

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 17TH DAY OF NOVEMBER 2022 / 26TH KARTHIKA, 1944

CRL.A NO. 1121 OF 2022

AGAINST THE ORDER DATED 20.10.2022 IN CRMP 1252/2022 AND
18.10.2022 OF SPECIAL COURT-TRIAL OF OFFENCE UNDER SC/ST (POA)

ACT1 989, MANNARKKAD

CRIME NO.159/2022 OF AGALI POLICE STATION, PALAKKAD

APPELLANT/ACCUSED NO.11:

AKSHAY @ AJEESH @ ANATHU
AGED 21 YEARS,
S/O ANEESH T, AKSHAYA'S VEEDU,
EDAVAZHITHALA, THANIMOODU P O,
ATHIYANNUR VILLAGE, NEYYATTINKARA,
THIRUVANANTHAPURAM DISTRICT, PIN - 695123.

BY ADV P.V.JEEVESH

RESPONDENTS/STATE AND DEFACTO COMPLAINANT:

- 1 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, PIN - 682031.
- 2 BABU,
FATHER OF DECEASED VINAYAN,
AGED 55 YEARS,
S/O ANDIKUNJU, PEEDIKAPARAMBIL HOUSE, THANNIYAM
BASAR, ANJANGADI, PADINJARE VEMBALLUR P O,
KODUNGALLUR, THRISSUR DISTRICT, PIN - 680671.

PUBLIC PROSECUTOR SRI.G.SUDHEER

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
10.11.2022, ALONG WITH CRL.A.1132/2022, THE COURT ON
17.11.2022 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

**THURSDAY, THE 17TH DAY OF NOVEMBER 2022 / 26TH KARTHIKA,
1944**

CRL.A NO. 1132 OF 2022

**AGAINST THE ORDER DATED 18.10.2022 IN CRMP NO.1262/2022 OF
SPECIAL COURT-TRIAL OF OFFENCE UNDER SC/ST(POA) ACT1 989,
MANNARKKAD**

CRIME NO.159/2022 OF AGALI POLICE STATION, PALAKKAD

APPELLANT/ACCUSED NOS.2 AND 5:

- 1 AKHIL.A.P. @ LALU
AGED 24 YEARS, S/O.AMBUJAKSHAN,
CHERUVILA HOUSE, JELLIPPARA P.O.,
AGALI, ATTAPPADI TALUK, PALAKKAD, PIN - 678582.
- 2 JOMON,
AGED 24 YEARS, S/O.JOHN,
RESIDING AT VALIYAVEETTUVILA,
JELLIPPARA P.O., AGALI,
ATTAPPADI TALUK, PALAKKAD, PIN - 678582.

BY ADVS.
T.K.SANDEEP
VEENA HARIKUMAR
SWETHA R.

RESPONDENTS/COMPLAINANT & STATE:

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

2 RISHINANDAN,
AGED 25 YEARS
S/O.BABU, R/AT THANIAM BAZAR, ANJANGADI,
KODUNGALLUR, PADINJARE VEMBALLUR, THRISSUR
DISTRICT, PIN - 680671.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
10.11.2022, ALONG WITH CRL.A.1121/2022, THE COURT ON
17.11.2022 DELIVERED THE FOLLOWING:

“C.R”

A. BADHARUDEEN, J.

=====
Crl.Appeal No.1121 of 2022

and

Crl.Appeal No.1132 of 2022
=====

Dated this the 17th day of November, 2022

COMMON JUDGMENT

Crl.Appeal No.1121 of 2022 and Crl.Appeal No.1132 of 2022 arise out of orders dated 20.10.2022 in Crl.M.P.No.1252/2022 and 18.10.2022 in Crl.M.P.No.1262/2022 respectively on the file of the Special Court for Trial of offences under Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'SC/ST(POA) Act' for convenience), Mannarkkad. Accused No.11 is the petitioner in Crl.M.P

No.1252/2022 and accused Nos.2 and 5 are the petitioners in Crl.M.P.No.1262/2022 in Crime No.159/2022 of Agali Police Station.

2. Accused Nos.2, 5 and 11 in the same crime have filed Crl.Appeal Nos.1132/2022 and 1121/2022 challenging dismissal of default bail application and regular bail application respectively, submitted by the accused before the Special Court.

3. Heard the learned counsel for the appellants as well as the learned Public Prosecutor in detail. In these matters though notices were given to the defacto complainant as mandated under Section 15-A(3) of the SC/ST (POA) Act, the defacto complainant did not appear.

4. In Crime No.159/2022, the prosecution alleges commission of offences punishable under Sections 143, 147, 148, 341, 323, 324, 307, 302, 342, 363, 364, 365, 367, 368, 120(B), 392

and 201 r/w 149 IPC and Section 3(2)(v), 3(2)(va) of SC/ST (POA) Act and the allegation is that the accused persons hatched conspiracy to murder one Vinayan and his friend Nandakishore and pursuant to the said conspiracy, on 28.06.2022 accused Nos.1 to 3 kidnapped and brought the said Vinayan to Agali from Kombidinjamakkal, Thrissur in a car bearing No.KL-50-J-9682. Thereafter accused Nos.1, 2, 3 and 6 have brought the aforesaid Vinayan at Grand Residency Lodge, Kakkuppadi in an autorickshaw bearing No.KL-50-C-5217 and detained Vinayan in room No.108 of that lodge. In that room accused Nos. 1, 2, 3 and 6 had beaten the said Vinayan. Thereafter on 29.06.2022 accused Nos.1 to 3 had shifted the aforesaid Vinayan to house bearing No.XI/568 of Agali Grama Panchayath from that lodge and wrongfully confined in that house after tying his limbs. Thereafter on 30.06.2022 accused Nos.1 to 10, who do not belong to Scheduled Caste or Scheduled Tribe community, formed

themselves into an unlawful assembly at that house and in prosecution of that unlawful assembly, all of them had beaten Vinayan by using dangerous weapons such as iron rod, wooden stick, bamboo stick etc. on his head and on various parts of his body with intent to kill him knowing that Vinayan was a member of Scheduled Tribe community. The accused persons have brutally beaten the aforesaid Vinayan.

5. The further allegation is that on 30.06.2022 at about 10.30 pm accused Nos.1, 5 and 7 brought the above mentioned Nandakishore from his house situated near to Sidhi Vinayaka Temple, Bhoothivazhi, Agali in a motor cycle bearing No.KL-51-L-6054 to the very same house, wherein Vinayan was wrongfully confined. The accused persons had tied the limbs of Nandakishore also. In prosecution of their common object to kill Nandakishore and Vinayan, accused persons 1 to 10 had beaten both of them by using iron rod, wooden stick etc. and stamped them. Accordingly,

the said Nandakishore and Vinayan have succumbed to death. The accused persons further threatened the friend of Nandakishore namely Athulkrishna and wrongfully restrained him. The allegation against the 11th accused is that he had destroyed the mobile phone which was forcefully taken from Haris with intention to destroy the evidence of this case.

6. The vital question to be decided in these appeals is whether filing of an application through on-line within time, to canvass statutory/default bail under Section 167(2) of Cr.P.C without filing an application in physical court within time, could be treated as an application filed for statutory bail within time ?

In order to answer this query, the contentions raised by accused Nos.2 and 5 are required to be considered.

7. It is argued by the learned counsel for accused

Nos.2 and 5, who filed Crl.Appeal No.1132/2022 that they were arrested on 4.7.2022. Annexure II e-filing dashboard has been given emphasis by the learned counsel for the accused to convince this Court that, on 10.10.2022, the accused had filed an application for statutory bail through e-filing mode and therefore, even though a physical copy of the application was not filed, then also, the accused is liable to be released on statutory bail. According to the learned counsel for accused Nos.2 and 5, the Special Court dismissed the petition seeking statutory bail on the finding that final report in this crime was filed on 11.10.2022 at 10 a.m by the Investigating Officer before the Special Court. The bail application in physical form was filed by accused 2 and 5 at 11 a.m on the same day. Therefore, the application for statutory bail was filed after filing the charge sheet and as such the statutory bail plea was not filed before filing of the charge sheet.

8. However, the learned Public Prosecutor stoutly opposed

interference in the orders impugned. He submitted that there is a case of double murder and the allegations are very serious. Further it is argued that since no application in physical form was filed before filing of the final report, accused Nos.2 and 5 cannot press for statutory bail.

9. Here, accused Nos.2 and 5 were arrested on 4.7.2022 and the offences are very very serious. Evidently, in this matter, final report is not filed within 90 days. It is pertinent to note that all other accused except accused Nos.2 and 5, were released on statutory bail consequent to failure on the part of the prosecution to file final report within 90 days as contemplated under Section 167 (2) Cr.P.C.

10. While denying statutory bail, the learned Special Judge relied on a decision of this Court reported in [2021 (1) KHC 697], *State of Kerala v. Muneer* to hold that even if the investigating agency had not filed final report/charge sheet within the period

prescribed under Section 167 (60 days or 90 days as the case may be, from the day of remand), so long as investigating agency, thereafter, files final report but before remand of the accused and the accused had made his plea to be released on statutory default bail, then the right of the accused to be released on statutory bail would get extinguished.

11. However, in para.12 of the impugned order, the learned Special Judge also found that accused 2 and 5 had e-filed the bail application on 10.10.2022, but they failed to point out the said filing to the notice of the Special Court on 10.10.2022. Further it was observed by the Special Judge that the physical filing of the bail application was brought to the notice of the Special Court on 11.10.2022 at 11 a.m, after filing of the final report at 10 a.m on the same day. Therefore, there was no application for statutory bail before filing of the final report. It was for the said reasons, default bail was rejected. It is in this context, it is relevant to refer what

has been contemplated under Section 167(2) of Cr.P.C. Section 167 Cr.P.C reads as under:

"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 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 in any custody 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;]

xxxx xxxx xxxx"

On a plain reading of Section 167(2)(a) of Cr.P.C it is crystal clear that detention of the accused in custody of the police on expiry of

the period of 90 days, whether the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and 60 days, where the investigation relates to any other offence on the expiry of the period of 90 or 60 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. So, the relevant point of consideration is whether the accused Nos.2 and 5 were prepared to furnish bail, on expiry of 90 days, that too, before filing of the final report.

12. In this connection I am inclined to refer 2 decisions of the Apex Court. The first one is reported in [2017 (4) KHC 470 : 2017 (2) KLD 443 : 2017 (9) SCALE 24 : ILR 2017 (3) Ker. 673 : AIR 2017 SC 3948 : 2017 (4) KLT 284 : 2017 (4) KLJ NOC 8 : 2018 CriLJ 155 : 2017 (15) SCC 67], ***Rakesh Kumar Paul v. State***

of Assam. In the said case, the Apex Court answered a question involving Section 167(2) of Cr.P.C while disposing the petition by majority view, as under:

"A bare reading of S.167 of the Code clearly indicates that if the offence is punishable with death or life imprisonment or with a minimum sentence of 10 years, then S.167(2)(a)(i) will apply and the accused can apply for 'default bail' only if the investigating agency does not file charge sheet within 90 days. However, in all cases where the minimum sentence is less than 10 years but the maximum sentence is not death or life imprisonment then S.167(2)(a)(ii) will apply and the accused will be entitled to grant of 'default bail' after 60 days in case charge sheet is not filed."

13. In the said decision, the Apex Court also considered the procedure for obtaining default bail. It was held that 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. 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.

14. Going by the above ratio, it is crystal clear that oral application itself is sufficient to canvass default bail.

15. The second decision I would like to refer is a latest decision of the Apex Court reported in [2022 (4) KHC 570 : 2022 KHC OnLine 6655 : 2022 SCC OnLine SC 825], *Satender Kumar Antil v. Central Bureau of Investigation & anr.*, where again the Apex Court considered the ratio of *Rakesh Kumar Paul v. State of Assam (supra)* and held that the rate of conviction in criminal cases

in India is abysmally low. This factor weighs on the mind of the Court while deciding the bail applications in a negative sense. Courts tend to think that the possibility of a conviction being nearer to rarity, bail applications will have to be decided strictly, contrary to legal principles. Courts cannot mix up consideration of a bail application, which is not punitive in nature with that of a possible adjudication by way of trial. On the contrary, an ultimate acquittal with continued custody would be a case of grave injustice.

16. In this matter, admittedly, an application was filed through e-filing mode on 10.10.2022 and Annexure-II would go to show that such an application was filed before filing of the charge sheet. The Special Court also found this fact, while rejecting default bail plea of accused Nos.2 and 5.

17. In the case in hand, it is crystal clear that the application for statutory bail was filed through e-filing mode though it was physically submitted before the court on 11.10.2022 at 11 a.m, in a

case where charge sheet was filed at 10 a.m on 11.10.2022. Now we are in the E-world. In many Courts e-filing is made mandatory and steps to complete mandatory e-filing in all Courts in India are on its final call. Such being the scenario, how can a court ignore an application filed through e-filing mode to hold that there was no petition filed within time for want of production of physical copy of the same within time. No doubt, in such a case involving the question as to whether the accused filed an application for statutory bail within time, by filing the same in e-filing mode, it has to be held that the accused expressed his preparedness to be released on statutory bail within time and to furnish bail, by filing application for bail through the e-filing mode. Legal position is so flexible since it has been settled that even an oral application would suffice the requirement of default bail. Further the Court has a duty to point out the accused of his legal right under Section 167(2)(a) of Cr.P.C, since it is an indispensable right of personal liberty,

guaranteed by the Constitution of India. Therefore, the learned Special Judge went wrong in dismissing the plea of regular bail at the instance of accused Nos.2 and 5. Therefore, the order in CRMP.No.1262/2022 is liable to be set aside.

18. In Crl.Appeal No.1121/2022, the 11th accused, who was arrested on 27.09.2022, seeks regular bail since his petition for regular bail, vide order in Crl.M.P.No.1252/2022 was dismissed by the Special Court.

19. It is argued by the learned counsel for the 11th accused that the 11th accused is absolutely innocent against the allegations and the prosecution also has no case that the 11th accused actively participated in commission of the above crime. He also submitted that the detention of the 11th accused in custody for the last 52 days cannot be justified in a case the allegation was confined to destruction of mobile phone which was alleged to be forcefully taken from one Haris, with intention to destroy the evidence of this

case.

20. The learned Public Prosecutor vehemently supported the dismissal of regular bail application of the 11th accused by the Special Court contending that the master mind behind this crime is the 11th accused and he would submit that the root cause of the incident is the fraud played by the 11th accused. In fact, the prosecution has no allegation that the 11th accused also involved in commission of offence punishable under Section 302 of I.P.C.

21. In this matter, the complicity of the 11th accused is not at par with the other accused and the allegation is causing disappearance of evidence. Therefore, it has to be held that his further custody for the purpose of investigation is unwarranted and he has no criminal antecedents also. Therefore, he also can be released on bail on conditions.

22. Therefore, the order of the learned Special Judge

dismissing the regular bail plea application of the 11th accused dated 20.10.2022 in Crl.M.P.No.1252.2022 in Crime No.159/2022 of Agali Police Station is also liable to be set aside.

23. In view of the discussion, orders impugned in both the Criminal Appeals shall stand set aside. Resultantly, both the Criminal Appeals shall stand allowed and the appellants in both these cases shall be released on bail on the following conditions:

i) The appellants in Crl.Appeal Nos.1121/2022 and 1132/2022 shall be released on bail on their executing bond for Rs.75,000/- (Rupees Seventy five thousand Only) each with two solvent sureties, each for the like amount to the satisfaction of the jurisdictional court concerned;

ii) They shall not intimidate the witnesses or tamper with evidence. They shall co-operate with the trial and shall be available for trial;

iii) They shall not intimidate the witnesses or tamper with evidence. They shall co-operate with trial and shall be available for trial;

iv) They shall surrender their passport before the trial court and shall not leave the jurisdiction without prior permission of the trial court. If anybody has no passport, he shall file an affidavit in this regard;

v) They shall not involve in any other offence during the currency of bail and any such event, if reported to come to the notice of this Court, the same shall be a reason to cancel the bail hereby granted.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/

APPENDIX OF CRL.A 1132/2022

APPELLANT'S ANNEXURES

- Annexure I TRUE COPY OF THE FIR IN CRIME NO.
159/2022 REGISTERED BY THE AGALI POLICE
STATION DATED 01.07.2022.
- Annexure II TRUE COPY OF THE E-FILING DASHBOARD OF
ADV.K.M.RETHEESH KUMAR IN THE E-COURTS
SYSTEM.
- Annexure III TRUE COPY OF THE ORDER OF THE JUDGE
SPECIAL COURT FOR SC/ST (POA)
ACT/ADDITIONAL SESSIONS COURT,
MANNARKKAD IN CRL.M.P.NO.1262/2022 DATED
18.10.2022.