased, which compels the investigation to doubt the veracity of the contentions now being put forth by the petitioner. Apart from the above, it was also argued that the petitioner came on Facebook live, revealing the identity of the victim, making her a laughing stock and even threatened to prosecute her. It was also asserted that the gravity of the allegations, the conduct of the accused, apart from the requirement to conduct a test identification parade as well as his potency test are areas

which require custodial interrogation. He concluded by submitting that even the subsequent conduct, after registration of the crime, should disentitle the petitioner to any relief in this application.

8. Sri. M.R.Rajesh, learned counsel appearing on behalf of the victim argued with great elan that petitioner had misused and abused the trust reposed on him by her and that even during her menstrual periods, ignoring her repeated objections, forced himself upon her. As a novice artist, her objections were easily subdued and she could not prevent the repeated intrusions into her bodily autonomy and was subjected to repeated sexual assaults. The learned counsel also submitted that the victim had approached the police within eight days of the last assault, which itself shows the veracity of her allegations and hence, this was not a fit case for the grant of pre-arrest bail.

9. Adv.M.R.Rajesh, further argued that the modus operandi adopted by the petitioner by building up confidence and trust in the victim as a powerful actor and producer of movies created an aura of faith and thereafter sexually abused the victim. It was further pointed out that though the accused had come out in the

public, revealing the identity of the victim and even stated that he retains the WhatsApp messages, but curiously, the documents produced show absence/deletion of such messages from the mobile phones for the period till 31.03.2022. The learned counsel further argued that the selective deletion of WhatsApp messages is crucial, considering the victim's statement that on 16.03.2022 she was brutally raped after forcing her to consume red wine. The learned counsel further contended that without custodial interrogation, the investigation will not be able to unravel the clear picture that happened from 16.03.2022 onwards and that the manipulation of evidence by deleting the WhatsApp messages indicates the extent to which the accused could go to destroy the evidence. In such circumstances, the benefit of pre-arrest bail ought not to be granted.

10. Exhaustive arguments were raised by all the counsel with the aid of numerous judgments. However, this Court reminds itself that this is an application for anticipatory bail. The nuances of 'consent' under the Indian Penal Code or of 'rape' are not to be deliberated upon at this stage, lest it prejudices either side, at the time of trial. In this phase of legal proceedings, this

Court is only to consider the competing claims of liberty of an individual guaranteed under Article 21 of the Constitution of India as against the power of investigation of the police against a person accused of a serious crime.

11. However, before considering the merits of this application, it is essential to advert to the preliminary objection raised by the respondents on the maintainability of this bail application. When the application was filed, petitioner was not in the country. It was alleged that petitioner fled from India after coming to know of the registration of the crime. Noticing the intention of the petitioner to subject himself to the jurisdiction of this Court, an interim order was issued 'not to arrest the petitioner'. On that basis, petitioner returned and is presently in Kerala.

12. Since the question regarding the maintainability of an application for pre-arrest bail while the applicant is residing outside the country, arises quite often, the said issue is considered. On the basis of decisions in **Souda Beevi and Another v. S.I. of Police and Others** (2011 (3) KHC 795) and **Shafi S.M. v. State of Kerala and Another** (2020 (4) KHC

510) it was argued that the presence of the petitioner outside the country disentitles the applicant to seek pre-arrest bail.

13. A reading of the aforementioned two decisions shows that such an absolute restriction has not been laid down by this Court. On the other hand, all that those two decisions say is that, atleast before the final hearing, the Court must be convinced that the applicant is within the jurisdiction of the Court so that the conditions if any imposed, could be effectively enforced.

14. Section 438 Cr.P.C does not contain a restrictive mandate that a person residing outside the country cannot file an application for anticipatory bail. It is possible that a person can apprehend arrest even outside the country for an offence that occurred in India. With the advancement in investigative technology and communication, the various agencies of investigation could even be deployed to arrest a person outside the country. An apprehension of arrest can arise even while the applicant is residing outside the country. Thus, when a bonafide apprehension exists, the statute confers power on such a person to seek protection from arrest. In the absence of any restrictive

clauses in S.438, restricting the right of a person residing outside the country from filing an application for pre-arrest bail, court cannot read into the provision such a restriction which the legislature did not incorporate.

15. In the decisions in **Sushila Aggarwal and Others v. State (NCT of Delhi) and Another** [(2020) 5 SCC 1], as well as **Shri Gurbaksh Singh Sibbia and Others v. State of Punjab** [(1980) 2 SCC 565], it was held that courts cannot read into section 438 Cr.P.C. a restriction, which the legislature had not thought it fit to impose. In fact, the Court deprecated the practice of an over-generous infusion of constraints into section 438 and even observed that such restrictions can make the provision itself constitutionally vulnerable. Therefore, I am of the considered view that an application for pre-arrest bail can be filed even by a person residing outside the country. However, the only limitation is that prior to the final hearing, the applicant must be inside the country to enable the court to impose and enforce conditions contemplated under the statutory provisions.

16. Section 438 Cr.P.C has conferred a discretionary right on the higher courts to consider whether a pre-arrest bail ought

to be granted under the particular circumstances of the case. The discretion conferred upon the superior courts of law, though not controlled by any specific guidelines, the same is not to be exercised arbitrarily. Law adjures such courts to utilize their trained discretion while considering an application for pre-arrest bail.

17. Though, as mentioned earlier, numerous decisions were cited by either side, some old and some recent, a narrative of all those decisions is not required since the position of law is classically illustrated in two judgments, both of which are Constitution Bench judgments.

18. In **Shri Gurbaksh Singh Sibbia and Others v. State of Punjab** [(1980) 2 SCC 565], mentioned earlier, the Supreme Court, after noticing the object behind the incorporation of section 438 Cr.P.C held that the said section is a procedural provision which is concerned with the personal liberty of an individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. After noticing that the crimes, the criminals and even

the complainants can occasionally possess extraordinary features, in which the powerful processes of criminal law could be perverted for achieving extraneous ends, the Supreme Court observed that it is to meet such situations also that the provision for grant of anticipatory bail was introduced into the Code of 1973. It was even noted that a developed jurisprudence of bail is integral to a socially sensitized judicial process, especially in the light of the guarantee of personal liberty of an accused. {See the decision in **Gudikanti Narasimhulu v. Public Prosecutor** [(1978) 1 SCC 240] also}.

19. Again in a recent judgment, another Constitution Bench of the Supreme Court in **Sushila Aggarwal and Others v. State (NCT of Delhi) and Another** [(2020) 5 SCC 1], has, after considering the entire gamut of the law relating to anticipatory bail came to twelve significant conclusions in paragraph 92 of the said judgment. Five of those conclusions which are relevant are extracted below:

"92.4. Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant

anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

92.5. Anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge-sheet till end of trial.

92.6. An order of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

92.7. An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

*92.8. The observations in **Sibbia** regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement*

made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail.”

20. The above decisions thus hold that while considering an application for anticipatory bail, the court must be guided by considerations such as nature and gravity of the offences, the role attributed to the applicant, facts of the case, the character of evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offences, the possibility of the accused tampering with the evidence and obstructing the course of justice.

21. While considering an application for bail, Court must take care not to enter into a meticulous examination of the materials collected or comment on the same. Courts must also avoid scrutinizing feminine conduct from a masculine point of view. Myths, stereotyping and even generalisation, which are all different forms of bias, must be avoided. As observed in **Aparna Bhat and Others v. State of Madhya Pradesh and Another** [(2021) SCC OnLine SC 230], the stereotyped notions of chastity, resistance to rape, having visible physical injuries,

behaving in a certain way, reporting the offence immediately, etc are all rape myths. Notwithstanding the above, care must be taken to avoid consensual relationships being converted into instances of rape. Thus, each case presents its own factual scenario and therefore certain grounds peculiar to each case can be taken into account.

22. Viewed in the perspective of the principles referred above, this Court called for the case diary of the investigation, to satisfy itself whether anticipatory bail can be granted to the petitioner or not. In **Chidambaram P. v. Director of Enforcement** [(2019) 9 SCC 24], it was observed that the court can peruse the case diary, even before the trial begins for various purposes, including at the stage of considering an application for pre-arrest bail. Conscious of the need to avoid meticulous analysis of materials collected by the investigation, as revealed from the case diary, I refrain from discussing those in detail.

23. From the materials collected and on an appreciation of the arguments made across the Bar, the following circumstances are taken note of, for the purpose of this application:

(a) The survivor was aware that the petitioner was a married man and that he is continuing in the marriage for the sake of his child.

(b) Petitioner being involved in a subsisting marriage, there was no possibility of a legal marriage with the survivor at present.

(c) During the period from 16-03-2022 till 14-04-2022, the survivor was not under any form of confinement.

(d) The petitioner and the survivor have been communicating with each other through WhatsApp and Instagram consistently and in plenty.

(e) The available messages (from 31-03-2022 to 17-04-2022) between the petitioner and the survivor prima facie convey an intense relationship between them.

(f) While the petitioner deleted the messages from 16-03-2022 till 30-03-2022 from his phones, the survivor also deleted all messages between them, for the entire period in question.

(g) Mobile communications between the petitioner and survivor atleast from 31-03-2022 till 17-04-2022 do not

refer to any instances of sexual assault.

(h) Petitioner has already been questioned for 38 hours and he has handed over to the investigating officer, his two mobile phones, allegedly used by him during the period.

(i) The mobile phones of the petitioner as well as the survivor have been sent for examination to the forensic science laboratory and it is informed that even the deleted WhatsApp and Instagram messages/chats can be retrieved.

(j) Petitioner did not include the survivor in a proposed new movie and another actress has been chosen as a heroine, which came to the knowledge of the survivor after 15-04-2022 and she shouted at the petitioner on 17-04-2022.

(k) Petitioner's wife had filed a case against him in 2018 alleging inter-alia, domestic violence and promiscuous behaviour, however, the complaint was withdrawn within few weeks.

(l) Petitioner's passport has already been impounded and

hence he cannot flee from the country.

24. The above-noted circumstances cannot be ignored while arriving at the conclusion on whether the petitioner should be given the benefit of pre-arrest bail or not.

25. Though the learned Additional Director General of Prosecution and the learned counsel for the survivor laid great emphasis on the presumptions available under section 114(a) as well as under section 53(a) of the Evidence Act 1872, I am of the view that at the stage of considering the grant of pre-arrest bail, those provisions cannot be given undue preference. The presumptions provided under section 114(a) and section 53(a) are rebuttable. Further, as the provisions themselves indicate, those presumptions will arise only when substantive evidence is adduced in a court of law i.e; at the stage of trial. Time has therefore not yet reached to apply those presumptions.

26. On a consideration of the above-mentioned circumstances, I am of the view that petitioner ought to be given the benefit of pre-arrest bail, subject to the condition of limited custody to the investigating officer, as contemplated in the

decision of the Supreme Court in **Gurbaksh Singh Sibbia's** case (supra) and in **Susheela Aggarwal's** case (supra).

27. Accordingly, I allow this application for pre-arrest bail on the following conditions:

(1) The petitioner shall surrender before the Investigating Officer on 27-06-2022 at 09.00 AM for interrogation.

(2) The petitioner can be interrogated for the next seven days i.e; from 27-06-2022 till 03-07-2022 (inclusive) from 09.00 AM till 06.00 PM every day, if required. The petitioner shall be deemed to be under custody during the aforesaid period for facilitating the requirements of investigation.

(3) If the Investigating Officer intends to arrest the petitioner, then he shall be released on bail on the petitioner executing a bond for Rs.5,00,000/- (Rupees Five Lakhs only) with two solvent sureties each for the like sum before the Investigating Officer.

(4) Petitioner shall appear before the Investigating Officer as and when called for.

(5) Petitioner shall not contact or interact with the victim or any of the witnesses.

(6) Petitioner shall not indulge in any form of attack through the social media or other modes against the victim or her family.

(7) Petitioner shall not leave the State of Kerala without prior permission of the jurisdictional court and shall co-operate with the investigation.

(8) Petitioner shall not commit any other offence while he is on bail.

(9) Though petitioner's passport has been impounded, he shall surrender his passport as and when he is issued with a fresh one or if the impounding is cancelled, as the case may be.

Sd/-

**BECHU KURIAN THOMAS
JUDGE**

vps

/True Copy/

PS to Judge