

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

TUESDAY, THE 5TH DAY OF JUNE 2018 / 15TH JYAISHTA, 1940

Bail Appl..No. 3320 of 2018

CRIME NO. 349/2018 OF HOSDURG POLICE STATION , KASARGOD

PETITIONER/ACCUSED

MR.X,
S/O BABY V.M.

BY ADVS.SRI.T.MADHU
SMT.C.R.SARADAMANI

RESPONDENT/STATE:

THE STATE OF KERALA
THROUGH THE STATION HOUSE OFFICER, HOSDURG POLICE
STATION, KASARAGOD DISTRICT, REPRESENTED BY THE PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM 682 031

BY PUBLIC PROSECUTOR SRI.O.CHANDRASENAN

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON 28-05-2018,
THE COURT ON 05-06-2018 PASSED THE FOLLOWING:

“CR”

R.NARAYANA PISHARADI, J

B.A.No.3320 of 2018

Dated this the 5th day of June, 2018

ORDER

Is an application for anticipatory bail at the instance of a child in conflict with law maintainable before the High Court or the Court of Session? This question essentially falls for consideration in this application for anticipatory bail filed under Section 438 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code').

2. The petitioner is the third accused in the case registered as Crime No.349/2018 of the Hosdurg police station under Sections 143, 147, 148, 341 and 307 read with 149 I.P.C. He seeks the protection envisaged under Section 438 of the Code in case of his arrest by the police in the aforesaid case.

3. The prosecution case is that on 31.03.2018, at about 19.30 hours, at the road near the house of the de facto complainant, about 50 persons including the accused in the case

attacked him and his friends with deadly weapons and that they made attempt to commit murder of the friend of the de facto complainant by name Nandu. It is alleged that the accused threw stones towards the de facto complainant and his friends and that the second and the third accused wrongfully restrained Nandu and that the second accused beat on the head of Nandu with an iron rod with the intention to kill him.

4. I have heard the learned counsel for the petitioner and the learned Public Prosecutor and perused the case diary.

5. Learned counsel for the petitioner would submit that the petitioner is a child in conflict with law as defined under the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'the Act') and that the petitioner is entitled to get every protection and privilege provided under the Act to such a person.

6. Section 2(13) of the Act states that a "child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence. The incident in

this case occurred on 31.03.2018. The petitioner has produced a copy of his birth certificate. It shows that his date of birth is 21.06.2000. Therefore, on the date of commission of the offences, the petitioner had not completed the age of 18 years. It follows that, prima facie, he is a child in conflict with law as defined under the Act.

7. Section 438(1) of the Code provides that where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under that section that in the event of such arrest he shall be released on bail.

8. The following conditions are required to be satisfied for maintaining an application under Section 438(1) of the Code: (1) The applicant is accused of having committed a non-bailable offence (2) He entertains an apprehension or belief that he may be arrested on accusation of having committed such offence and (3) The apprehension or belief entertained by him is reasonable.

9. In **Gurbaksh Singh Sibbia v. State of Punjab : AIR**

1980 SC 1632, a Constitution Bench of the Supreme Court has held as follows:

"Section 438 (1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has 'reason to believe' that he may be arrested for a non - bailable offence. The use of the expression 'reason to believe' shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief', for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that 'some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non - bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438 (1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely".

10. The expression 'anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. The concepts of personal liberty and freedom are recognised in the provision contained in Section 438 of the Code. 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.

11. The relevant provisions under the Act may be now adverted to. Section 10 (1) of the Act reads as follows:

10. Apprehension of child alleged to be in conflict with law.- (1) *As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:*

Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lockup or lodged in a jail.

12. Section 12 of the Act provides as follows:

12. Bail to a person who is apparently a child alleged to be in conflict with law.-

(1) *When any person, who is apparently a child and is*

alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the

bail order, such child shall be produced before the Board for modification of the conditions of bail."

13. In **K. Vignesh v. State (MANU/TN/1491/2017)**, a Division Bench of the Madras High Court had occasion to examine the scope and ambit of the aforesaid provisions in the Act to determine whether an application for anticipatory bail is maintainable at the instance of a child in conflict with law. The Court held that the legislature consciously did not empower the police to arrest a child in conflict with law and thus, it is manifestly clear that an application seeking anticipatory bail under Section 438 of the Code at the instance of a child in conflict with law is not at all maintainable. While reaching this conclusion, the Court has stated as follows:

"A deep reading of these two provisions would make it crystal clear that no police officer has been empowered to arrest a child in conflict with law and instead he has been empowered only to apprehend a child in conflict with law. While enacting the Juvenile Justice (Care and Protection of Children) Act, 2015, the Legislature was well aware of Chapter V of the Code of Criminal Procedure more particularly Section 46 of the Code of Criminal Procedure as to how a person could be arrested. Had it been the

intention of the Legislature, that a police officer should be empowered to arrest a child in conflict with law, the Legislature would have very well used the expression 'arrest' instead of using the expression 'apprehend' in Section 10 of the Juvenile Justice (Care and Protection of Children) Act, 2015. In our considered view, the Legislature has, thus, consciously omitted to use the expression 'arrest' in Section 10 of the Act, which means that the Legislature did not want to empower the police to arrest a child in conflict with law. The Legislature, being aware of the consequences that ensue the arrest, has avoided to empower the police to arrest a child in conflict with law. At the same time, the child in conflict with law cannot be let free as it would not be in the interest of the child in conflict with law as well as the society. Therefore, the Legislature had obviously thought it fit to give only a limited power to the police. In other words, the Legislature has empowered the police simply to apprehend a child in conflict with law and immediately, without any delay, cause his production before the Juvenile Justice Board. The Juvenile Justice Board has also not been empowered to pass any order of remand of the child in conflict with law either with the police or in jail. The proviso to Section 10 of the Act makes it very clear that in no case a child alleged to be in conflict with law shall be placed in a police lock-up or lodged in a jail. The Board has been obligated to send the child either to an observation home or a place of safety. There are lot of other safeguards in the Act as well as in the

Juvenile Justice (Care and Protection of Children) Model Rules, 2016 to ensure that the child so apprehended by a police or any other authority shall not in any manner be disturbed emotionally, psychologically or physically. Thus, a reading of the entire scheme of the Act would inform that no authority, including the police, has been empowered to arrest a child in conflict with law but instead the child in conflict with law could only be apprehended and produced before the Juvenile Justice Board. After the child in conflict with law is so apprehended or detained by the police or appears or brought before the Board such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person. Thus, a child in conflict with law apprehended or detained is, as of right, entitled for bail irrespective of whether the offence said to have been committed by him is bailable or non-bailable. From the above narration of various provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, one can understand, without any doubt whatsoever, that a child in conflict with law cannot be arrested and thus there cannot be apprehension of arrest and so an application at the instance of a child in conflict with law either before the High Court or before the Court of Sessions under Section 438 Cr.P.C. is not maintainable. The Juvenile Justice (Care and

Protection of Children) Act, 2015 is a self-contained Code which is both substantive as well as procedural. In the light of these safeguards, and in the light of the legal position that the child in conflict with law cannot be arrested, the child in conflict with law need not apply for anticipatory bail. The legislature has consciously did not empower the police to arrest a child in conflict with law. Thus, it is manifestly clear that an application seeking anticipatory bail under Section 438 Cr.P.C. at the instance of a child in conflict with law is not at all maintainable”.

14. The Madras High Court has given much emphasis and importance to the fact that Section 10 of the Act provides for apprehending a child in conflict with law by the police and not for arresting him. That court has taken the view that the Act does not provide for the arrest of a child in conflict with law by the police and in the absence of any arrest, no question of invoking the provision contained in Section 438 of the Code arises. That court is of the view that since a child in conflict with law cannot be arrested, he/she need not apply for anticipatory bail. With great respect, I am not in a position to agree with this view.

15. In **Gurbaksh Singh Sibbia** (supra), it has been observed as follows:

"Any order of bail can, of course, be effective only from the time of arrest because, to grant bail, as stated in Wharton's Law Lexicon, is to 'set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognisance, suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested. 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. Police custody is an inevitable concomitant of arrest for non bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post arrest order of bail, it 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. S.46 (1) of the Code of Criminal

Procedure which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest" shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". A direction under S.438 is intended to confer conditional immunity from this 'touch' or confinement".

16. In **Siddharam Satlingappa Mhetre v. State of Maharashtra: AIR 2011 SC 312**, the Apex Court has elaborately dealt with the concept of liberty. It is apt here to extract the following passages from this judgment.

"17. It is clear from the Statement of Objects and Reasons that the purpose of incorporating S.438 in the Cr.P.C was to recognize the importance of personal liberty and freedom in a free and democratic country. When we carefully analyze this section, the wisdom of the legislature becomes quite evident and clear that the legislature was keen to ensure respect for the personal liberty and also pressed in service the age - old principle that an individual is presumed to be innocent till he is found guilty by the court.

54. Blackstone in "Commentaries on the Laws of England", Vol.I, p.134 aptly observed that "Personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law".

55. According to Dicey, a distinguished English author of the Constitutional Law in his treatise on Constitutional Law observed that, "Personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification." [Dicey on Constitutional Law, 9th Edn., pp.207-08]. According to him, it is the negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory. In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual, and personal liberty in this sense is the antithesis of physical restraint or coercion.

62. This court defined the term "personal liberty" immediately after the Constitution came in force in India in the case of A. K. Gopalan v. The State of Madras, AIR 1950 SC 27. The expression 'personal liberty' has wider as well narrow meaning. In the wider sense it includes not only immunity from arrest and detention but also freedom of speech, association etc. In the narrow sense, it means immunity from arrest and detention. The juristic conception of 'personal liberty', when used the latter sense, is that it consists freedom of movement and locomotion.

63. Mukherji, J. in the said judgment observed that 'Personal Liberty' means liberty relating to or concerning the person or body of the individual and it is, in this sense, antithesis of physical restraint or coercion.

'Personal Liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. This negative right constitutes the essence of personal liberty.

64. In Kharak Singh v. State of U.P. and Others AIR 1963 SC 1295, Subba Rao, J. defined 'personal liberty', as a right of an individual to be free from restrictions or encroachment on his person whether these are directly imposed or indirectly brought about by calculated measure. The court held that 'personal liberty' in Art.21 includes all varieties of freedoms except those included in Art.19.

65. In Maneka Gandhi v. Union of India and Another, 1978 (1) SCC 248, this court expanded the scope of the expression 'personal liberty' as used in Art.21 of the Constitution of India. The court rejected the argument that the expression 'personal liberty' must be so interpreted as to avoid overlapping between Art.21 and Art.19(1). It was observed: "The expression 'personal liberty' in Art.21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Art.19."

17. Section 10 of the Act empowers the police for apprehending a child alleged to be in conflict with law. It does not provide for arresting a child alleged to be in conflict with law.

Section 46(1) of the Code deals with how arrests are to be made. It provides that in making an arrest, the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action. Apprehending a person necessarily involves touching or confining the body of that person or submission of the person to the control of the police officer. Therefore, apprehending a person involves arrest of the person. Apprehending a person curtails his personal freedom and liberty. In my view, merely for the reason that Section 10 of the Act provides for apprehending a child in conflict with law and not for arresting him, it cannot be held that an application under Section 438 of the Code by him/her is not maintainable.

18. As per Section 12 of the Act, when any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before the Juvenile Justice Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the

time being in force, be released on bail unless the Board is satisfied that there are reasonable grounds for believing that granting bail to him is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or his release would defeat the ends of justice. Section 12(1) of the Act, to a large extent, obliterates the distinction between aailable offence and a non-ailable offence as far as a child in conflict with law is concerned because whatever be the nature of the offence,ailable or non-ailable, he is entitled to be released on bail unless the proviso to that provision applies. The question is whether Section 12(1) of the Act, for that reason, creates a bar for the application of Section 438 of the Code.

19. Section 12(1) of the Act deals with a situation where a child in conflict with law is apprehended or detained by the police or appears or brought before the Board. It deals with the procedure to be followed after apprehending a child in conflict with law. When a child in conflict with law is apprehended or detained or appears or brought before the Board, the provision

contained in Section 12(1) of the Act comes into play. The expression "notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)" in Section 12(1) of the Act is applicable to granting of bail to a child who is alleged to be in conflict with law after his apprehension or detention by the police or appearance or production before the Board. It does not deal with a situation before apprehending a child in conflict with law. In other words, this provision does not deal with a situation before the apprehension or detention of a child in conflict with law by the police or his appearance or production before the Board. Therefore, the provision contained in Section 12(1) of the Act does not take away the jurisdiction of the High Court or the Court of Session under Section 438 of the Code even by implication.

20. Section 4(1) of the Code provides that all offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions contained in the Code. Section 4(2) of the Code states that all offences under any other law shall be investigated, inquired into,

tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Section 5 of the Code states that nothing contained in the case shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. It is apparent from Section 4 of the Code that the provisions of the Criminal Procedure Code are applicable where an offence under the Indian Penal Code or under any other law is being investigated, inquired into, tried or otherwise dealt with. Section 5 of the Code is not in derogation of Section 4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction and it does not nullify the effect of Section 4(2) of the Code. The provisions of the Code would be applicable in the absence of any contrary provision in the special Act or any special provision excluding the jurisdiction or applicability of the

Code.

21. In **Vishwa Mitter v. O. P. Poddar : AIR 1984 SC 5**, the Supreme Court has held as follows:

"Generally speaking, anyone can put the criminal law in motion unless there is a specific provision to the contrary. This is specifically indicated by the provision of sub-section (2) of S.4 which provides that all offences under any other law meaning thereby law other than the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions in the Code of Criminal Procedure, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. It would follow as a necessary corollary that unless in any statute other than the Code of Criminal Procedure which prescribes an offence and simultaneously specifies the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences, the provisions of the Code of Criminal Procedure shall apply in respect of such offences and they shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code of Criminal Procedure."

22. There is no provision in the Act which either expressly or by necessary implication excludes the applicability of Section 438 of the Code which provides for granting anticipatory bail. The Act does not contain any special provision dealing with

granting of anticipatory bail to a child in conflict with law. Where no special provision is made under the Act with regard to any particular matter, the provision contained in the Code in that regard shall be applicable. The Act does not contain any provision which excludes the general application of the provisions of the Code as such. Wherever the legislature intended to give overriding effect to the statutory scheme of the Act over the provisions of general application contained in the Code, it has been specifically provided so.

23. In **Sudhir Sharma v. State of Chattisgarh : MANU/CG/0449/2017**, a Division Bench of the Chattisgarh High Court has held as follows:

"There is no warrant for conclusion that non obstante clause contained in Section 12 of the Act of 2015 completely excludes the availability of remedy of applying for grant of anticipatory bail by a CICL, who is apprehending his arrest on the accusation of commission of any offence. The only provision for grant of bail as contained under Section 12 of the Act of 2015, which deals with application for grant of bail by a CICL applies, when he is apprehended or detained by the police or appears or brought before the Board on the allegation of having committed a bailable or non-

bailable offence. The statutory scheme of Section 12 mandates grant of bail to a CICL by use of word "shall" unless there appears reasonable grounds for believing that the release is likely to bring the CICL in association with known criminal or to expose such person to mental, physical or psychological danger or his release would defeat the ends of justice. The provision, in fact, deals with a case of child differently from any other person who is not a child. Unless the aforesaid three exceptional grounds are made out for rejection of application for grant of bail, CICL has to be granted bail irrespective of nature and gravity of allegations against him. We fail to see how the beneficial provision for grant of bail to CICL could be interpreted to the utter prejudice of a CICL to say that he would not be entitled to say that important statutory scheme of seeking anticipatory bail provided under Section 438 of the Code of Criminal Procedure, 1973 is not available to him. On rational construction of the non obstante clause in Section 12, it only seeks to put a CICL in a better position as compared to any other person who is not a CICL by providing that ordinarily a CICL has to be granted bail and it could be rejected upon existence of three specified grounds exhaustively enumerated in the provision itself. There is no justification for giving non obstante of such a wide amplitude as to exclude the statutory remedy of applying for anticipatory bail by a CICL".

24. I am in respectful agreement with the aforesaid view. At

this juncture, it is to be noticed that in **Gopakumar v. State of Kerala** (2012 (4) KHC 841: 2012 (4) KLT 755), while considering the provisions contained in the Act of 2000, this Court has held that a juvenile in conflict with law apprehending arrest in a non-bailable offence, no doubt, will be entitled to seek the discretionary relief of pre-arrest bail envisaged under Section 438 of the Code because that Section takes within its ambit 'any person' to seek such relief when he has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence.

25. The upshot of the discussion above is that an application for anticipatory bail under Section 438 of the Code at the instance of a child in conflict with law is maintainable before the High Court or the Court of Session.

26. One thing more deserves to be mentioned here. While granting anticipatory bail to a child in conflict with law, the court shall not impose conditions which are violative of or not in conformity with the provisions of the Act. The court shall not impose conditions which are against the object and spirit of the

Act. For example, the court shall not direct the child in conflict with law to appear in the police station.

27. In the instant case, the non-bailable offence alleged against the petitioner and the other accused is under Section 307 IPC. However, the role of the petitioner in the incident, as alleged by the prosecution, is only that he wrongfully restrained the victim. The prosecution has no case that the petitioner was armed with any weapon or that he used any weapon to attack the victim. He has got no criminal antecedents. The prosecution has no case that release of the petitioner is likely to bring him into association with any known criminal or that his release would defeat the ends of justice. In these circumstances, I find that the petitioner can be granted the benefit of anticipatory bail.

28. In the result, the application is allowed and it is ordered as follows:

1) The petitioner shall be released on bail on execution of a bond for Rs.10000/- (Rupees ten thousand only) each by two sureties, who shall be his parents or other close relatives, in the event of his apprehension/arrest by the police in Crime

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No.349/2018 of the Hosdurg police station.

2) The petitioner shall appear before the Juvenile Justice Board concerned as and when he is called upon to do so.

29. Taking into account the spirit and object of Section 74 of the Act which prohibits disclosure of the identity of a child in conflict with law, I direct that the name of the petitioner shall not be mentioned in the cause title of this order but his name shall be described as `Mr.X'.

(sd/-)

R.NARAYANA PISHARADI, JUDGE

jsr