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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

TUESDAY, THE 7TH DAY OF MARCH 2023 / 16TH PHALGUNA, 1944

BAIL APPL. NO. 1193 OF 2023

CRIME NO.59/2023 OF OTTAPALAM POLICE STATION, PALAKKAD

PETITIONER/S:

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

RESPONDENT/S:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
PIN - 682031
- 2 STATION HOUSE OFFICER
OTTAPALAM POLICE STATION, (CRIME NO 59/2023 OF
OTTAPALAM POLICE STATION, PALAKKAD DISTRICT -, PIN -
679101

BY SRI.SREEJITH V.S., PUBLIC PROSECUTOR

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON
01.03.2023, THE COURT ON 07.03.2023 PASSED THE FOLLOWING:

ORDER

The petitioner is the accused in Crime No.59/2023 of the Ottapalam Police Station. The offences alleged against the petitioner are under Section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and Sections 7,8,10,9(1),9(m),9(n) of the Protection of Children from Sexual Offences Act, 2012 (POCSO ACT).

2. The victim in the said case is none other than the son of the petitioner herein, who is aged ten years. The allegation against the petitioner is that while the petitioner was given interim custody of the child as per the order passed by the Family Court, Ottapalam and when he was interacting with the child by sitting in his car parked in front of the Family Court, the petitioner allegedly shown nude photographs of the victim, which were taken while he was a small kid and also touched inappropriately with sexual intent on the private parts of the victim. This application for Anticipatory Bail is submitted

by the petitioner in such circumstances as he apprehends arrest.

3. Heard Sri. S. Rajeev, the learned counsel for the petitioner and Sri.Sreejith V.S., the learned Public Prosecutor of the State.

4. The specific contention of the learned counsel for the petitioner is that this case is falsely foisted against the petitioner to deprive him of the opportunity to interact with the child. It is pointed out that certain litigations between the petitioner and his wife are pending before the Family Court, Ottapalam, for dissolution of the marriage between them and regarding custody of the child. According to him, even though various orders were passed by the learned Judge of the Family Court granting permission to interact with the child and also giving overnight custody of the child with the petitioner for a short period, none of the aforesaid orders was complied with. The petitions submitted at the instance of the petitioner for initiating

appropriate proceedings against his wife for violating such orders are pending before the Family Court. The present crime was registered with false allegations, much belatedly, when coercive proceedings against the wife of the petitioner for violating the orders passed by the Family Court became imminent.

5. On the other hand, the learned Public Prosecutor would oppose the aforesaid contentions by relying on the contents of the First Information Statement and the statement of the victim recorded under Section 164 of the Cr.PC. It was pointed out that there are specific allegations of sexual assault, which would attract the offences alleged in the F.I.R. The matter is now under investigation, and therefore if the petitioner is granted anticipatory bail, it would adversely affect the progress of the investigation, and the dismissal of the bail application was sought by the learned Public Prosecutor in such circumstances.

6. After going through the materials placed on record and hearing the contentions raised from either side, I am of the view that, before going into the rival contentions of the parties, it is necessary to examine the sequence of events which ultimately led to the registration of the FIR.

7. The petitioner and his wife are Engineering graduates and IT professionals. The marriage between them was solemnized on 25.12.2010, and in the said wedlock, a boy child was born, who is now aged ten years. It appears that with the passage of time, there occurred certain matrimonial discord between the husband and the wife, and according to the petitioner, his wife was reluctant to come and reside along with the petitioner, who was working at Bangalore. In such circumstances, the petitioner submitted OP No.308/2017 before the Family Court, Ottapalam, for restitution of conjugal rights. The aforesaid OP was ultimately disposed of as per Annexure-II judgment based on the settlement between the parties. The terms of the settlement were to the

effect that, as soon as the academic year is over, the wife of the petitioner shall join the petitioner in Bangalore after obtaining the transfer certificate of the boy from the school from which he was studying at the relevant time.

8. However, even though the said original petition was disposed of based on such terms and conditions of settlement, the same was never complied with. The petitioner was even deprived of interaction with the child. In such circumstances, the petitioner submitted OP No.668/2022 for dissolution of marriage before the Family Court, Ottapalam, which is now pending consideration. As the petitioner was not given custody of the child and even the interaction with the child was denied, the petitioner submitted another original petition numbered as OP(G&W)No.726/2022 before the Family Court, Ottapalam seeking custody of the minor child. Along with the said Original Petition, I.A.No.2/2022 was filed for passing an interim order to grant interim custody of the minor child for two days on alternate weekends of

every month, five days during Onam and Christmas holidays and one month during mid-summer school vacation.

9. While considering the aforesaid application, on 14.11.2022, an order was passed by the Family Court in IA No.2/2022 permitting the petitioner to have interaction with the child on 26.11.2022 and 3.12.2022 from 10 a.m. to 1 p.m. To have such an interaction, the wife was directed to produce the child before the Family Court on those dates, with a direction to hand over the child to the petitioner. In compliance with the said direction, the child was produced, and the petitioner interacted with the child while sitting in his car parked in front of the Family Court.

10. While so, the petitioner's wife agreed to give overnight custody of the child for three days during Christmas vacation. Based on the said understanding, the hearing of I.A.No.2/2022 was advanced. Thereupon the Family Court passed an order

on 29.12.2022. Taking note of the arrangements agreed between the parties, the Family Court granted overnight custody of the child from 31.12.2022 at 10.30 a.m. to 4 p.m. on 2.1.2023. Annexure-VI is the order passed by the learned Judge wherein it was observed by the learned Judge that the interaction between the petitioner and the child on 26.11.2022, 3.12.2022, 10.12.2022 and 17.12.2022 were conducted smoothly and without any complaints. The court granted overnight custody of the child by taking note of the above facts. However, the petitioner's wife did not produce the child as ordered in the Annexure-VI order on 29.12.2022. Thereupon, the petitioner submitted Annexure-VII application for issuing a warrant against the respondent for violating the order dated 29.12.2022. Consequently, the Annexure-X order is seen passed in I.A.No.2/2022 by the learned Judge on 12.01.2023. It is discernible from Annexure-X order that, on that day, i.e. on 12.1.2023, the child was produced before the court, and the Counsellor was directed to conduct counselling with

the child on that day itself and file a report in compliance with the same. Accordingly, counselling of the child was conducted, and the Counsellor submitted a report in that regard before the learned Judge.

11. In the Annexure-X order passed, the contents of the report of the Counsellor are referred to, which would indicate that the child was not interested in going with his father, but yet the Counsellor opined that the child should be provided with ample opportunity to interact with the other people including the relatives or biological father. Taking note of the above aspects, the learned Judge in Annexure-X order directed that the petitioner and his wife shall attend counselling on 17.01.2023, and the child shall also be produced on that day. This order was passed with the intention to conduct counselling with interactive sessions of the petitioner, his wife, and his child. Again, on 19.1.2023, a further order was passed by the learned Judge granting permission to the petitioner to interact with the child on 28.1.2023 from 10 a.m. to

1 p.m. However, even though the petitioner's wife brought the child to the Family Court that day, she did not permit the petitioner to interact with the child and took the child back. In connection with the same, the petitioner submitted Annexure-XI application for appropriate action against the wife of the petitioner for willfully violating the order passed by the Family Court on 19.1.2023, which is also pending consideration.

12. Meanwhile, the Counsel who was appearing for the petitioner's wife relinquished her vakkalath, and in his place, a new counsel appeared. Thereafter, Annexure-VII objection was submitted by the petitioner's wife on 2.2.2023. Annexure-VII contended that the non-production of the child on 31.12.2022 before the Family Court in compliance with Annexure-VI order passed by the Family Court dated 29.12.2022 was not willful. According to her, she noticed some disturbance in the child's behaviour and therefore, the child was taken to P.K. Das Medical Science Hospital, Vaniamkulam where they consulted Dr

P.M.Dhanya, Assistant Professor, Department of Psychiatry. It is stated that, during the course of interaction with the doctor, the child stated that while the petitioner had interaction with the child as per the orders of the Family Court, the petitioner had shown nude photographs of the child, which were taken when he was a small kid and also touched inappropriately on the private parts of the child. According to the petitioner's wife, the Doctor advised her not to leave the child in the petitioner's custody. It is also stated that the child was admitted to the hospital for treatment. It is pointed out that it was due to the fact that the child was undergoing treatment during the said dates she could not produce the child before the Family Court as ordered in Annexure-VI order.

13. In the said objection, it was also stated that, in connection with the aforesaid allegations, a crime had been registered by the police for the offences mentioned above, and an investigation is now ongoing. This application for anticipatory bail is

submitted by the petitioner as he apprehends arrest in connection with the crime referred to in the aforesaid objection.

14. On going through the sequence of events as revealed from the documents referred to above, I find some force in the contentions put forward by the learned counsel for the petitioner. The crucial aspect to be noticed is that, as per the FIR, the victim was subjected to sexual assault while the petitioner interacted with the child as per the orders passed by the Family Court. It is evident from the records that the petitioner had interacted with the child as per the various orders of the Family Court on 26.11.2022, 3.12.2022, 10.12.2022 and 17.12.2022. In Annexure-VI order passed by the Family Court on 29.12.2022, it is categorically observed that the aforesaid interactions occurred smoothly without any complaints. This would indicate that nobody has raised any complaints as to any sexual assault from the part of the petitioner.

15. The mother of the victim indeed has a case that she came to know about the sexual assault committed on her child when the child was taken to a Psychiatrist and during such consultation with the doctor. Annexure-IX is the report of the said doctor pertaining to the interaction which she had with the child and his mother. On perusal of the same, it can be seen that there is no indication of any revelation made by the child regarding any sexual assault by the petitioner herein. Another crucial aspect to be noticed in the report is that the child was admitted on 31.12.2022 for further evaluation. After two days after the admission, the mother and the maternal grandfather requested his discharge. Even though the doctor was of the opinion that the treatment of the child as an inpatient is necessary for a complete assessment and psychotherapy sessions, the child was discharged against the medical advice due to the compulsion of the mother of the victim. While considering this aspect, the crucial aspect about the same is the timing of such admission and discharge.

As per Annexure-VI order passed by the Family Court, the child was to be given to the custody of the petitioner from 31.12.2022 to 3.1.2023. The child got admitted on 31.12.2022 and got discharged against the medical advice after two days, i.e. at the time of the expiry of the period during which the child was required to be given in custody of the petitioner. Besides the same, the reason for the disturbance of the child, as recorded in Annexure-IX, is reported to be the ongoing legal issues in the family which got aggravated when the child was asked to meet his father. No allegation or information of sexual assault committed by the father of the victim is seen referred to in the aforesaid document, even though the mother of the victim has a specific case in her objection that it was the doctor who advised not to allow the child with the father of the child upon being informed of about sexual assault.

16. There is yet another aspect which creates a shadow of doubt over the veracity of the allegations against the petitioner. Admittedly, the child was

produced before the Family Court, and the petitioner interacted with the child on various occasions during November and December, 2022. In the Annexure-X order passed by the Family Court, a reference was made by the learned Judge as to the counselling of the child conducted by the Counsellor and the report submitted in this regard. It is evident that before the Counsellor also, the child did not mention any sexual atrocities committed by the petitioner. Had such an allegation been made, the counsellor would not have opined that the child should have more opportunities to interact with his biological father. This counselling was conducted on 12.01.2023, whereas the sexual assaults were allegedly committed on the dates much before that. When taking into account all these aspects, I am of the view that there is a shadow of doubt with regard to the allegations raised in the FIR.

17. Apart from the above, on going through the statements of the victim, one of the allegations is that the petitioner had shown nude photographs of the

child himself, which were taken while he was very . It is highly doubtful whether the said act by itself would attract any offences under the POCSO Act. This is because there is no allegation that the petitioner had shown nude photographs of other persons. It is also true that, there is an allegation that the petitioner had touched on the private parts of the child with sexual intent. At the moment, what is available is a statement of the victim only, and in the facts and circumstances of this case, those statement is doubtful. When all the sequence of events which led to the FIR are taken into consideration, I am of the view that the denial of anticipatory bail to the petitioner merely based on such a doubtful statement is not safe. The possibility of tutoring the child cannot be ruled out.

18. The learned counsel for the petitioner brought the attention of this Court to the observations made by the Division Bench of this Court in **Suhara and Others v. Muhammed Jaleel** [2019(2)KHC

596] [2019 (2) KLT 960] wherein it was observed as follows:

"28. In our opinion, mere registration of a crime under the provisions of the POCSO Act against the parent of the ward is no assurance to a Family Court that allegation of sexual abuse made against him is nothing but true. The allegation made against the biological father could be true in rare cases, but could be wholly false also. The Family Court, before which such registration of crime is proved must necessarily apply its mind and endeavour to find out the true circumstances which activated the registration rather than being allured by the mere fact of registration. Unless a very cautious approach is adopted by the Family Court to ensure that information on which crime was registered is not frivolous and vexatious, many a innocent parent fighting for custody of his own ward would be victim of false implication of crimes under the POCSO Act. There is a growing tendency in the recent years to foist false crimes against the biological father alleging sexual abuse of own child misusing the provisions of the POCSO Act when serious fight for custody of ward is pending resolution before the Family Courts. The Family Courts to whose notice registration of crime under the POCSO Act is brought owe an onerous responsibility to ensure that the registration of crime against the parent is not a ruse for defeating his legitimate claim for custody of the ward. The Family Courts ought to examine the outcome of investigation of the crime placed before the court and also take into consideration all relevant facts and circumstances which would

help the Judge form a prima facie opinion as to whether the allegation of sexual abuse of the ward is baseless or not. Each case requires to be approached and evaluated on its own facts and we realise that no hard and fast approach could be laid in this respect at all. We do not mean to say that Family Courts should disregard the materials collected by the investigating agency in the crime and hold a total independent enquiry in order to get at the truth or veracity of the allegation. We make it clear that unless there are reliable materials capable enough to convince the allegation of sexual abuse to be well founded, mere registration of crime shall not be reckoned as a ground for rejecting the claim of the parent for custody of the child."

19. In the aforesaid decision, this Court highlighted the growing tendency of foisting false cases against the biological father alleging sexual abuse misusing the provisions of the POCSO Act. This Court alerted the Family Courts by emphasizing the necessity to adopt a conscious approach while dealing with the allegation of offences under the POCSO Act in cases where the custody of the child is under serious litigation. The courts, while dealing with the applications for bail, involving the offences of the POCSO Act, allegedly committed by the accused

against their children, should take a very cautious approach, particularly when the custody of the child is under serious litigation between the parents. In such cases, when the materials placed before the court evoke a reasonable suspicion as to the veracity of the allegations, the courts should not hesitate to invoke the powers under section 438 of the Cr.P.C. What is at stake is someone's personal liberty, integrity, dignity and sometimes, the life itself. The power under section 438 is an important tool for the court to protect the personal liberty of the persons, which is one of the fundamental rights guaranteed under the Constitution of India.

20. On perusal of the records, I am of the view that there is some possibility of this case coming under the said category. However, a final conclusion cannot be arrived at this stage as the matter is under investigation. The impression that could be gathered from the sequence of events referred to above compels this court to take the view that an order to protect the personal liberty of the

petitioner is absolutely necessary. This Court cannot ignore the trauma, loss of dignity and other difficulties which the petitioner, who is an educated person without any criminal antecedents, has to face if he is compelled to undergo detention based on allegations which are under the shadow of a doubt. If it is ultimately turned out that the allegations are false, nobody can compensate for the loss that may occur to a person due to such detention. As far as the investigation of the case is concerned, the effectiveness can be ensured by directing the petitioner to surrender before the Investigating Officer with appropriate conditions to ensure his cooperation with the same.

In such circumstances, this Bail Application is disposed of with the following directions:

i) The petitioner shall surrender before the Investigating Officer, within a period of two weeks from today, for subjecting himself to interrogation;

ii) After interrogation, the petitioner shall be

released on bail on the very same day of surrender upon the petitioner executing a bond for Rs. 1,00,000/- (Rupees One Lakh only) with two sureties each for the like sum, to the satisfaction of the Investigating Officer;

iii) The petitioner shall fully cooperate with the investigation, including subjecting himself to the deemed police custody for recovery, if any, as and when demanded;

iv) The petitioner shall appear before the Investigating Officer between 10.00 a.m and 11.00 a.m every Saturday until the filing of the final report;

v) The petitioner shall appear before the Investigating Officer as and when required;

vi) The petitioner shall not commit any offence of similar nature while on bail.

vii) The petitioner shall not attempt to tamper with the evidence or influence any witnesses or other persons related to the investigation.

viii) The petitioner shall not leave the country without the permission of the Jurisdictional

Court.

In case of violation of any of the above conditions, the jurisdictional Court shall be empowered to consider the application for cancellation of bail, if any, and pass appropriate orders in accordance with the law.

Sd/-

ZIYAD RAHMAN A.A.
JUDGE

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APPENDIX**PETITIONER'S ANNEXURES**

ANNEXURE 1	A TRUE COPY OF THE PETITION SUBMITTED BY THE PETITIONER BEFORE THE FAMILY COURT, PALAKKAD AS OP NO.668/2022
ANNEXURE II	COPY OF THE ORDER IN OP NO.308/2017 DATED 18.01.2019
ANNEXURE III	A COPY OF THE PETITION SUBMITTED BY THE PETITIONER FOR THE CUSTODY OF THE CHILD
ANNEXURE IV	A COPY OF THE I.A. NO.1/2022 IN OP (G&W) NO.726/2022
ANNEXURE V	THE ORDER PASSED BY THE FAMILY COURT DATED 14.11.2022
ANNEXURE VI	A COPY OF THE ORDER IN I.A NO.2/2022 IN OP NO.726/22 DATED 29.12.2022
ANNEXURE VII	A COPY OF THE PETITION SUBMITTED BY THE PETITIONER AS IA NO.3/2023 ON 3.1.2023
ANNEXURE VIIA	A COPY OF THE COUNTER FILED BY THE RESPONDENTS IN I.A.NO.IN 3/2023
ANNEXURE VIII	COPY OF THE PETITION IN I.A NO.4/2023
ANNEXURE IX	A COPY OF THE TREATMENT SUMMARY ISSUED FROM THE HOSPITAL
ANNEXURE X	ORDER DATED 12.01.2023 ISSUED BY FAMILY COURT
ANNEXURE XI	PETITION NUMBERED AS I.A. NO.5/2023
ANNEXURE XII	COPY OF THE FIR IN CRIME NO.59/2023 OF OTTAPALAM POLICE STATION.