

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

WEDNESDAY, THE 4TH DAY OF JULY 2018 / 13TH ASHADHA, 1940

Bail Appl..No. 3896 of 2018

CRIME NO. 1248/2018 OF ADOOR POLICE STATION , PATHANAMTITTA

PETITIONER

SUJITH,
AGED 32 YEARS, S/O. SURENDRAN REJA BHAVAN, MUKKOLA
YAMUNA NAGAR, KACHANI, KARAKULAM, TRIVANDRUM.

BY ADV.SRI.M.R.SARIN

RESPONDENTS:

1. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM - 682 031.
2. THE SUB INSPECTOR OF POLICE,
ADOOR POLICE STATION, PATHANAMTHITTA DISTRICT,
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM - 682 031.

R1&2 BY ADV. ADDL.DIRECTOR GENERAL OF PROSECUTION
BY PUBLIC PROSECUTOR SMT.M.N.MAYA

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON 04-07-2018,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

'CR'

R.NARAYANA PISHARADI, J

B.A.No.3896 of 2018

Dated this the 4th day of July, 2018

ORDER

The petitioner, who is accused of committing aggravated penetrative sexual assault, seeks the protection of pre-arrest bail envisaged under Section 438 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code').

2. The petitioner is the accused in the case registered as Crime No.1248/2018 of the Adoor police station. The case was initially registered under Section 57 of the Kerala Police Act, 2011. The missing person, who was a minor girl, was later found out from the house of the petitioner. Subsequently, the petitioner was implicated as an accused in the case for committing the offences punishable under Sections 363 and 376 of the Indian Penal Code and Section 5(l) read with 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the Act') and

also under Section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

3. The facts of the case can be briefly stated as follows:
The victim girl was found missing from her house from 11.05.2018 onwards. On the basis of the statement given to the police by the father of the girl, Crime No.1248/2018 of the Adoor police station was registered under Section 57 of the Kerala Police Act, 2011. A letter was found at her house in which it was stated that she had left the house with the person she loved. Investigation revealed that the girl was residing with the petitioner in his house. On 19.05.2018, she was produced before the Magistrate concerned. During the further investigation conducted by the police, it was revealed that the girl has not attained the age of 18 years. The statement given by the victim girl to the Magistrate concerned revealed that the petitioner had promised her that he would marry her and he had sexual

intercourse with her several times when she was residing with him in his house. Consequently, the offences mentioned earlier were incorporated and the petitioner was arrayed as accused in the case.

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

5. The case diary does not contain the statement of the victim girl recorded by the Magistrate under Section 164 of the Code. But it contains the statement given by her to the Magistrate when she was traced out and produced before the court. In this statement she has categorically stated that the petitioner had promised her that he would marry her and he had persuaded her to have sexual intercourse with him. She has also stated that he had sexual intercourse with her several times when they resided together in his house.

6. The case diary contains copy of the birth certificate of the victim girl. It shows that her date of birth is 16.10.2000. It means that she had not attained the age of 18 years when the petitioner had sexual intercourse with her. Section 2(d) of the Act defines a child as any person below the age of eighteen years. It follows that the victim was a child when she was subjected to sexual assault by the petitioner.

7. Section 5(l) of the Act provides that whoever commits penetrative sexual assault on a child more than once or repeatedly is said to commit aggravated penetrative sexual assault. As per Clause 'sixthly' of Section 375 of the Indian Penal Code, a man is said to commit rape if he commits sexual intercourse with a woman, with or without her consent, when she is under eighteen years of age.

8. At this stage of the case, prima facie, there are sufficient materials to find that the petitioner has committed

the offences punishable under Section 376 of the Indian Penal Code and Section 5(I) read with 6 of the Act.

9. Learned counsel for the petitioner has submitted that the victim girl and the petitioner were in love with each other and that the petitioner had sexual intercourse with the victim with her consent. Learned counsel would point out that the victim had left her house on her own wish and will and she resided with the petitioner voluntarily and they had only consensual sex. In such circumstances, learned counsel has made a fervent plea that the petitioner is entitled to get the protection of pre-arrest bail.

10. The submissions made by the learned counsel for the petitioner have no legal basis. The age of consent for sexual intercourse is definitively 18 years. Therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. The age of consent has not been specifically reduced by any Statute.

There is no question of a girl child giving express or implied consent for sexual intercourse. The age of consent is statutorily and definitively fixed at 18 years and there is no law that provides for any specific deviation from this.

11. Even if the victim girl is the wife of the petitioner, sexual intercourse with her by him amounts to rape. True, Exception 2 to Section 375 of the Indian Penal Code provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. But, in **Independent Thought v. Union of India : AIR 2017 SC 4904**, the Apex Court has held that Exception 2 to Section 375 of the IPC shall be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape".

12. There is difference between consent and submission. Every consent involves submission but the

converse does not follow. A mere act of submission does not involve consent. If there was no voluntary participation in the sexual act, it would not amount to consent. Voluntary participation involves the exercise of intelligence based on the knowledge of its significance and moral quality of the act. Consent cannot be equated to inability to resist or helplessness. Consent is an act of reason accompanied by deliberation. A minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. A minor girl can be easily lured into giving consent for sexual intercourse since she does not have the capacity to understand the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of

the so-called consent given by a girl who is less than 18 years of age. Even when there is consent of a girl below 18 years, the other partner in the sexual act is treated as a criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual.

13. The very purpose of bringing a legislation in the form of the Act is to protect the children from sexual assault, harassment and exploitation, and to secure their best interest. Dignity of the child has been laid immense emphasis in the scheme of the legislation. The Act contains special provisions for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. The preamble to the Act recognizes that it is imperative that the law should operate "in a manner that the best interest and well being of the child are regarded as being of paramount importance at

every stage, to ensure the healthy, physical, emotional, intellectual and social development of the child". The preamble of the Act also provides that "sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed". These are matters to be kept in mind by the Court while considering an application for anticipatory bail filed by a person who is accused of an offence under the Act.

14. Section 29 of the Act states that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. Therefore, the principle that an accused is presumed innocent till found guilty, will not apply to a case under Sections 3, 5, 7 and 9 of the Act with its full rigor. The Court

shall take into consideration the presumption under Section 29 of the Act while dealing with an application for bail filed by a person who is accused of the offences under Sections 3, 5, 7 and 9 of the Act (See **State of Bihar v. Rajballav Prasad : AIR 2017 SC 630**). True, a presumption in a criminal case can arise only when the prosecution has adduced the facts forming the foundation of the case. In the instant case, prima facie, there are sufficient materials to find the complicity of the petitioner in the crime.

15. What is stated above does not mean that under no circumstances a person accused of the offences under the Act shall be granted pre-arrest bail. There may be cases where a person is falsely implicated and accused of committing offences under the Act to wreak personal vengeance of the complainant or his/her relatives. There may be cases in which there are circumstances to doubt that the accused is roped in on account of matrimonial disputes

and the provisions of the Act are misused by putting the dignity of the child under stake. As held by the Apex Court in **Siddharam Saltingappa Mhetre v. State of Maharashtra : AIR 2011 SC 312**, frivolity in prosecution should always be considered 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. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. It should necessarily depend on facts and circumstances of each case in consonance with the legislative intention. However, the Courts shall also take note of the fact that as per the Criminal Law Amendment Ordinance, 2018 which came into force on 21.04.2018, in a case involving the arrest of any person accused of the offence of rape on a woman under the age of sixteen years, the provisions contained in Section 438 of the Code shall not apply.

16. In the present case, there are no circumstances to doubt the genuineness of the prosecution case. The offences alleged against the petitioner are grave in nature. The statement given by the victim to the Magistrate shows that she got acquainted with the petitioner through 'Facebook'. The petitioner is aged 32 years. The statement given to the police by the father of the petitioner reveals that the petitioner is a married person and his wife has deserted him seven years ago. The petitioner has not raised any plea that he intends to marry the victim girl on her attaining the age of eighteen years. Enticing an adolescent girl and sexually abusing her cannot be viewed lightly. The investigation of the case is at the stage of infancy. There is basis for the apprehension expressed by the learned Public Prosecutor that granting pre-arrest bail to the petitioner would hamper the investigation of the case. If the petitioner is granted bail, there is possibility of him influencing or even

intimidating the victim girl and other witnesses preventing them from disclosing real facts before the investigating officer. Considering these aspects, I find that the discretion of the Court cannot be exercised in favour of the petitioner to grant him the benefit of pre-arrest bail. The petition is liable to be dismissed.

17. In the result, the prayer for granting anticipatory bail to the petitioner is rejected and the petition is dismissed. Any observation made by this Court in this order will not affect the right of the petitioner to raise his pleas before the trial court. The observations made in this order are only for the purpose of considering the question as to whether the petitioner is entitled to get anticipatory bail or not and not for any other purpose.

(sd/-)

R.NARAYANA PISHARADI, JUDGE

jsr