

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE GOPINATH P.

WEDNESDAY, THE 18TH DAY OF OCTOBER 2023 / 26TH ASWINA, 1945

BAIL APPL. NO. 7797 OF 2023

PETITIONERS:

1 M J JOHNSON,
AGED 55 YEARS, S/O JOSPEH, MULACKAL HOUSE, ERANHOLI
P.O., THALASSERY, PIN - 670107

2 PHILIP K K,
AGED 60 YEARS, S/O KURIAN, KOLATHD HOUSE, ERANHOLI,
THALASERRY, PIN - 670107

BY ADVS.
S.RAJEEV
V.VINAY
M.S.ANEER
PRERITH PHILIP JOSEPH
ANILKUMAR C.R.
SARATH K.P.
K.S.KIRAN KRISHNAN

RESPONDENTS:

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

2 STATION HOUSE OFFICER,
THALASERRY POLICE STATION, (CRIME NO 1189/2023 OF
THALASERRY POLICE STATION - 670101), PIN - 67010

3 XXX
XXX THE DEFACTO COMPLAINANT IS IMPLEADED AS THE
ADDITIONAL R3 AS PER ORDER DATED 13-9-23 IN CRL MA 1/23

BY ADV LUKE J CHIRAYIL

OTHER PRESENT:

SRI VIPIN NARAYAN (SR PP)

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
18.10.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



ORDER

The petitioners are the accused in Crime No.1189/2023 of Thalassery Police Station, Kannur District alleging commission of offences under Sections 376, 354, 120B read with Section 34 of the Indian Penal Code.

2. The petitioners are stated to be practising lawyers. The allegation against the petitioners essentially is that after the *de facto* complainant / victim approached the 1st petitioner in the year 2021 for the purposes of filing proceedings before the Family Court, Kozhikode for obtaining divorce from her husband, the 1st petitioner sexually abused the *de facto* complainant / victim. It is alleged that the 1st petitioner had invited the *de facto* complainant / victim to meet him at a hotel in Kozhikode and after offering her a drink which was spiked, he sexually abused her. It is alleged that thereafter the 1st petitioner promised the *de facto* complainant / victim that she would be taken care of just as his wife and the education of the daughter of the *de facto* complainant / victim would also be taken care of. A further promise was allegedly made that the accused would purchase for the *de facto* complainant / victim a house in Kozhikode. It is alleged that thereafter the *de facto* complainant / victim was sexually abused on several occasions. It is alleged that the *de facto* complainant / victim was asked to come to Tellicherry and there the 2nd petitioner who is a colleague of the 1st petitioner also sexually abused the *de facto* complainant / victim. It is also alleged that the 1st petitioner / 1st accused had recorded certain nude pictures and videos of the *de facto* complainant / victim on his mobile phone and therefore the petitioners had committed the offences alleged against them.



3. The learned counsel appearing for the petitioners would contend that the petitioners are fairly successful Advocates practising in the courts at Tellicherry and at Kozhikode. It is submitted that the *de facto* complainant / victim had approached the 1st petitioner seeking his professional help in filing a petition for obtaining divorce. It is submitted that the petition for divorce was filed before the Family Court, Kozhikode and by Annexure-I order in O.P No.1011/2022 on the file of the Family Court, Kozhikode, divorce was granted to the *de facto* complainant / victim. It is submitted that the wedding of the daughter of the 1st petitioner was fixed for 01-07-2023. It is submitted that Annexure-II is a copy of the invitation card. It is submitted that on knowing that the wedding of the daughter of the 1st petitioner was fixed on 01-07-2023, Annexure-III complaint was filed by the *de facto* complainant / victim. Annexure-III was addressed to the City Police Commissioner, Kozhikode, but it was taken on record as a complaint by the Station House Officer, Nadakkavu Police Station, Kozhikode. It is submitted that according to the *de facto* complainant / victim, after she had approached the office of the City Police Commissioner, she was directed to approach the Station House Officer, Nadakkavu Police Station. The learned counsel for the petitioners submit that there are allegations in Annexure-III complaint dated 30-06-2023, that would indicate that even according to the *de facto* complainant / victim she was aggrieved by the fact that she had not received sufficient compensation following her divorce and she was also aggrieved by the fact that though the petitioners had offered her financial help and had given her other promises such as helping in the education of her child and helping her to purchase a house, none of those promises were kept by the



petitioners, therefore she wants action to be taken in the matter to ensure that all disputes are settled. It is submitted that thereafter on the basis of advice of friends and relatives the petitioners had agreed to pay a sum of Rs.3,00,000/- to the *de facto* complainant / victim and accordingly a sum of Rs.3,00,000/- was transferred to the account of the *de facto* complainant / victim, following which she gave Annexure-V letter to the City Police Commissioner, Kozhikode on 03-07-2023 stating that any relationship between the *de facto* complainant / victim and the petitioners was purely consensual and she does not wish to prosecute the complaint in any manner. It is submitted that after giving Annexure-V (produced along with Crl. M.A. No.2/2023) letter dated 03-07-2023, the *de facto* complainant / victim filed Annexure-R3 (a) complaint before the Station House Officer, Tellicherry Police Station containing allegations distinct from the allegations contained in the complaint filed before the City Police Commissioner (Annexure-III). It is submitted that very serious allegations were raised in the Annexure-R3 (a) including a complaint that certain nude pictures and videos of the *de facto* complainant / victim had been recorded on a red color Apple phone. It is submitted that Annexure-R3 (a) is dated 29-08-2023 and 2 days later on 31-08-2023 an identical complaint was filed before the Superintendent of Police, Kannur, which is on record as Annexure-R3 (b) along with the counter affidavit of the additional 3rd respondent (*de facto* complainant / victim). It is submitted that on 03-09-2023 a private complaint [Annexure-R3 (c)] was filed before the Judicial First Class Magistrate Court, Tellicherry containing very same allegations as raised in Annexure-R3 (a) and (b) complaints. It is submitted that even in the complaint filed



before the learned Magistrate, allegations distinct from the allegations raised in the first complaint before the City Police Commissioner, Kozhikode were raised against the petitioners. It is submitted that Annexure-R3 (c) was referred for investigation by the police under Section 156 (3) Cr.P.C and it is accordingly that Crime No.1189/2023 of Tellicherry Police Station has been registered against the petitioners alleging commission of offences punishable under Sections 376, 354, 506, 120-B read with the Section 34 of the Indian Penal Code and Section 35 of the Advocates Act, 1961. It is submitted that while it may not be proper for this court to enter into any finding regarding the nature of the relationship between the petitioners and the *de facto* complainant / victim, it is evident that even according to the complaint of the *de facto* complainant / victim the relationship can only be termed as consensual. It is reiterated that the petitioners are fairly successful lawyers and having practice in courts in Tellicherry and Kozhikode and any arrest and detention of the petitioners may cause serious prejudice to the petitioners and also to their families. It is submitted that the Supreme Court in ***Bhadresh Bipinbhai Sheth v. State of Gujarat and another; (2016) 1 SCC 152*** considered the scope of anticipatory bail where very serious offences are alleged. It is submitted that the aforesaid decision is authority for the proposition that there is nothing in the law which would indicate that anticipatory bail cannot be granted when an offence of rape is alleged. It is submitted that the Supreme Court has found that a great ignominy, humiliation and disgrace is attached to arrest and arrest leads to many serious consequences not only for the accused but also for the entire family and at times for the entire community. It is submitted that the Supreme



Court has observed that most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage and there is no justification for reading into Section 438 the limitations mentioned in Section 437 of the Cr.P.C. It is submitted the decision is authority for the proposition that there is no requirement that the accused must make out a special case for the grant of anticipatory bail. It is also pointed out that the said decision takes the view that an accused is entitled to the presumption of innocence till he is convicted by a court of competent jurisdiction. The learned counsel also referred to various decisions to contend that there is difference between consensual sex and rape. However, I do not intend to burden this judgment with reference to those judgments as I do not propose to make any finding as to whether there was a consensual relationship between the petitioners and the *de facto* complainant / victim as it would not be proper for this court to make any observation regarding the same in an order considering the anticipatory bail application of the petitioners.

4. The learned Public Prosecutor and the learned counsel appearing for the *de facto* complainant / victim would vehemently oppose the grant of anticipatory bail. At the outset it is pointed out that the petitioners are practising Advocates who on their own showing have a fairly successful practice. It is submitted that the 1st petitioner was a former District Government Pleader and Public Prosecutor and therefore he wields considerable influence in the Police Department. It submitted that the *de facto* complainant / victim is a person making a living by running a tailoring shop and she is a single mother raising a girl child. It is submitted that if the petitioners are granted anticipatory bail there is



every chance that the *de facto* complainant / victim will be influenced and intimidated. It is submitted that Annexure-V produced along with CrI. M.A. No.2/2023 is not written in the handwriting of the *de facto* complainant / victim and the difference in the handwriting is evident from a glance at Annexure-III complaint and also Annexure-V. It is submitted that this court must be alive to the fact that the *de facto* complainant / victim was a client of the petitioners and they might have misused signed papers obtained from the *de facto* complainant / victim to make a document in the nature of Annexure-V. It is submitted that while the signature and thumb impression on Annexure-V may be hers, the contents of Annexure-V were not written by the *de facto* complainant / victim. It is submitted that, therefore, nothing turns on Annexure-V. It is submitted that the *de facto* complainant / victim is a hapless women, who has been subjected to rape and that the grant of bail to the petitioners will send a wrong message to the society and the public at large that even a person accused of a serious offence like rape can obtain anticipatory bail and that lawyers can commit any mischief and obtain anticipatory bail. The learned counsel appearing for the *de facto* complainant would also argue that the contention taken on behalf of the petitioners that the *de facto* complainant / victim is trying to extort money being aggrieved by the fact that she did not get compensation in the proceedings before the Family Court cannot be true as the *de facto* complainant / victim has not filed any complaint against any other lawyer, who appeared along with the petitioners before the Family Court, Kozhikode. It is submitted that the custody of the petitioners is essential for completing the investigation into the crime registered against them and therefore,



the anticipatory bail application may be dismissed.

5. The learned counsel appearing for the petitioners would submit in reply that the petitioners had voluntarily appeared before the Investigating Officer and had handed over their mobile phones, which was stated to be required for the purpose of investigation. It is submitted that the petitioners were also interrogated for the whole day on 13-10-2023. It is submitted that this is clear indication of the fact that the petitioners are co-operating with the investigation and their custodial interrogation may not be necessary.

6. Having heard the learned counsel appearing for the petitioners, the learned Public Prosecutor and the learned counsel appearing for the *de facto* complainant / victim, I am of the opinion that the petitioners can be granted anticipatory bail. The allegations against the petitioners are no doubt serious. However, I must take note of the fact that even according to the *de facto* complainant / victim, she had first approached the 1st petitioner seeking his professional help in the year 2021. A cumulative reading of all the complaints preferred by the *de facto* complainant / victim would indicate that she was abused right from the time she had first approached the 1st petitioner seeking his professional help. However, the first complaint seems to have been filed only on 30-06-2023. While this itself may not be fatal to the prosecution case, it lends credence to the argument of the learned counsel for the petitioners that the *de facto* complainant / victim had actually filed a complaint being aggrieved by the fact that she had not received sufficient compensation in the proceedings before the Family Court. I must also note that the order in the Original Petition filed before the Family



Court, Kozhikode was delivered only in the month of January 2023. The Supreme Court in ***Bhadresh Bipinbhai Sheth (supra)*** held as follows;

“19. Before we proceed further, we would like to discuss the law relating to grant of anticipatory bail as has been developed through judicial interpretative process. A judgment which needs to be pointed out is a Constitution Bench Judgment of this Court in the case of *Gurbaksh Singh Sibbia and Others v. State of Punjab*((1980) 2 SCC 565). The Constitution Bench in this case emphasized that provision of anticipatory bail enshrined in Section 438 of the Code is conceptualised under Article 21 of the Constitution which relates to personal liberty. Therefore, such a provision calls for liberal interpretation of Section 438 of the Code in light of Article 21 of the Constitution. The Code explains that an anticipatory bail is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore, effective at the very moment of arrest. A direction under Section 438 is therefore intended to confer conditional immunity from the 'touch' or confinement contemplated by Section 46 of the Code. The essence of this provision is brought out in the following manner:

“26. We find a great deal of substance in Mr Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the 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. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the Legislature, is open to no exception on the ground that it prescribes a



procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein.”

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21. It is pertinent to note that while interpreting the expression “may, if it thinks fit” occurring in Section 438(1) of the Code, the Court pointed out that it gives discretion to the Court to exercise the power in a particular case or not, and once such a discretion is there merely because the accused is charged with a serious offence may not by itself be the reason to refuse the grant of anticipatory bail if the circumstances are otherwise justified. At the same time, it is also the obligation of the applicant to make out a case for grant of anticipatory bail. But that would not mean that he has to make out a “special case”. The Court also remarked that a wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use.

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23. The principles which can be culled out, for the purposes of the instant case, can be stated as under:

(i) The complaint filed against the accused needs to be thoroughly examined, including the aspect whether the complainant has filed a false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the Investigating Officer is established then action be taken against the investigating officer in accordance with law.

(ii) The gravity of charge and the exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases, the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.

(iii) It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion to grant bail must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined the investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided. A great ignominy, humiliation and disgrace is attached to arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire



community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.

(iv) There is no justification for reading into Section 438 Cr. P.C. the limitations mentioned in Section 437 Cr. P.C. The plenitude of Section 438 must be given its full play. There is no requirement that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 Cr. P.C. to a dead letter. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.

(v) The proper course of action on an application for anticipatory bail ought to be that after evaluating the averments and accusations available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor the court may either reject the anticipatory bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of anticipatory bail. The Public Prosecutor or the complainant would be at liberty to move the same court for cancellation or modifying the conditions of anticipatory bail at any time if liberty granted by the court is misused. The anticipatory bail granted by the court should ordinarily be continued till the trial of the case.

(vi) It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the Public Prosecutor or the complainant, on finding new material or circumstances at any point of time.

(vii) In pursuance of the order of the Court of Session or the High Court, once the accused is released on anticipatory bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

(viii) Discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under Section 438 Cr.P.C. should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject the wide power and discretion conferred by the Legislature to a rigorous code of self-imposed limitations.

(ix) No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of



anticipatory bail. In consonance with legislative intention, the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case.

(x) We shall also reproduce para 112 of the judgment wherein the Court delineated the following factors and parameters that need to be taken into consideration while dealing with anticipatory bail:

(a) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(b) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(c) The possibility of the applicant to flee from justice;

(d) The possibility of the accused's likelihood to repeat similar or other offences;

(e) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(f) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(g) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution, because over implication in the cases is a matter of common knowledge and concern;

(h) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to free, fair and full investigation, and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(i) The Court should consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(j) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused in (sic) entitled to an order of bail.”

In the aforesaid judgment, the principles that should weigh with the court while considering an application for anticipatory bail have been set out. It has been stated



that if the court is of the considered view that the accused has joined the investigation and he is fully co-operating with the investigating agency and he is not likely to abscond, custodial interrogation should be avoided. It is also stated that the court must keep in mind that no special case need be made out for grant of anticipatory bail and there is nothing in the law which indicates that anticipatory bail cannot be granted where serious offences such as rape are involved. It has been also held that while considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely that, no prejudice should be caused to the free, fair and a proper investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused.

7. Considering the apprehension expressed by the learned counsel appearing for the *de facto* complainant / victim that the petitioners are highly influential persons and one of them was even a former District Government Pleader and Public Prosecutor, I had indicated to the counsel for the *de facto* complainant / victim that the investigation of the case can be entrusted to any Senior Officer of the I.P.S cadre in the State of the choice of the *de facto* complainant / victim. The learned counsel for the *de facto* complainant / victim then stated that the present Investigating Officer, who is the Assistant Superintendent of Police, Thalassery is conducting a fair investigation and *de facto* complainant / victim has complete faith in the said officer. The learned Public Prosecutor submitted that the Assistant Superintendent of Police, Thalassery is Sri.Arun K Pavithran, I.P.S.

8. Having regard to the fact that there must be a full, free and fair investigation into the allegations raised against the petitioners, I deem it necessary



to order that the investigation into Crime No.1189/2023 of Thalassery Police Station, Kannur District, shall be conducted by Sri. Arun K Pavithran, I.P.S, Assistant Superintendent of Police, Thalassery and the said officer shall continue to be in charge of the investigation till the filing of final report in the aforesaid crime.

9. The argument that the grant of anticipatory bail in a case of this nature will have an impact on the society and will send a wrong message to the public at large does not appeal to this court as ***“in this country we do not administer justice by plebiscite”*** [Judge Hiller B. Zobel at the trial of the Nanny, Louise Woodward, 1998].

In the light of the aforesaid discussions, this Bail Application is allowed and it is directed that the petitioners shall be released on bail in the event of their arrest in connection with Crime No.1189/2023 of Thalassery Police Station, Kannur District subject to the following conditions:-

(i) Petitioners shall execute separate bonds for sums of Rs.50,000/- (Rupees fifty thousand only) each with two solvent sureties each for the like sum to the satisfaction of the arresting officer;

(ii) Petitioners shall report before the Investigating officer in Crime No.1189/2023 of Thalassery Police Station, Kannur District at 11 a.m on 20-10-2023 and 21-10-2023 and thereafter the petitioners shall appear as and when called upon to do so;

(iii) Petitioners shall not attempt to contact the *de facto* complainant / victim or interfere with the investigation or to influence or intimidate any witness in Crime No.1189/2023 of Thalassery Police Station, Kannur District;



(iv) The petitioners shall surrender their passports before the Investigating officer in Crime No.1189/2023 of Thalassery Police Station, Kannur District. If the petitioners do not have passports, they shall execute an affidavit to that effect and submit the same before the Investigating officer in Crime No.1189/2023 of Thalassery Police Station, Kannur;

(v) Petitioners shall not involve in any other crime while on bail.

If any of the aforesaid conditions are violated, the Investigating officer in Crime No.1189/2023 of Thalassery Police Station, Kannur District or *de facto* complainant / victim in the case may approach this Court for cancellation of bail. It is clarified that even while on anticipatory bail the petitioners will be deemed to be in custody for the purposes of effecting any recovery etc., as held by the Supreme Court in ***Suseela Agarwal and others v. State; (2020) 5 SCC 1.***

HIGH COURT OF KERALA
Sd/-
GOPINATH P.
JUDGE
CERTIFIED COPY



APPENDIX OF BAIL APPL. 7797/2023

PETITIONER ANNEXURES

Annexure-II A COPY OF THE WEDDING LETTER IN CONNECTION WITH THE MARRIAGE OF THE DAUGHTER OF THE PETITIONER DATED 01.07.2023



**HIGH COURT OF KERALA
CERTIFIED COPY**