CR

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

FRIDAY, THE 14TH DAY OF AUGUST 2020 / 23RD SRAVANA, 1942

Bail Appl..No.4628 OF 2020

CRIME NO.335/2019 OF KODENCHERY POLICE STATION, KOZHIKODE DISTRICT

PETITIONER/ACCUSED:

JOLLYAMMA JOSEPH
AGED 47 YEARS
PONNAMATTAM VEEDU, KOODATHAI BAZAR, KOODATHAI VILLAGE, THAMARASSERY, KOZHIKODE DISTRICT. 673573

BY ADV. SRI.B.A.ALOOR
ADV. SRI.K.P.PRASANTH

RESPONDENT

STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR HIGH COURT OF KERALA 682031

R1 BY SRI.SUMAN CHAKRAVARTHY, SENIOR GOVT.PLEADER

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON 14.08.2020, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

O R D E R

14th day of August, 2020

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

2. The petitioner is the accused in Crime No.335 of 2019 of Kodenchery Police Station, Kozhikode District. The above case is registered against the petitioner alleging offences punishable under Sections 110, 120(B), 201, 302, r/w. Section 34 of the Indian penal Code (IPC) and under Section 2 r/w. 6(2) of the Poison Act. The petitioner was arrested on 28.10.2019 in another case, and her arrest, in this case, was recorded, and she is in judicial custody from 03.11.2019.

3. The prosecution case is that on 01.05.2014 at about 9.30 a.m., the petitioner who is the 1st accused in this case with an intention to kill Alfine, who is the minor daughter of her second

husband, poisoned the child through food and killed the said child by administering cyanide which was procured with the aid and assistance of accused Nos.2 and 3. The above case is registered based on the confession statement of the petitioner who is an accused in Crime No.189 of 2011 of Kodencherry Police Station. The confession statement was recorded in that case by the investigating officer and forwarded the same with a report through proper channel to Kodencherry Police Station. Based on that confession statement, the F.I.R.in Crime No.335 of 2019 was registered on 11.10.2019 at 5:41 hours. The victim Alfine, a female child, aged 1½ years, was living with her father Shaju Sakhariyas, her mother Sili and elder brother Aibel at Ponnamattom House Pullikkayam. The petitioner, who is the 1st accused, was the daughter in law of the elder brother of Sakhariyas. For the ulterior intention and motive to marry the said Shaju Sakhariyas, who is a teacher and having a fixed and regular government salary, the 1st accused plotted a

plan to do away with the little daughter of Shaju namely Alfine. The child was calculated as a burden in the future by the petitioner. Therefore, on 01.05.2014 on the day of the first communion of Aibel who is the elder son of Shaju, the 1st accused went to Ponnamattom house owned by the father of the said Shaju wherein the function was held and at about 9.30 a.m., the 1st accused with an intention to kill the victim administered cyanide which was procured with the aid and assistance of accused Nos.2 and 3. It is the prosecution case that the accused mixed cyanide in food and gave the same to the victim. Cyanide was procured by the 1st accused after conspiring with the 2nd and 3rd accused with an ulterior aim to do away with the child who was apprehended to be a burden in the future in her relationship with Shaju. After taking the food in which cyanide was mixed, the victim collapsed and taken to a hospital at Kodencherry and from there transferred to a hospital at Omassry and ultimately referred to the Mims hospital at Kozhikode and from

that hospital the victim died on 03.05.2014 without responding to the medical treatment. It is the prosecution case that the accused suppressed the evidence further for accomplishing the aim of the 1st accused to marry Shaju Sakhariyas. After about 1 ½ years, the 1st accused killed the first wife of said Shaju by administering cyanide. Thereafter, the 1st accused married Shaju Sakhariyas within a short span of time. The petitioner Joliyamma Joseph is now the 1st accused in the following cases in addition to the present case:

1) Kodenchery Police Station Crime No.189 of 2011 under Section 174 Cr.P.C. altered into 110, 120(B), 466, 467, 468, 471, 302, 201 r/w. 34 IPC & Section 2 r/w. Section 6(2) of the Poison Act, 1919, for committing the pilot murder of her first husband Roy;

2) Kodenchery Police Station Crime No.332 of 2019 under Sections 120(B), 466, 467, 468, 471, 302, 201 r/w.34 IPC & Section 2 r/w.Section 6(2) of the Poison Act, 1919, for murdering her former mother in law;

3) Kodenchery Police Station Crime No.333 of 2019 under Sections 110, 120(B), 466, 467, 468, 471, 302, 201 r/w. Section 34 IPC & Section 2 r/w. Section 6(2) of the Poison Act, 1919, for killing her former father in law;

4) Kodenchery Police Station Crime No.334 of 2019 under Sections 110, 120(B), 466,467, 468, 471, 302, 201 r/w. Section 34 IPC & Section 2 r/w. Section 6(2) of the Poison Act, 1919, for committing the murder of her first wife of petitioners second husband Shaju

5) Thamarassery Police Station Crime No.980 of 2019 under Sections 110, 120(B), 466, 467, 468, 471, 302, 201 r/w. 34 IPC & Section 2 r/w. Section 6(2) of the Poison Act, 1919, for committing the murder of Manjadiyil Mathew the uncle of her first husband.

The petitioner was in judicial custody from 03.11.2019 onwards.

4. Heard the learned counsel for the petitioner Advocate B.A.Aloor and the learned public prosecutor Suman Chakravarthy.

5. The learned counsel for the petitioner

argued the case in detail. The counsel submitted that, even if the entire prosecution case is accepted, there is no legal evidence to convict the petitioner. The counsel submitted that, there is no medical evidence to substantiate the prosecution case. The counsel also submitted that, the final report is filed without necessary documents. The investigating agency submitted the final report with an ulterior motive to deny bail to the petitioner. The counsel submitted that, the 3rd accused, in this case, was already released on bail. The counsel submitted that, as per the rule of parity, the petitioner is also entitled bail. The counsel also submitted that, the evidence against the petitioner are all manipulated statements and the investigating officer produced photocopy of the alleged statements of the witnesses recorded in one case as the statement in all the other cases. The counsel for the petitioner also submitted that, the petitioner is a lady and she is entitled the benefit of proviso to Section

437 Cr.P.C. The counsel also submitted that, the learned Sessions Judge erred in considering the bail application of the petitioner in this case along with the bail application in Crime No.980 of 2019. According to the counsel, the learned Sessions Judge ought not have passed a common order in two bail applications filed in two separate crime cases. The counsel produced a compilation of judgments to support his contentions. The counsel cited the judgment of the Apex Court in *Maulana Mohammed Amir Rashadi v. State of Uttarpradesh and Another* [2012(2)SCC 382], *the order dated 5.12.2016 in SLP (Crl.) No.143 of 2016*, *Arnesh Kumar v. State of Bihar & Anr.* [(2014) 8 SCC 273], *Dataram Singh v. State of Uttar Pradesh & Ors.* [AIR 2018 SC 980] and *P.Chidambaram v. Central Bureau of Investigation* [AIR 2019 SC 5272]. The counsel also produced the judgment of the *Himachal Pradesh High Court in Rajinder Kumar v. State of Himachal Pradesh* [2018 Cri LJ (NOC) 589]. In the compilation, the judgment dated 19.7.2011 in *Civil*

Miscellaneous Writ Petition No.29888 of 2011 **of Allahabad High Court is also produced. It is not clear what is the relevancy of this judgment in this bail application.**

6. The learned public prosecutor seriously opposed the bail application. The prosecution case is that, the petitioner committed six murder. The public prosecutor also submitted that the method used by the accused in all the cases are similar. The public prosecutor submitted that, as far as the present case is concerned, final report is already filed. The public prosecutor submitted that, the prosecution could prove the case before the trial court because there are strong circumstantial evidence against the petitioner. The public prosecutor also relied the judgment of the Hon'ble Supreme Court in *Kalyan Chandra Sarkar v. Rajesh Ranjan* [(2004)7 SCC 528], *Rajesh Ranjan Yadav alias Pappu Yadav v. CBI through its Director* [(2007) 1 SCC 70] and *Chandrakeshwar Prasad alias Chandu Babu v. State of Bihar* [(2016) 9 SCC 443]. The public

prosecutor submitted that, the petitioner is not entitled bail in this case on several grounds. The public prosecutor submitted that, considering the gravity of the offence committed by the petitioner, granting of bail in this case will be against the principles laid down by the Apex Court.

7. I considered the contentions of both sides. It is a bail application filed under Section 439 Cr.P.C. The petitioner filed a bail application before the Sessions Court also under Section 439 Cr.P.C. before filing this bail application. One of the grounds raised by the petitioner is that, the bail application of the petitioner in two crime cases was considered by the Sessions Court by a common order, and that is illegal. There is concurrent jurisdiction to entertain an application under Section 439 Cr.P.C. to Sessions Courts and the High Court. While considering a bail application under Section 439 Cr.P.C., this Court is not considering the validity of the order passed by the Sessions Court under Section 439 Cr.P.C.

Therefore, the validity or illegality of the order passed by the Sessions Court under Section 439 Cr.P.C. cannot be considered by this Court while considering this application under Section 439 Cr.P.C. Moreover, I see no serious illegality in passing a common order by the Sessions Court in two bail applications filed in two crime cases registered against the petitioner. The accused in both the cases are same. The allegation against the petitioner is almost the same. The counsel for the petitioner argued both bail applications together before the learned Sessions Judge. The learned Sessions Judge clearly stated in the first sentence in paragraph 11 of Annexure A2 common order that *'the learned counsel for the petitioner has addressed common arguments in both cases'*. Therefore, there is nothing wrong in passing the common order by the Sessions Court in two bail applications filed by the petitioner in two separate crimes. There is no rule prohibiting a court of law in passing such orders. It is only the

convenience of the court concerned. Moreover, as stated by me earlier, I cannot decide the validity of an order passed by a Sessions Court under Section 439 Cr.P.C. while exercising the concurrent jurisdiction by this Court with the same provision. The contention of the petitioner on that ground is unsustainable.

8. The counsel for the petitioner submitted that, the petitioner is a woman. Therefore, she is entitled the benefit of first proviso to Section 437 (1) Cr.P.C. The first proviso to Section 437 (1) Cr.P.C. says that, *'the Court may direct that a person referred to in Clause(i) or Clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm'.* The counsel for the petitioner vehemently argued that, this is a mandatory provision and the petitioner is entitled bail under the first proviso to Section 437 (1) Cr.P.C. I cannot agree with this submission of the petitioner. In the first proviso to Section 437 (1) Cr.P.C. the word 'may' is used,

that itself shows that, it is the discretion of the court concerned to grant or not to grant bail to a person who is under the age of 16 years or a woman or a sick person or an infirm person. In Section 437 Cr.P.C. itself the verb 'may' and 'shall' are used at different places. Moreover, in the Code of Criminal Procedure itself, the Legislature used the words 'may' or 'shall' at different places and the same will show the intention of the Legislature. In Section 436 Cr.P.C. it is clearly stated that, if a person accused in a bailable offence is prepared at any time while in custody to give bail such person shall be released on bail. But in Section 437(1) Cr.P.C. the word 'may' is used. But again, in Section 437(2) Cr.P.C. the word 'shall' is used. Sub section (6) of Section 437 also says that, in the circumstances mentioned in that subsection, such person 'shall be released' on bail. Therefore, at certain places, the word 'may' is used in Section 437 Cr.P.C. and in certain places, the word 'shall' is used in Section 437 Cr.P.C. That will

clearly shows that, the first proviso to Section 437(1) is not mandatory. This point is considered by a Division Bench of Alahabad High Court in detail in *Pramod Kumar Manglik & Ors. v. Sadhna Rani and Ors.* [1989 Crl.LJ. 1772]. The relevant paragraphs of the said judgment are extracted hereunder:

> ***"20. We have absolutely no doubt that the aforesaid quotations are good law and have to be applied and followed where attracted. In the instant controversy, however, upon a close scrutiny of the provisions contained in the relevant Sections in the New Code and the decisions thereon, the quotations relied upon by the learned single Judge do not appear attracted and they have failed to persuade us to hold that the first proviso in Section 437 New Code is mandatory.***
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> ***21. It is to be noted that the Legislature has used the word 'shall' in various provisions contained in Chapter XXXIII of the New Code which consists of "Provisions as in bail and bonds". Incidentally, Section 436 is the first section in the said Chapter, which provides that an accused in bailable offence case shall be released on bail. The second Section is 437 in this chapter. As above, it has seven sub-sections. It is remarkable that Section 437(1), which is the enacting section, itself uses the word 'may'. This is the provision***

which confers power on a Magistrate to exercise his discretion of granting bail, but, Sub-section (2), Sub-section (6) and Sub-section (7) use the word 'shall', thus carrying the legislative mandate that in cases covered by the said three sub-sections, the Magistrate shall grant bail(subject to the restrictions therein stated), Section 438 New Code provides directions in the nature of anticipatory bail. A person apprehending his arrest may apply to the High Court or to Court of Sessions for a direction of the nature of anticipatory bail. If such an order is made, the person SHALL be rleased on bail. Section 439 New Code inter alia provides that a High Court or a Sessions Judge MAY direct that any person accused of an offence and in custody be released on bail (Emphasis by us).

22. In view of the intentional use of the word 'may' in Sub-section (1) of Section 437 New Code and of the word 'shall' in three of its sub-sections, then again using the word 'shall' in Section 436 and the word 'may' in Section 439, we cannot but hold that the Legislature has consciously made a distinction in choosing the respective verbs in the various provisions. It has used the auxiliary verb 'shall' where it desired the provision to be mandatory and has used 'may' where it wanted the matter to be left to judicial discretion. It appears that perhaps the use of the two different verbs in various sub-sections of Section 437 and three other allied sections of Chapter XXXIII was not brought to the notice of the learned single judge because we do not find any mention of it in Shakuntala's case

MANU/UP/0291/1985.

23. We have perused the objects and reasons for bringing about the Amending Act 63 of 1980 which states that in order to bring more checks on the discretion of 'the Magistrate to grant bail in certain types of accused, the second proviso was added. By the said proviso special reasons for the release on bail of those accused who are thereby covered, have to exist. It is of paramount importance to note that Sub-section (4) of Section 437 New Code requires that where any accused is being released on bail under Sub-section (1) of Sub-section (2), reasons or special reasons shall have to be recorded by the Magistrate if he uses his discretion to grant bail. Thus, while on the one hand we were asked to interpret Sub-section (1) as mandatory, on the other, nothing has been argued as to why the Legislature enacted Sub-section (4) providing that recording of reasons or special reasons was mandatory, if bail is granted by the Magistrate. We are consequently of the view that once the law requires recording of the reasons or the special reasons a must for granting bail by Magistrate, it goes without saying that he will have to justify his order by referring to the grounds for which he is finding justification for releasing an accused on bail, to whom he can normally not grant bail. If either Sub-section (1) itself or its first proviso were enacted to lay down mandatory release of accused on bail, there was absolutely no need to enact Sub-section (4).

33. Thus while construing the 'proviso' to the

aforesaid sub-section, we have to remember that it is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. A proviso to a particular provision of a statute only embraces the field which is covered by the main provisions. It only carves out an exception to the main provision to which it has been enacted as a proviso and no other. We are fortified in our view by the decisions of Supreme Court, in R.N. Sons v. A.C.S.T. and Abdul Jabbar v. State of J.K. MANU/SC/0084/1955: (1955)2 SCR 483 and MANU/SC/0017/1956 1957 CriLJ 404. We are, therefore, unable to hold that proviso (first) to Sub-section (1) to Section 437 New Code confers more power upon the Magistrates than the sub-section itself.

34. In view of the aforesaid discussion, we regret that we are unable to agree with the view of the learned single judge in Shakuntala's case MANU/UP/0291/1985 that the first proviso to sub-section (1) is mandatory. We accordingly overrule the view that all women, children, up to sixteen, sick or infirm who appear or are brought before a Magistrate on being arrested concerning cases covered by Clauses(i) and (ii) of Sub-section(1) of Section 437 New Code must have to be released on bail by the Magistrate, But, according to us, the judicial discretion of Magistrates Conferred by the said Sub-section which stands excluded regarding persons falling within its Clauses (1) and (2) has been restored concerning only the said four categories of persons covered by the first proviso."

I respectfully agree with the above dictum laid down by the Allahabad High Court. Consequently, the contention of the petitioner that, she is entitled bail as per the first proviso to Section 437(1) Cr.P.C. is not sustainable. It is the discretion of the court to decide whether a woman is to be released on bail in the facts and circumstances of each case. Simply because the petitioner is a woman, she is not entitled bail. In this case, the allegations against the petitioner are very serious. The prosecution alleges that, the petitioner committed six murders including the present one. The modus operandi in all cases are almost similar. Therefore, the petitioner is not entitled bail on the ground that she is a woman.

9. The counsel for the petitioner relied several judgments to substantiate his case that, she is entitled bail. The counsel cited the judgment of *Maulana Mohammed Amir Rashadi* (supra) to contend that, simply because the petitioner is involved in some other cases, bail cannot be

rejected. The facts of the above case are entirely different from the present case. The petitioner in the above case before the Apex Court was a sitting Member of Parliament facing several criminal cases. Some of those cases were already ended in acquittal for want of proper witnesses. In such circumstances, the Apex Court observed that, merely on the basis of criminal antecedents, the claim of an accused for bail, cannot be rejected. The facts of that case is not applicable to the present case. Similarly, *the order dated 5.12.2016 in SLP(Crl.)No.143 of 2016*, is also not applicable to the facts of the case. Actually in that case the bail is not granted. The Apex Court directed the prosecution to produce all material witnesses before the trial court within two months and on expiry of two months, it is stated that the petitioner in that case is entitled a concession of bail. Such a situation is not here in this case. Similarly *Arnesh Kumar's* case (supra) is also produced by the learned counsel for the

petitioner. That is a case in which the offence alleged includes an offence under Section 498A IPC. That was a matrimonial offence case. In such circumstances, the Hon'ble Supreme Court made certain observations. That decision is not also applicable to the facts and circumstances of the case. Similarly in *Rajinder Kumar's* case (supra), the Himachal Pradesh High Court was considering a bail application under the POCSO Act. While considering that bail application, certain observations are made regarding the general principles about the grant of bail. Therefore, that case is also not applicable to the facts of the present case. The counsel for the petitioner heavily relied the judgment of *Dataram Singh's* case (supra). It is true that salutory principle about the grant of bail is considered by the Apex Court in that judgment in detail. But, it is a settled position that each case has to be considered based on facts and circumstances of each case. In *Dataram Singh's* case (supra), the offence are related to

monetary claims. The facts of that case is entirely different from the facts of the present case. The learned counsel also relied *Chidambaram's case* (supra). It is true that, the jurisdiction to grant bail has to be exercised on well settled principle laid down by the Hon'ble Suprme Court in *Chidambaram's case* (supra). The Apex Court held that the following factors are to be considered while considering the application for bail.

> ***(i) Nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution;***
>
> ***(ii) Reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses;***
>
> ***(iii) Reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence;***
>
> ***(iv) Character, behaviour and standing of the accused and the circumstances which***

are peculiar to the accused;

(v) Larger interest of the public or the State and similar other considerations.

It is true that, there is no hard and fast rule regarding the grant or refusal of regular bail. Each case has to be considered on the basis of the facts and circumstances of that case. The Apex Court was only referring the general principles while considering the bail application. I do not think that the petitioner is entitled bail based on the above factors narrated by the Apex Court in *Chidambaram's case* (supra).

10. Another contention raised by the petitioner is that, the final report submitted by the Police is incomplete and hence she is entitle default bail. In this case, the Police filed final report long back. The case is committed to the Sessions Court. From the statement filed by the Investigaing agency it is clear that the case is posted for framing charge. At this stage, the contention of

the petitioner that the final report is incomplete cannot be considered. There is nothing to show that the petitioner raised this point in the committal court or before the trial court.

11. Another contention raised by the petitioner is that, the 3rd accused in this case is already released on bail and hence on 'parity rule' the petitioner is entitled bail. The allegation against the petitioner who is the first accused in this case and the allegations against the 3rd accused are entirely different. Very serious allegations are there against the petitioner. In such circumstances, the petitioner cannot be released on bail for the reason that the 3rd accused is released on bail.

12. This Court earlier dismissed the bail application of the petitioners filed in Crime No.980 of 2019 of Thamarassery Police Station and Crime No.189 of 2011 of Kodenchery Police Station. Similar allegations are raised against the petitioner in this case also. The other contentions

raised by the petitioner are discussed in detail by this Court. This Court also considered the arguments of the learned Public Prosecutor that the petitioner had attempted to commit suicide inside the jail and releasing the petitioner at this stage is dangerous to her. The relevant discussion in the order dated 30.6.2020 in B.A.No.3246 of 2020 filed by the petitioner is extracted hereunder:

> ***"10. Applying the above principles to the case in hand, I find that the petitioner is a lady, who is involved in six cases in which she has allegedly murdered her close relatives, including her former husband. It is also brought in by the learned Public Prosecutor that the petitioner had attempted to commit suicide inside the jail by slashing her wrists. Timely intervention saved her life. In case she is released on bail, there is every possibility of her influencing or intimidating witnesses, repeating similar offences also cannot be ruled out, and may even go to the extent of causing harm to herself. The nature of the accusation definitely will have to be borne in mind and the facts in this case point out to a very grave crime allegedly committed by the petitioner. The learned Sessions Judge was therefore, justified and declining bail to the petitioner. I have no***

reason to find otherwise"

The relevant paragraph of the order dated 20.3.2020 in B.A.No.1607 of 2020 is extracted hereunder:

> *"14. Deprivation of freedom by refusal of bail is of - course not for punitive purpose, but prima facie when there are reasonable grounds to believe that the petitioner had committed the offence and seriousness and the gravity of the offences alleged against her is quite obvious, while exercising the discretion in a judicious manner, this court can only reject her request to enlarge her on bail. In fact there are no circumstances justifying her release on bail, at this stage. She is the prime accused in five other murder cases. The deceased in all the cases were close relatives rather members of the very same family. Release of her on bail where charge is not even framed would shake the confidence of the public/ society in judicial system. To ensure a fair trial, I find that the discretion of this court cannot be exercised in favor of this petitioner, just considering the fact that she is a lady undergoing incarceration for the last more than five months."*

13. I respectfully agree with the findings of this Court in the above two cases. The same

principle is applicable in the facts and circumstances of this case also. The petitioner's contention that there is no medical evidence and the evidence produced by the prosecution are inadmissible evidence can't be considered in this bail application. Those are matters to be considered by the trial court at the appropriate stage. The allegations against the petitioner are very serious in nature. The petitioner is involved in altogether six murder cases. The modus operandi of the petitioner, as per the allegation of the prosecution is almost the same in all the cases. Considering the entire facts and circumstances of the case, the petitioner is not entitled to bail under Section 439 Cr.P.C.

Hence, this Bail Application is dismissed.

Sd/-

pkk P.V.KUNHIKRISHNAN,

JUDGE