IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

TUESDAY, THE 12TH DAY OF MAY 2020 / 22ND VAISAKHA, 1942

BA NO.2827 OF 2020

(Crime No.123/2020 of Kuzhalmannam Police Station, Palakkad District)

Petitioner/Accused:-

Prasad, S/o. Chandran, aged 30 years, Priya Nivas, Thevarmani, Chathamangalam P.O, Nemmara, Palakkad District-678 508.

By Advs. Sri. Jacob Sebastian
Sri. K.V.Winston
Sri. Anu Jacob

Respondents/State & Complainant:-

1. State of Kerala, rep. by Public Prosecutor, High Court of Kerala, Ernakulam-682 031.

2. The Sub Inspector of Police, Kuzhalmannam Police Station, National Highway 544, Chandapura, Kuzhalmannam, Palakkad District-678 702.

By P.P. Sri.Ajith Murali & Santhosh Peter(Sr)

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON 12.05.2020, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.V.KUNHIKRISHNAN, J

B.A.No.2827 of 2020

Dated this the 12th day of May, 2020

O R D E R

This Bail Application filed under Section 439 of Criminal Procedure Code was heard through Video Conference.

2. Petitioner is the accused in Crime No.123 of 2020 of Kuzhalmannam Police Station, Palakkad. The above case is registered against the petitioner alleging offences punishable under Sections 354 A of the Indian Penal Code (IPC) and Sections 7, 8, 9 and 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO). Petitioner was arrested on 21.04.2020 and he is in custody.

3. The prosecution case is that, sometime in December 2019, the accused was giving a toffee to the victim, he touched the hands and thighs of the victim girl.

4. The counsel for the petitioner submitted that, he filed

a bail application as B.A.TMP.No.161/2020 under Section 438 of Cr.P.C before this Court, which was pending for consideration. While that application was pending, the petitioner was arrested in this case. He also submitted that, the father of the alleged victim is the uncle (mother's brother) of the petitioner. The father of the victim is working abroad. According to the learned counsel for the petitioner, the family of the victim consists of her mother, victim and her brother. According to the counsel for the petitioner, the petitioner and the family of the victim are neighbours and relatives. The uncle of the petitioner, who is in abroad developed a suspicion about an affair between the petitioner and his wife. He came on leave. At that stage, the present case is filed at his instance, because of the enimity. The alleged incident was happened on December 2019 and the present complaint is filed on 02.03.2020. According to the counsel for the petitioner, it is a false case foisted against him.

5. The learned Public Prosecutor opposed the bail application and submitted that the petitioner was arrested on

24.04.2020. The learned Public Prosecutor also submitted that, the petitioner was arrested at the time when the bail was pending. According to the learned Public Prosecutor, due to communication gap, the pendency of the anticipatory bail application may not be aware to the Arresting Officer and that is why he arrested the petitioner.

6. I am forced to say that, its a sorry state of affairs. The Full Bench of this Court, in order dated 25.03.2020 in W.P.(C) No.9400 of 2020 (Suo Motu), considered the COVID-19 crisis and the other related problems. The Full Bench heard the Additional Advocate General and other parties. Thereafter, a detailed order was passed on 25.03.2020 regarding the arrest of citizens in connection with the crime cases during the lock down period. The relevant paragraphs are 19, 20, and 21 which are extracted herein under:-

> "19. In the interim order of the Hon'ble Supreme Court, there is no reference to the anticipatory bail applications. On instructions, Shri Ranjith Thampan, learned Additional Advocate General submitted that, in view of the National lock down for 21 days declared by the Hon'ble Prime Minister, and the difficulties expressed by the staff and Law officers attached to the Office of the Advocate General, they may not be able to attend the office or Courts. It is the further

> submission that it is not possible to get instructions from the officers concerned, and therefore, the learned Additional Advocate General, by letter dated 25.03.2020, has requested the Registrar General, High Court of Kerala that all the proceedings have to be postponed.
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> 20. Representing the Advocates, Shri R. Lakshmi Narayan, President of the Kerala High Court Advocates' Association reiterated that, same difficulty and hardship is faced by the staff attached to the learned counsel, litigants, and having regard to the right of personal liberty guaranteed under Article 21 of the Constitution of India, a general order, as regards anticipatory bail applications, is required to be passed.
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> 21. Therefore, taking note of the above said situation, we are of the firm view that, right of personal liberty guaranteed under Article 21 of the Constitution of India should not, at any rate, be infringed by arresting an accused, except in matters where arrest is inevitable. However, the State is at liberty to take appropriate decision in respect of heinous/serious offences and in rest of the cases, State may act accordingly.

7. This Court clearly stated that, taking note of the situation, right of liberty guaranteed under Article 21 of the Constitution of India should not at any rate be infringed by arresting an accused, except in matters where arrest is inevitable. The Full Bench also observed that however, the State is at liberty to take appropriate decision in respect of heinous/serious offences and in rest of the cases, State may act accordingly.

8. The offences alleged in this case are under Sections

354 A of IPC and Sections 7 to 10 of the Protection of Children from Sexual Offences Act, 2012. Section 354 A of IPC is a bailable offence. Sections 7 and 8 are included in Clause (C) of Chapter II of the POCSO Act. The maximum punishment that can be imposed under Section 8 is up to 5 years. The maximum punishment that can be imposed under Section 10 of the POCSO Act is 7 years. Punishment is mentioned in Sections 8 and 10 of the POCSO Act. The Apex Court and this Court held that, the persons who are involved in offences, in which the maximum punishment is below 7 years should be released on bail. In such situation, in total violation of the directions of the Full Bench of this Court and the directions of the Apex Court, the investigating officer in this case arrested the petitioner. It is also to be noted that a bail application under Section 438 CrPC is pending before this court and at that time the petitioner was arrested. It is also to be noted that the decision of the Full Bench is published in all media and the investigating officer alone cannot say that, he was not aware about the decision of the Full Bench of this Court. In such

circumstances, according to me, an enquiry is necessary against the Arresting Officer in this case. I am not making any further observations against the Arresting Officer because he is not heard at the time of hearing the bail application. But a senior officer should conduct an enquiry and the enquiry report should be submitted before this Court. Otherwise, there will not be any respect to the decision of the Full Bench of this Court. Therefore, the District Police Chief, Palakkad should conduct an enquiry regarding the conduct of the Police Officer, who arrested the petitioner in this case, when the Bail Application under Section 438 CrPC is pending and when there is a general direction issued by the Full Bench regarding arrest of the citizen are in force.

9. The District Police Chief should conduct the enquiry either himself or through a Senior Police Officer, and submit an action taken report before the Registrar General of this Court within thirty days from the date of receipt of this order.

10. Coming back to the facts of this case, the Bail Application is opposed by the Public Prosecutor. According to me, the maximum punishment that can be imposed in this case is below 7 years. Moreover, the petitioner was arrested on 21.04.2020. Section 354 A of IPC is bailable. Whether, the offences under Section 7, 8,9 and 10 of the POCSO Act is attracted or not in the facts and circumstances of this case is a matter to be investigated by the Investigating Officer.

11. Considering the facts and circumstances of the case and considering the fact that the petitioner is in custody from 21.04.2020 onwards, I think this Bail Application can be allowed.

12. Moreover, considering the need to follow social distancing norms inside prisons so as to avert the spread of the novel Corona Virus Pandemic, the Hon'ble Supreme Court in **Re: Contagion of COVID-19 Virus In Prisons case (Suo Motu Writ Petition(C) No.1 of 2020)** and a Full Bench of

this Court in **W.P(C)No.9400 of 2020** issued various salutary directions for minimizing the number of inmates inside prisons.

13. Moreover, it is a well accepted principle that the bail is the rule and the jail is the exception. The Hon'ble Supreme Court in **Chidambaram. P v Directorate of Enforcement (2019 (16) SCALE 870),** after considering all the earlier judgments, observed that, the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial.

14. Considering the dictum laid down in the above decision and considering the facts and circumstances of this case, this Bail Application is allowed with the following directions:

1. The Superintendent of Jail concerned where the petitioner is incarcerated is directed to release the petitioner on bail on executing a self bond ensuring that he will appear before the Court concerned as and when required, if

he is not in detention in any other case. It is further directed that the Superintendent of Jail should get the bail bond from the petitioner as stipulated in Section 441 Cr.P.C.

2. The Superintendent of Jail concerned shall also get the phone number and the address at which the petitioner would be residing after his release.

3. The Superintendent of Jail concerned, immediately after release of the petitioner will forthwith forward the bail bond obtained from the petitioner to the jurisdictional Court.

4. The petitioner immediately after release from the prison, report before the Station House Officer of the Jurisdictional Police Station and shall furnish his phone number and the place where he is going to reside. The Station House Officer concerned shall keep a vigil on the whereabouts of the

petitioner and shall ensure that the petitioner does not violate the terms of the undertaking.

5. The petitioner shall appear before the Investigating Officer as and when required. The petitioner shall co-operate with the investigation and shall not threaten or attempt to influence the witnesses or tamper with the evidence.

6. The petitioner shall within one week from the commencement of the functioning of the jurisdictional court, if the court is not functioning at present, execute a bond for Rs.50,000/- (Rupees Fifty Thousand only) with two solvent sureties each for the like sum to the satisfaction of the jurisdictional Court.

7. The petitioner shall strictly abide by the various guidelines issued by the State Government and Central Government with respect to keeping of social distancing and

other directions in the wake of declared lock-down.

8. If any of the above conditions are violated by the petitioner, the jurisdictional Court can cancel the bail in accordance with law, even though the bail is granted by this Court.

The Registry of this court will forward a copy of this order to the District Police Chief, Palakkad for compliance and report.

P.V.KUNHIKRISHNAN, JUDGE

YKB