2024:KER:70829

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

TUESDAY, THE 24TH DAY OF SEPTEMBER 2024 / 2ND ASWINA, 1946

BAIL APPL. NO. 7331 OF 2024

CRIME NO.1192/2024 OF MUSEUM POLICE STATION,

THIRUVANANTHAPURAM

PETITIONER:

XXXXXXXXXX
XXXXXXXXXX XXXXXXXXXX

BY ADVS.
PHILIP T.VARGHESE
B.RAMAN PILLAI (SR.)
SUJESH MENON V.B.
THOMAS T.VARGHESE
ACHU SUBHA ABRAHAM
V.T.LITHA
K.R.MONISHA
NITYA R.

RESPONDENTS:

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

2 XXXXXXXXXX
XXXXXXXXXX XXXXXXXXXX, IS IMPLEADED AS AN INTERVENOR AS PER ORDER DATED 24.9.2024 IN CRL.MA.NO.1/2024

BY ADVS.
ADVOCATE GENERAL OFFICE KERALA
V.HARISH
SHRI.P.NARAYANAN, SPL. G.P. TO DGP AND ADDL. P.P.
SHRI.SAJJU.S., SENIOR G.P.()
DIRECTOR GENERAL OF PROSECUTION(AG-10)
RAJAN VISHNURAJ

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 24.09.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

2024:KER:70829

"C.R"

C.S.DIAS, J.

Bail Application No.7331 of 2024

Dated this the 24th day of September, 2024

O R D E R

The accused in Crime No.1192 of 2024 of the Museum Police Station, Thiruvananthapuram, which is registered against him for allegedly committing the offences punishable under Sections 376 and 506 of the Indian Penal Code, has filed the application under Section 482 of the Bharatiya Nagarik Suraksha Sanhita, 2023, for an order of pre-arrest bail.

2. The survivor of the above crime has submitted Annexure 2 complaint to the State Police Chief, *inter alia,* alleging that the accused got in touch with her through Facebook in 2014. He frequently interacted with her and her mother over the phone and via Skype. The accused encouraged the survivor to work in the

cinema and assured her of all help from his side. In 2016, the accused invited the survivor and her parents to attend the preview of his movie 'Sukhamayirikatte', which they attended. It was for the first time the survivor met the accused. After the movie, the accused invited the survivor to the Mascot Hotel for lunch and to discuss on a new film in which his son was proposed to play the lead role. Accordingly, the survivor went to the accused's hotel room. The accused made the survivor sit on a chair near his bed, and he explained the adjustments and compromises that are expected of women to excel in the field. After that, he went near the survivor and, without her consent, grabbed her hand, pressed her fingers and said that her nails were looking good and that he loved her nail polish colour. Suddenly, he kissed her cheeks, neck, lips and shoulders, and then he grabbed and pressed her body very hard, including her stomach and breasts. The survivor was startled by the accused's acts and froze with fear. He then touched her genitals. He removed the survivor's clothes and inner garments and bit and licked the survivor's body, breasts and vagina. The

survivor tried her best to push away the accused, but he confined her. He requested the survivor to permit him to lick her genitals if she did not allow him to have penetrative sex. Yet, he attempted to have sexual intercourse, which the survivor resisted. The accused touched, inserted his finger and spat on the survivor's genitals. The survivor got angry, sad and broke down. She told the accused that she would tell people about the incident. But he told her that no one would believe her, as she does not have a profile and her standing is zero compared to his. The survivor was shell-shocked and managed to escape from the room, completely shaken. Even after the incident, the accused attempted to contact the survivor, but she refused to respond to his calls, and she blocked him. The survivor belongs to a middle-class family. The trauma was so much that she could not reveal the whole incident even to her parents. In 2019, she gathered courage and mentioned the harassment in a Facebook post. Subsequently, the survivor got threatening messages, due to which she never had the courage to complain. The survivor has been living in immense trauma, fear and distress

and still fears for her life. Hence, urgent intervention may be made. Consequent to the complaint, the instant FIR was registered against the accused.

3. Heard; Sri. B. Raman Pillai, the learned Senior Counsel appearing for the petitioner; Sri. P. Narayanan, Additional Public Prosecutor; and Sri. V. Harish, the learned Counsel appearing for the survivor/intervenor.

4. The learned Senior Counsel appearing for the petitioner zealously argued that the petitioner is innocent of the accusations attributed against him. The alleged incident occurred in 2016, but the FIR was registered only in 2024, i.e., after eight years, proving the falsity and hollowness of the crime. The survivor has given no plausible explanation for the inordinate delay in lodging the complaint. In the Annexure 5 Facebook post published by the survivor on 21.05.2019, she failed to mention anything about the sexual assault that allegedly took place at the Mascot Hotel, as alleged in the instant complaint. This material omission substantiates the frivolity of the crime. It is equally hard to

believe that after the sexual harassment allegedly committed by the petitioner against the survivor at 'Nila Theatre', the survivor would dare to go to the hotel room of the accused. In Annexure 2 complaint, the survivor has not mentioned the date or time of the alleged incident, which throws a cloud on the accusation. The survivor has no case that the petitioner had committed sexual intercourse. Therefore, the offence under Section 375 of the IPC is not attracted. Annexure 4 Facebook post made by the survivor depicts her true character. She is an outspoken lady and does not hesitate to falsely indict anyone. It is improbable that the survivor is scared to complain, that too against a person who has misbehaved with her. In Annexure 10 Facebook post, she made allegations against 14 persons to humiliate them. Annexure 5 Facebook post is an aftermath of the press conference conducted by the petitioner against the survivor's association. In Annexure 4 Facebook post, the survivor has put a 'me too' hashtag, which shows that she is attempting to blackmail the petitioner. The survivor has repeatedly made and published defamatory posts against the petitioner in

print, visual and social media. The silence of the petitioner disconcerted the survivor. It is only to get the petitioner arrested and put him behind bars that the survivor has made the false accusations. The petitioner is a law-abiding citizen without any criminal antecedents. The petitioner is ready to abide by any condition that may be imposed by this Court and is willing to cooperate with the investigation. As the complaint is highly belated, detention and custodial interrogation of the petitioner are not required to collect evidence. The learned Senior Counsel relied on the decision of the Honourable Supreme Court in **Bhadresh Bipinbhai Sheth v. State of Gujarat and another** [(2016) 1 SCC 152] to buttress his contentions. He prayed that the application be allowed.

5. The learned Public Prosecutor opposed the application. He drew the attention of this Court to the allegations in Annexure 2 complaint and contended that the complaint satisfies all the ingredients to attract the offence under Section 375 of the IPC. He submitted that it was only because the survivor was apprehensive

for her life due to the powerful position of the petitioner that she did not complain earlier. After the Justice Hema Commission report was published, many actors opened up. Then, the survivor also garnered the courage to complain. A co-joint reading of the Annexure 5 Facebook post and Annexure 2 complaint undoubtedly reveals that the petitioner raped the survivor on the ill-fated day. In Annexure 1 complaint submitted by the petitioner to the State Police Chief, he has candidly admitted to having met the survivor on the day of the screening of his film. But he has bluntly denied meeting the survivor in the Mascot Hotel. There are witnesses and incriminating materials to establish that the petitioner and survivor were together in the hotel room where the petitioner raped the survivor. The learned Public Prosecutor referred to the bail objection report filed by the Investigation Officer, wherein it is, *inter alia*, stated that the petitioner intends to revile and malign a poor rape victim by treating her with utmost rancour and disrespect. Immediately upon receipt of the complaint, the investigation has started and is progressing in the right direction. A scene mahazer

has been prepared. The survivor and witnesses have been examined and their statements are recorded. The details of the Hotel room booked by the petitioner have been collected. The proximity of the petitioner and the survivor has been verified and ascertained based on documentary evidence. Several witnesses have a clear perception of the crime. The investigation is only at a nascent stage. There is a stockpile of evidence against the petitioner. If the petitioner is granted pre-arrest bail, considering his influence and clout, he would tamper with the evidence and threaten the witnesses. The petitioner's custodial interrogation is necessary to investigate the crime, particularly his potency test, which has to be invariably conducted. If the application is allowed, it will send a wrong message to the Society. The learned Public Prosecutor relied on the decision of the Honourable Supreme Court in **State of Punjab v. Gurmit Singh and others** [(1996) 2 SCC 384] to canvass the position that the delay in filing a complaint in a rape case is not fatal. He prayed that the application be dismissed.

6. The learned Counsel for the survivor/intervenor stoutly resisted the application. He contended that there are convincing records to establish that the petitioner had raped the survivor. Annexure 5 Facebook post of the survivor indicates the incident. It was only because the petitioner is a powerful and highly influential personality who is well connected in the corridors of power that the survivor was mortally scared to file a complaint against him. The survivor was apprehensive that the petitioner would ruin her career and also cause harm to her life. It is well settled by a host of judicial pronouncements that courts cannot overlook that in sexual offences, delay in lodging the FIR can be due to a variety of reasons. The fact that the petitioner has deleted his Facebook account, through which he contacted the survivor, after the registration of the crime, proves his culpability. The State Police are not conducting the investigation properly. They have yielded to the petitioner's influence by not arresting him or recovering the electronic evidence. There is every likelihood of the petitioner destroying the evidence. The petitioner's custodial interrogation is

necessary for a full-fledged investigation of the crime. As the petitioner has committed a heinous crime, this Court may not exercise its discretionary power in favour of such a criminal. Hence, the application may be dismissed.

7. The principal contention of the learned Senior Counsel for the petitioner was that there was an inordinate delay of eight years between the alleged incident and the lodging of Annexure 2 complaint. He asserted that the purported incident of rape transpired in 2016; however, Annexure 2 complaint was sent by email to the State Police Chief only on 27.08.2024. Therefore, the inexcusable delay undermines the credibility of the prosecution case, casts significant doubt upon the veracity of the allegations, and cuts at the roots of the complaint.

8. It is trite in **Kalyan Chandra Sarkar v. Rajesh Ranjan** [(2004) 7 SCC 528]) and a catena of decisions of the Honourable Supreme Court that a detailed examination of the evidence and elaborate documentation of the merits of the case shall not be undertaken at the stage of considering a bail application.

Nevertheless, the orders on such applications shall indicate reasons for prima facie concluding why bail is granted or refused, particularly where the accused is alleged to have committed a serious offence.

9. In Annexure 2 complaint, the survivor has explicitly described the trauma that she endured due to the incident, which was agonising that it inhibited her from disclosing the details to anyone, including her parents. In 2019, she mustered the courage to address the harassment in a Facebook post. Following this disclosure, the survivor received threatening messages, whereby she lost the courage to complain. The survivor has been living in a state of continuous trauma, fear and distress and continues to harbour fears for her life.

10. Whether the survivor's above explanation is plausible will have to be ultimately evaluated and decided after a full-fledged trial. Nevertheless, the contention that the above delay vitiates the entire prosecution case is not a ground for scraping the complaint,

particularly while considering a bail application. Victims of sexual abuse and assault may experience psychological, emotional and social barriers that feed the delay in reporting the matter, which necessarily has to be understood in the context of the trauma. The above principle is well-supported by precedents referred to below.

11. In **State of Punjab v. Gurmit Singh and others** [(1996) 2 SCC 382]) the Honourable Supreme Court has emphatically observed that the courts cannot overlook the fact that in sexual offences, delay in lodging the FIR can be due to a variety of reasons, particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. The same view has been reiterated by the Honourable Supreme Court in **Deepak v. State of Haryana** [(2015) 4 SCC 762])

12. It is also contextual to recall the law laid down by the Honourable Supreme Court in Sohan Singh and another v. State of

Bihar [(2010) 1 SCC 68]) that it is difficult to appreciate the plight of the victim who has been criminally assaulted. Obviously, the prosecutrix must also have gone through great turmoil, and only after serious thought would she decide to lodge the FIR.

13. In yet another decision on the point, the Honourable Supreme Court in **State of U.P v. Manoj Kumar Pandey** [(2009) 1 SCC 72]) has held that, apart from the normal rule regarding the duty of the prosecution to explain the delay in lodging the FIR and the lack of prejudice and/or prejudice caused because of such delayed lodging of FIR, the same does not per se apply to the rape cases.

14. Considering the above exposition of law and the explanation given by the survivor in Annexure 2 complaint, this Court, at this preliminary stage, cannot accept the contention that the delay in reporting the crime is fatal to the prosecution. The circumstances and context surrounding the delay warrant careful examination after the trial.

15. The next contention of the learned Senior Counsel for the

petitioner was that, in the absence of any allegation that the petitioner committed penetrative sexual intercourse on the survivor, the offence under Section 375 of the IPC was not attracted.

16. In view of the above submission, it is apposite to refer to Section 375 of the IPC, which reads thus.

> **"375. Rape**.— A man is said to commit "rape" if he—
>
> (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
>
> **(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or**
>
> (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
>
> **(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,** under the circumstances falling under any of the following seven descriptions:
>
> First—Against her will. Secondly—Without her consent.
>
> Thirdly—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
>
> Fourthly—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> Fifthly—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
>
> Sixthly—With or without her consent, when she is under eighteen years of age. Seventhly—When she is unable to communicate consent.

Explanation 1: For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2: Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

PROVIDED that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1: A medical procedure or intervention shall not constitute rape.

Exception 2: Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape".

17. On an examination of the allegations in Annexure 2 complaint, prima facie, it indicates that the petitioner has committed the above offence because it is alleged that he had inserted his finger in the survivor's vagina and applied his mouth in a similar manner which falls under clauses (b) and (d) of Section 375. Hence, the said contention also fails.

18. The allegations in Annexure 2 complaint are unquestionably serious and are grave.

19. Recently, the Honourable Supreme Court in **XXX v. Arun Kumar C.K and another** [(2022) SCC Online SC 1529]) while considering an appeal arising out of an order granting

anticipatory bail to an accused under the Protection of Children from Sexual Offences Act, 2012, has categorically held thus:

> "12. In a case containing such serious allegations, the High Court ought not to have exercised its jurisdiction in granting protection against arrest, as the Investigating Officer deserves free-hand to take the investigation to its logical conclusion. It goes without saying that appearance before the Investigating Officer who, has been prevented from subjecting Respondent No. 1 to custodial interrogation, can hardly be fruitful to find out the *prima facie* substance in the allegations, which are of extreme serious in nature.
>
> Xxx xxx xxx xxx xxx
>
> 14. It may be true, as pointed out by learned counsel appearing for Respondent No. 1, that charge-sheet has already been filed. It will be unfair to presume on our part that the Investigating Officer does not require Respondent No. 1 for custodial interrogation for the purpose of further investigation.
>
> 15. Be that as it may, even assuming it a case where Respondent No. 1 is not required for custodial interrogation, we are satisfied that the High Court ought not to have granted discretionary relief of anticipatory bail.
>
> 16. We are dealing with a matter wherein the original complainant (appellant herein) has come before this Court praying that the anticipatory bail granted by the High Court to the accused should be cancelled. To put it in other words, the complainant says that the High Court wrongly exercised its discretion while granting anticipatory bail to the accused in a very serious crime like POCSO and, therefore, the order passed by the High Court granting anticipatory bail to the accused should be quashed and set aside. In many anticipatory bail matters, we have noticed one common argument being canvassed that no custodial interrogation is required and, therefore, anticipatory bail may be granted. **There appears to be a serious misconception of law that if no case for custodial interrogation is made out by the prosecution, then that alone would be a good ground to grant anticipatory bail. Custodial interrogation can be one of the relevant aspects to be considered along with other grounds while deciding an application seeking anticipatory bail. There may be many cases in which the custodial interrogation of the accused may not be required, but that does not mean that the *prima facie* case against the accused should be ignored or overlooked and he should be granted anticipatory bail. The first and foremost thing that the court hearing an anticipatory bail application should consider is the *prima facie* case put up against the accused. Thereafter, the nature of the offence should be**

> **looked into along with the severity of the punishment. Custodial interrogation can be one of the grounds to decline anticipatory bail. However, even if custodial interrogation is not required or necessitated, by itself, cannot be a ground to grant anticipatory bail".**

20. Similarly, in **Ram Govind Upadhyay v. Sudarshan Singh [Ram Govind Upadhyay v. Sudarshan Singh,** [(2002) 3 SCC 598] the Honourable Supreme Court has held that the grant of bail, though involve the exercise of discretionary power of the Court, such exercise of discretion has to be made judiciously and not as a matter of course.

21. The parameters to grant an order of pre-arrest bail have been succinctly culled out by the Hon'ble Supreme Court in ***Siddharam Satlingappa Mhetre v. State of Maharashtra*** [(2011) 1 SCC 694] in the following lines:

> "112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail: (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made; (ii) 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; (iii) The possibility of the applicant to flee from justice; (iv) The possibility of the accused's likelihood to repeat similar or other offences; (v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her; (vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people; (vii) 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; (viii) 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 the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused; (ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant; (x) 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 is entitled to an order of bail."

22. Even in **Bhadres Bipinbhai Sheth's** case (supra), the decision relied on by the learned Senior Counsel, the Honourable Supreme Court has observed that the gravity of the charge and the exact role of the accused must be properly comprehended, and the courts must evaluate the facts of the case meticulously.

23. The learned Senior Counsel for the petitioner had also characterised the survivor as an outspoken and vociferous lady who has made unsubstantiated allegations against fourteen men; therefore, her complaint lacks credibility. The submission is unwarranted and reflects an uncharitable view of the survivor's circumstances. A woman's experiences of sexual assault are not a reflection of her character but rather an indication of her suffering. The attempt to blame a woman for speaking out may be a strategy

to silence her, which is hostile to the supremacy of the law. The courts are called to evaluate the merits of the application, free from any prejudicial assumption of the survivor's character. The core of the matter is whether the petitioner has prima facie committed the offences alleged against him and whether he is entitled to pre-arrest bail.

24. In light of the reference made by the learned Public Prosecutor to the Justice Hema Committee report, this Court finds it necessary to state the background facts regarding the report briefly. The Government of Kerala had appointed an Expert three-member Committee headed by Justice K. Hema, a former Judge of this Court, to study and report the issues faced by women in cinema and suggest solutions to their problems. Although the Expert Committee submitted the report to the Government in 2019, mysteriously, the Government maintained a sphinx-like silence for five years. Ultimately, it was only through the intervention of this Court that the report saw the light of day. Subsequently, the Government constituted a Special Investigation Team to take

action against the offenders named in the report, but based on independent complaints filed by the victims. Consequently, several victims have filed complaints before the Police, like the survivor in the instant case. The question of the legality or rather illegality of the Government shelving the report and the future course of action to be taken on the report are being independently examined by a Division Bench of this Court. Therefore, I refrain from delving into the aspect. Be that as it may, in view of the directions of this Court to publicise the report, the same has presumably emboldened the victims, like the survivor, to step forward.

25. Turning back to the case on hand, on overall scrutiny of the facts, the law on the point, and my reasoning given above, and on comprehending the nature, gravity and seriousness of the accusations alleged against the petitioner, coupled with the materials placed on record that prima facie shows the petitioner's involvement in the crime, that the petitioner's custodial interrogation is inevitable for the proper investigation of the crime, especially since his defence is a total denial of the incident and his

potency test is to be conducted, and the reasonable apprehension of the prosecution that the petitioner may intimidate the witnesses and tamper with the evidence, I arrive at the irresistible conclusion that this is not a fit case to exercise the discretionary powers of this Court in favour of the petitioner.

26. Before concluding, it is worth reminiscing the observations of the Honourable Supreme Court in **Bilkis Yakub Rasool v. Union of India,** [(2024) 5 SCC 481] that a woman deserves respect howsoever high or low she may be otherwise considered in society or to whatever faith she may follow or any creed she may belong to.

In light of the above discussions, I hold that the application is to be dismissed. Consequentially, the application is dismissed. Nonetheless, it is clarified that the observations made in this order are only for the purpose of considering the application and shall not be construed as an expression of the merits of the case.

SD/-
C.S.DIAS, JUDGE

sks/23.09.2024