IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ASHOK MENON

TUESDAY, THE 10TH DAY OF NOVEMBER 2020 / 19TH KARTHIKA, 1942

Bail Appl..No.6686 OF 2020

CRIME NO.1765/2020 OF Thampanoor Police Station , Thiruvananthapuram

PETITIONERS/A1-A3:

1 BHAGYALAKSHMI K, AGED 55 YEARS
DAUGHTER OF BHARGAVI AMMA, RESIDING AT F16,
HEERA SWISS TOWN, C BLOCK, SURYA GARDENS,
PIPPINMOODU, SASTHAMANGALAM,
THIRUVANANTHAPURAM, PIN -695005.

2 SHAJNA N.S & DIYA SANA,
AGED 30 YEARS, D/O.AR SHAJI, ARS MANZIL,
KATTACKAL, KUTHIRAKULAM PO, VEMBAYAM,
THIRUVANANTHAPURAM, PIN – 695 615.

3 SREELAKSHMI
AGED 25 YEARS, D/O.USHAKUMARY A.R., ARACKAL HOUSE,
KILIYANTHARA P.O., KANNUR DISTRICT, PIN – 670 706.

BY ADVS.
SRI.S.RENJITH
SRI.K.P.JAYACHANDRAN

RESPONDENTS/STATE & DE FACTO COMPLAINANT:

1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF KERALA, ERNAKULAM – 682031,

ADDL.R2 VIJAY P.NAIR, AGED 51 YEARS
S/O.PURUSHOTHAMAN NAIR, SWATHI CHAPRA LANE,
THENOOR, NEMOM P.O., THIRUVANANTHAPURAM
(IMPLEADED AS PER ORDER DATED 30/10/2020 IN CRL.MA 3/2020)
R1 BY PUBLIC PROSECUTOR
R1 BY DIRECTOR GENERAL OF PROSECUTION
R1 BY SRI.SUMAN CHAKRAVARTHY, SENIOR GOVT.PLEADER
R2 BY ADV. K.ARJUN VENUGOPAL
FOR ADDL.RESPONDENTS SOUGHT TO BE IMPLAEDED
BY ADV. RENJITH B.MARAR
BY ADV. SMT.LAKSHMI.N.KAIMAL
BY ADV. V.N.RAMESAN NAMBISAN
BY ADV. SRI.S.PRASANTH

OTHER PRESENT:

SRI.SUMAN CHAKRAVARTHY SR PP.

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON 30.10.2020, THE COURT ON 10.11.2020 PASSED THE FOLLOWING:

'C.R.'

O R D E R

[Dated this the 10th Day of November, 2020]

Application filed for anticipatory bail under Section 438 of Cr.P.C.

2. The applicants are accused in Crime No. 1765 of 2020 of Thambanoor Police Station, Thiruvananthapuram, for having allegedly committed offences punishable under Sections 452, 323, 506, 294 (b) and 392 read with Section 34 of the Indian Penal Code.

3. The prosecution case, in brief, is that under a misapprehension that a video uploaded by the de facto complainant on the YouTube pertaining to some feminists refers to the 1st accused, at about 5 PM on or about 26/09/2020, the applicants in furtherance of common intention, having made preparation to wrongfully restrain, intimidate, assault and cause hurt to the de facto complainant, trespassed into the room No. 34 of

"Shrinivas" Lodge at Thambanoor, where he was staying, questioned him about his alleged derogatory post in the YouTube channel, hurled abuses at him, put him in fear of assault, caused simple hurt by slapping him, and then smeared black ink over his body with the intention to humiliate him, rubbed stinging nettle plant on his body, attempted to disrobe him by pulling at his dothi, intimidated him, and robbed his laptop, mobile phone, headset and microphone.

4. The applicants would contend that the allegations are not true and that a false case has been foisted against them. The 1st applicant claims to be a film dubbing artist of repute while the 2nd and 3rd applicants are social workers, and activists in various fields and the 3rd applicant is also a student. It is stated that the de facto complainant had aired a disparaging video through the YouTube channel abusing feminists and reputed women in

the State and in particular, made sly innuendoes against the 1st applicant and others intending to tarnish their reputation. Although he did not name the ladies he had abused, there was sufficient indication for the viewers that his slanderous allegations in the video were directed at the 1st applicant. She made a complaint regarding the said YouTube video of the de facto complainant to the Police, and in consequence of that, Crime No.725 of 2020 was registered against the de facto complainant at the Thiruvananthapuram Museum Police Station. On 25/09/2020, the 1st applicant had contacted the de facto complainant over the land phone and requested him to delete the offending YouTube video and also informed him about the complaint made against him before the Police. On learning that, he invited the 1st applicant to his lodgings to split differences. Accordingly, the applicants went to Shrinivas Lodge at the Pulimoodu by about 5 PM

on 26/09/2020. The de facto complainant invited the applicants to his room for discussion. He demanded that the complaint filed by the 1st applicant be withdrawn prior to his deleting the video. The applicants were not agreeable for that. Irked, he hurled abuses at the applicants, and even outraged the modesty of the 1st applicant. Soon thereafter, the de facto complainant did express regret over his derogatory behaviour. The applicants went to Thambanoor Police station and handed over the laptop, headset and mike belonging to the de facto complainant gathered for the purpose of investigation . The 1st applicant also lodged a complaint against the de facto complainant for having outraged her modesty and that Crime was registered as No. 1764 of 2020 for an offence punishable under Section 354 I.P.C. Subsequent to that, the present Crime was registered against the applicants as No. 1765 of 2020 on a complaint

made by the de facto complainant as a counter blast to the cases taken up against him. It is also stated that the offences as alleged in the F.I.R against the applicants are not sustainable. To attract an offence punishable under Section 294 (b) I.P.C hurling of abuses must have been done in a public place. Even admitting the allegations made by the de facto complainant, the incident took place inside a room. Offence under Section 452 I.P.C is not attracted because the applicants did not go to the lodge after having made preparations to assault, restrain, intimidate or hurt the de facto complainant. They were invited by the de facto complainant to settle their differences. To attract an offence of robbery punishable under Section 392 I.P.C, there must be dishonest intention, wrongful gain to the accused and wrongful loss to the complainant. The fact that the applicants had, soon after the occurrence voluntarily surrendered the allegedly stolen

articles belonging to the de facto complainant before the Police station, indicates total absence of dishonest intention on their part. The application for anticipatory bail filed by the applicants before the Court of Sessions, Thiruvananthapuram was dismissed by the Court vide Annexure-A1 Order. The applicants are law-abiding citizens and they have no other criminal antecedents. In case of arrest and incarceration, serious prejudice and irreparable loss and injury may be caused to their reputation. The applicants state that they are willing to abide by any conditions that may be imposed by this Court. Hence, they seek pre-arrest bail.

5. The de facto complainant filed an application to get himself impleaded as an additional respondent. Crl.M.A No.3 of 2020 filed by him was allowed. He has filed an affidavit accompanying the application for impleading him as a respondent. In the affidavit, he denies

of having made any sly slanderous remarks in his YouTube video to malign the 1st applicant. He did not name her in the video. The accused had trespassed into his lodging room armed with stinging nettle plant and ink, after having made preparation to assault him. After they wrongfully restrained and assaulted him, they hurled abuses at him, stole his laptop, headset and mike resisting the attempts made by him to prevent them. Their attempt to disrobe him by tugging at his dothi was thwarted by the de facto complainant. The intention of the applicants who attempted to disrobe him was to apply the stinging nettle plant to his private parts. They applied the plant over his abdomen instead. The applicants had videographed the entire incident on their mobile phones and had aired it live on the Facebook page for the public to view. Having taken law into their hands, the applicants are not entitled to the exceptional remedy of anticipatory bail. They have to be

subjected to custodial interrogation and seizures of the mobile phones belonging to him are yet to be made. The de facto complainant therefore, prays that the application for pre-arrest bail may be dismissed.

6. Heard the learned counsel for the applicant and the de facto complainant. The learned Senior Public Prosecutor was also heard.

7. The applications made by two persons to get themselves impleaded and heard on their objections in granting anticipatory bail to the applicants as Crl.M.A Nos.1 and 2 of 2020 were not entertained for the reason that they cannot be deemed to be persons fit or interested in the anticipatory bail application filed by the accused persons. True that the embargo under Section 301 Cr.P.C may not strictly apply to a petition for bail, but it is the discretion of the Court to find out who could be heard in the matter of granting of bail. I find that the applicants in

Crl.M.As 1 and 2 of 2020 are not persons fit to be heard. (See ***Kunhiraman v. State of Kerala [2005 (2) KLT 685]***). However, Crl.M.A No.3 of 2020 filed by the de facto complainant was allowed and the de facto complainant is heard through his counsel.

8. The learned counsel appearing for the applicants submits that the applicants are the ones who are really aggrieved because, the de facto complainant had aired malevolent statements in the You Tube about the 1st accused and also other respectable ladies who were holding responsible positions in the society and thus maligned them. Even though the applicant did not name them, there was sufficient indication amounting to blatantly hostile innuendo. It is submitted that the offence under Section 294 (b) I.P.C will not be attracted because the alleged uttering of obscene words by the applicants was inside the lodging room of the de facto complainant

and not in a public place which is an essential ingredient to attract the offence. It is submitted that only two of the offences alleged against the applicants are non-bailable and that this application for pre-arrest bail is limited to those offences. To attract an offence under Section 452 I.P.C there must be indication that the applicants had committed house trespass after having made preparation for causing hurt to the de facto complainant or to assault or wrongfully restrain him or for putting him in fear of hurt, assault or wrongful restraint. In the instant case, the applicants had gone to the de facto complainant's lodge on being invited by him and therefore the mere fact that the applicants had entered the lodging room of the de facto complainant and committed assault or caused hurt does not necessarily presupposes such preparation. There must be clear proof of a preparation for causing hurt, etc. When there is no such proof on record, the accusation

under Section 452 I.P.C is not maintainable.

9. It is true that there is not a scintilla of material to indicate that the applicants were invited by the de facto complainant for a compromise as alleged by them. The de facto complainant does not admit it. Even if the submissions made by the applicants that they were invited by the de facto complainant is to be accepted, the moment they turned hostile and either assault, intimidate, cause hurt or wrongfully restrain the de facto complainant, they shall be deemed to have lawfully entered the building and unlawfully remained there with the intent to commit the aforesaid acts which would amount to 'criminal trespass'. Whoever commits criminal trespass by entering into or remaining in any building used as human dwelling, he is set to commit 'house-trespass'. Both these ingredients, which are essential to attract an offence under Section 452 I.P.C, are prima facie present in the instant case. Section

452 does not state that the intention of the assailants should be to cause grievous hurt or to cause hurt with a weapon. Even if their intention was to cause simple hurt or to wrongfully restrain or intimidate the de facto complainant, it would amount to preparation which is the most essential ingredient to attract an offence under Section 452 IPC. The materials placed before this Court would sufficiently indicate that the applicants had they intend to intimidate or at least slap him and thus cause hurt to him and also applying stinging nettle plant over his body. Hence, prima facie there is sufficient material to indicate committing of an offence under Section 452 I.P.C by the applicants.

10. The other non-bailable offence allegedly committed by the applicants is an offence of robbery by thieving the laptop, headset, microphone and mobile phone of the de facto complainant. The learned counsel

appearing for the applicant submits that an offence under Section 392 I.P.C is not attracted for the reason that in taking away the laptop, mobile phone and other accessories belonging to the de facto complainant, the applicants did not have the dishonest intention to appropriate the same and thereby gain wrongfully or cause wrongful loss to the de facto complainant. The learned counsel states that the aforesaid articles were entrusted by the applicants to the Police for lawful action against the de facto complainant which would indicate that their action was with the intent to help the Police and not for any wrongful gain to themselves. Since there was no dishonest intention on their part, an offence under Section 392 I.P.C is not attracted.

11. In reply, the learned counsel appearing for the de facto complainant submits that the applicants had with dishonest intention taken away the aforesaid articles

without the permission of the de facto complainant and had thereby caused wrongful loss to the de facto complainant and there are elements of wrongful gain to the applicants. The learned counsel submits that the the mere fact that the applicants had entrusted the aforesaid stolen articles to the Police is not an extenuating circumstance to mitigate their crime. He submits that even depriving the possession momentarily would be sufficient to constitute an offence of theft. The learned counsel points out that to attract an offence of theft, the wrongful loss caused to the de facto complainant need not be permanent. The learned counsel relies on the decision in *K.N .Mehra vs. State of Rajasthan [AIR 1957 SC 369]* to argue that a person can be said to have dishonest intention to commit theft if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally

entitled to cause loss, by wrongful means, of property to which the person so losing is legally entitled. In the said decision the Hon'ble Supreme Court has appropriately discussed the definitions of "dishonest intention" and "wrongful gain" and "wrongful loss" under Sections 24 and 28 of the I.P.C. The Hon'ble Apex Court held thus:-

> "Taking these two definitions together, a person can be said to have dishonest intention if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss, by wrongful means, of property to which the person so losing is legally entitled. It is further clear from the definition that the gain or loss contemplated need not be a total acquisition or a total deprivation but it is enough if it is a temporary retention of property by the person wrongfully gaining or a temporary "keeping out" of property from the person legally entitled."

The learned counsel would further submitted that in some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself the prosecution need not establish that a particular

unlawful use was intended, so long as the goods or services in question could not be put to any lawful use. He relies on the decision of the Hon'ble Apex Court, ***State of Maharashtra vs. Som Nath Thapa [AIR 1996 SCC 1744]*** in support of his argument.

12. It is said that the intention is the gist of the offence of theft. If the intention to take dishonestly exists, then the taker intends to cause wrongful gain to either himself or some other person, or wrongful loss to another person. The elements of wrongful gain an wrongful loss must be involved in dishonesty. When dishonest intention is totally absent, there is no theft.

13. The Calcutta High Court has in ***Hamid Ali Bepari v. Emperor (ILR 52 Cal. 1015)*** held that,

> "It is not theft if a person, acting under a mistaken notion of law and believing that certain property is his and that he has the right to take the same ..... removes such property from the possession of another."

In ***Chandi Kumar Das Karmarkar and Another v. Abanidhar***

Roy [AIR 1965 SC 585], it is held by the Hon'ble Supreme Court that If there was absence of the *animus furandi* and the circumstances bring the case within the rule that where the taking of movable property is in the assertion of a bona fide claim of right, the act, though it may amount to a civil injury, and does not fall within the offence of theft.

14. In ***Birla Corporation Ltd. and Another v. Adventz Investments and Holdings Ltd. and Others. [2019 KHC 6559 : AIR 2019 SC 2390]*** the Hon'ble Supreme Court held thus.

> "69. The main question falling for consideration is whether in the facts and circumstances of the case in hand whether temporary removal of the documents and using them in the litigations pending between the parties would amount to theft warranting lodging of a criminal complaint.
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> 70. Admittedly, documents No. 1 to 54 including the Document No.1 – Internal Audit Report of Chanderia unit of the appellant Company has been filed by the respondents in the company petition. These documents are intra-company correspondence, internal audit reports, agreements, etc. in relation to the

> operations of the appellant Company. Admittedly, these documents have been produced in the company petition by the shareholders of the appellant – Company to substantiate their case of oppression and mismanagement by respondent No.17 and for vindication of their rights. As discussed infra in the facts and circumstances of the case in hand, in our view taking away of the documents temporarily and using them in the pending litigations between the parties would not amount to theft."

After discussing the definitions of 'dishonest intention', 'wrongful gain' and 'wrongful loss' the Hon'ble Apex Court continues by stating thus: -

> "73. In the facts and circumstances of the case, it is to be seen in using the documents in the litigation whether there is "dishonest intention" on the part of the respondents in causing "wrongful loss" to the appellant Company and getting "wrongful gain" for themselves. Respondents No.1 to 5 are the shareholders of the appellant – Company and they have produced the photocopies of the documents No.1 to 54 in the CLB proceedings which were filed by them on the ground of oppression and mismanagement. Merely because the respondents have produced the copies of the documents in the CLB proceedings, it cannot be said that the respondents have removed the documents with "dishonest" intention. Copies of documents are

produced in support of the case of respondents No.1 to 5 and to enable the Court to arrive at the truth in a judicial proceeding involving alleged oppression and mismanagement in the affairs of the appellant Company by respondent No. 17. A person can be said to have "dishonest intention" if in taking the property it is the intention to wrongful gain by unlawful means or to cause wrongful loss by unlawful means. As discussed earlier, the complaint does not allege that there was any wrongful gain to the respondents or wrongful loss to the appellant - Company so as to constitute ingredients of theft under S.378 IPC. The complaint only alleges that the copies of the document were used in the CLB proceedings by respondents No. 1 to 5. There is no allegation of "wrongful gain" to the respondents or "wrongful loss" to the appellant.

74. As pointed out earlier, documents No. 1 to 54 are filed in the Company Petition to substantiate their case of oppression and mismanagement. Filing of documents in the CLB proceedings is only to assert their claim of oppression and mismanagement of the appellant Company. According to the respondents, there is a bona fide dispute of oppression and mismanagement and the documents No.1 to 54 are filed only to substantiate their case. When a bona fide dispute exists between the parties as to whether there is oppression and mismanagement, there is no question of "wrongful gain" to the respondents or "wrongful loss" to the appellant. In using the documents, when there is no dishonest intention to cause "wrongful loss" to the complainant and

"wrongful gain" to the respondents, it cannot be said that the ingredients of theft are made out

75. As discussed earlier, respondents No.12 to 16 have filed five civil suits challenging the cancellation of the trusts for recovery of the property that had vested in public charity through the trust deeds. Respondents No.12 to 16 have filed copy of document No.1 - Internal Audit Report of Chanderia Unit of the appellant Company. By the time, the document was filed in the interlocutory applications filed in the civil suits, the document was already filed in CP No.1/2010. Here again, there is a bona fide dispute as to the correctness of cancellation of the revocation of the trusts deed and to substantiate the averments in the complaint and in the interlocutory applications. It cannot be said that the respondents No.1 to 16 had dishonest intention in using the documents so as to cause "wrongful loss" to the appellant or "wrongful gain" to themselves so as to attract the ingredients of theft under S.378 IPC."

15. In ***K.N.Mehra*** (supra) the facts are different. Two trainee cadets of the Indian Air Force undergoing training at Jodhpur Air Force Pilot Training School had without authority, flown an aircraft and landed it in Pakistan. The very act of having flown the plane unauthorisedly and

without permission of their superior, spelt out dishonest intention. In a later decision of the Hon'ble Supreme Court in ***Birla Corporation Ltd*** (*supra*), it is stated that the dishonest intention of 'wrongful gain' and 'wrongful loss' is to be ascertained from what the accused did with the article that was removed by them. In the instant case, the applicants had allegedly removed the laptop, mobile phone and accessories belonging to the de facto complainant for being entrusted to the Police. Within two hours of the alleged incident, the articles were taken into custody by the Police at the Police station. The applicant had gone straight to the Police station to surrender those articles. Hence, there is a serious doubt as to whether there was any dishonest intention on the part of the applicants to take those articles. "Wrongful loss" and "wrongful gain" must be involved in dishonesty. There is serious doubt about those ingredients in the instant case.

The videographs produced would indicate that the applicants are asking the de facto complainant to hand over his mobile phone and the laptop to them.

16. The learned counsel appearing for the de facto complainant relies on the decision of the Hon'ble Supreme Court in ***Y.S. Jagan Mohan Reddy v. C.B.I. [2013 KHC 4402: AIR 2013 SC 1933]*** to oppose the claim for anticipatory bail by the applicants. He points out to the dictum laid down in the aforesaid judgement which reads thus:-

> "16. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations."

The learned counsel submits that the applicants, who were involved in the aforesaid crime for a grave offence like

house trespass and robbery, may not be granted anticipatory bail considering the larger interest of the public and the State. It is stated that while deciding the bail petition the Court has to keep the interest of the society at large also, and that if such persons are released on bail it will definitely convey a wrong message to the society. The learned counsel relies on several decisions of the Kerala High Court wherein it was held that the granting of bail to persons involved in serious offences would give the wrong message to the society at large. Those decisions indicate that the persons accused therein were involved in offences under POCSO Act, NDPS cases and grave accusations of cheating.

17. The learned counsel appearing for the de facto complainant also draws the attention of this Court to the decision in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another [2010 KHC 4835: AIR 2011 SC 274]***, wherein it

was held thus;

> "11. We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are: (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the accusation; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being influenced; and (viii) danger, of course, of justice being thwarted by grant of bail. (See: State of U.P. through CBI v. Amarmani Tripathi, 2005 (8) SCC 21; Prahlad Singh Bhati v. NCT, Delhi and Another, 2001 (4) SCC 280; Ram Govind Upadhyay v. Sudarshan Singh and Others, 2002 (3) SCC 598.)"

The learned counsel appearing for the de facto

complainant points out that even if the applicants were aggrieved by the Act of the de facto complainant in maligning them by circulating a YouTube video, remedy that was available to them was to approach the Police or the Court. They could not have taken law into their hands. Pointing out to the order of the learned Sessions Judge the learned counsel submits that the application for anticipatory bail was rejected for the reason that granting of pre-arrest bail to the applicants would encourage people to take law into their hands and therefore should not be entertained. He relies on the decision of the Hon'ble Supreme Court in support of his argument. In ***Tehseen S. Poonawalla v. Union of India and Others. [2018 KHC 6513 : AIR 2018 SC 3354]*** it is held thus :

> "17. There can be no shadow of doubt that the authorities which are conferred with the responsibility to maintain law and order in the States have the principal obligation to see that vigilantism, be it cow vigilantism or any other vigilantism of any perception, does not take place.

> When any core group with some kind of idea take the law into their own hands, it ushers in anarchy, chaos, disorder and, eventually, there is an emergence of a violent society. Vigilantism cannot, by any stretch of imagination, be given room to take shape, for it is absolutely a perverse notion. We may note here that certain applications for intervention and written notes have been filed in this regard supporting the same on the basis that there is cattle smuggling and cruel treatment to animals. In this context, suffice it to say that it is the law enforcing agencies which have to survey, prevent and prosecute. No one has the authority to enter into the said field and harbour the feeling that he is the law and the punisher himself. A country where the rule of law prevails does not allow any such thought. It, in fact, commands for ostracisation of such thoughts with immediacy."

18. There is no doubt that vigilantism has no place in a civilised society. If people are permitted to take law into their hands and do what they believe to be right and justified, there will be a chaotic situation and would have the effect of undermining the legal and formal institutions of the state and altering the constitutional order. Such extrajudicial acts under the guise of protection of law

definitely requires to be kept under check, otherwise it would lead to rise of anarchy, lawlessness and mobocracy. I am in total agreement with the learned counsel for the de facto complainant on this aspect. But granting of bail is based on totally different parameters, and the fact that granting bail to the applicants would give a wrong message to the public at large and that it would amount to an encouragement of vigilantism is no reason to refuse granting of bail.

19. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case. In ***Gurbaksh Singh Sibbia v. State of Punjab, [1980 KHC 665 : AIR 1980 SC]***, a Constitution Bench of the Supreme Court has held as follows:

> "S.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. S.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."

20. In ***Siddharam Satlingappa Mhetre v. State of Maharashta, [2010 KHC 4952 :AIR 2011 SC 312]*** it was held thus by the Hon'ble Supreme Court :

> "17. It is clear from the Statement of Objects and Reasons that the purpose of incorporating S.438 in the CrPC 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."

21. The Court further discusses the importance of personal liberty in the following paragraphs which appears to be very relevant :-

> 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".
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> 55. According to Dicey, a distinguished English author of the Constitutional Law in his treatise on Constitutional Law observed that, "Personal liberty, asunderstood 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 into force in India in the case of A. K. Gopalan v. The State of Madras, 1950 KHC 183 : AIR 1950 SC 27 : 1950 SCR 88 : 1950 (2) MLJ 42 : 1950 MWN 495 : 1950 (51) CriLJ 1383. 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, 1963 KHC 618 : AIR 1963 SC 1295 : 1964 (1) SCR 332 : 1963 (2) CriLJ 329, 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 KHC 477 : 1978 (1) SCC 248 : AIR 1978 SC 597 : 1978 (2) SCR 621, 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."

Observing that the arrest is a part of the investigation

intended to secure several purposes, in ***Adri Dharan Das v. State of W.B. [2005 KHC 628 : AIR 2005 SC 1057***], it was held thus :-

> "19. Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under S.438 of the Code. The role of the investigator is well defined and the jurisdictional scope of interference by the court in the process of investigation is limited. The court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence."

22. In the instant case, the prosecution has not been

able to convince this Court as to the reason why the applicants should be taken for custodial interrogation. I have expressed my doubts regarding the maintainability of an accusation Section 392 I.P.C. However even if it is presumed that the applicants were involved in stealing of property as alleged, that property has already been recovered or surrendered before the Police. Custodial interrogation for that purpose is not necessary since nothing has to be discovered through the applicants under Section 27 of the Evidence Act. The learned counsel appearing for the de facto complainant submits that the applicants had video graphed the entire incident on their mobile phones. Those phones become essential material of evidence and hence it needs to be seized by the police. Even if the phones are import materials to be taken into custody, for the purpose of seizure of mobile phones the applicants need not be detained in custody. The

investigating officer could very well invoke the provisions under section 91 Cr.P.C and ask them to produce the mobile phones and they are under obligation to produce it.

23. The learned counsel appearing for the de facto complainant has challenged the maintainability of this application before this Court. He submits that applications for anticipatory bail can either be filed before the Sessions Court or before the High Court. Having exercised the option to file the application before the Sessions Court and suffered a dismissal, the applicants cannot now file another application under Section 438 Cr.P.C before this Court unless change of circumstances are brought about. The learned counsel relies on a decision of this Court in *Vineeth v. State of Kerala [2015 (5) KHC 224]* to argue that successive applications for anticipatory bail cannot be entertained. It was held thus:

> "As a general rule, it can be stated that a second application for anticipatory bail is not barred. Even though the principle of res judicata is not directly applicable in a criminal case, especially in a bail application, there is a strong line of thinking that the Courts are bound by the doctrine of judicial discipline. Therefore, the general proposition that a second bail application for pre-arrest bail is not legally barred is controlled by certain riders. Primarily, it has to be established by the applicant in the second application that there is a material change in the fact situation which makes him entitled to seek the relief. In other words, the applicant should establish a change in the circumstances sufficient to persuade the Court to invoke its extraordinary jurisdiction in favour of him."

In the aforesaid decision this Court has deprecated filing of successive applications before the High Court and then before the Sessions Court and has held as follows:-

> "20. The second point mentioned in the opening paragraph of this order deserves consideration in this context. The power under S.438 CrPC is conferred on the High Court as well as on the Court of Sessions. It may be true that a person has a right to move either the High Court or the Court of Sessions for a pre-arrest bail under S.438 CrPC at his option. However, there is a line of judicial

> pronouncements that where a person chooses to move the High Court at the first instance under S.438 CrPC and his application is rejected, then he is precluded from moving the Court of Sessions on the same set of facts and circumstances for the second time. The intent and purport of the reasoning is mentioned by the Apex Court in Kalyan Chandra Sarkar's decision, viz., the doctrine of judicial discipline which has to be respected. Hierarchical system of the judiciary makes it obligatory on the part of the subordinate Courts to consider the decision of the higher Courts with due weight when the earlier application under S.438 CrPC filed by the same petitioner was rejected."

In ***Kalyan Chandra Sarkar v. Pappu Yadav, [2005 KHC 604 : AIR 2005 SC 921]***, the Apex Court has held as follows:

> "Even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application"

It is further held by the Hon'ble Supreme Court with regard

to the hierarchy of Courts thus.:-

> "19. The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher court or a coordinate Bench must receive serious consideration at the hands of the court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the courts must give due weight to the grounds which weighed with the former or higher court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be re agitated on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting."

The order of rejecting an application for anticipatory bail by the Sessions Court is definitely not binding on the High Court but vice a versa may be true. In case an application under Section 438 Cr.P.C filed by the applicant before the High Court is rejected, there is no embargo on the applicant approaching the Apex Court for a favourable

order. Hence, the argument of the learned counsel that once the Sessions Court has dismissed the application for anticipatory bail, this Court cannot entertain an application unless there are change in circumstances, is not acceptable. The Hon'ble Supreme Court has in ***Siddharam Satlingappa Mhetre*** (*supra*) has in the following paragraphs summed up the decision thus:

> "95. The gravity of charge and exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.
>
> 96. It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.

97. A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage. Whether the powers under S.438 CrPC are subject to limitation of S.437 CrPC.?"

122. 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 the 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 accused is implicated with the help of S.34 and S.149 of the Indian Penal Code, 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.
>
> 123. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case."

The applicants cannot be subjected to custodial interrogation and incarceration merely for the reason that

granting them bail would give the wrong message to the public or that it would amount to encouragement of vigilantism or taking law into one's own hands. The prosecution has not made out a case that custodial interrogation of the applicant is most essential for the purpose of investigation. In ***Sanjay Chandra v. CBI [2011 KHC 5051: AIR 2012 SC 830]***, the Hon'ble Supreme Court has held thus:

> "Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson."

The first applicant claims to be a celebrity of repute and the other applicants claim to be involved in social work. Taking law into their hands would set them as bad example for people to follow. Though I do not approve of

vigilantism shown by the applicants in taking law into their hands, I also do not feel it necessary to incarcerate them just for the purpose of giving them a taste of imprisonment as a lesson. The gravity of the offence and the possibility of the applicants fleeing from justice are very important criteria for the granting of anticipatory bail. The applicants are ladies without any criminal antecedents. The fact that the applicants had, soon after the incident appeared before the Police and surrendered the articles which they had allegedly robbed is an indication to the fact that they're willing to co-operate with the investigation and are not likely to flee from justice.

24. I make it clear that none of what has been observed by me shall not influence the trial Court. An independent finding based on the materials that may be produced during trial shall be arrived at. The above finding

of this Court is intended solely for the purpose of disposing the application for anticipatory bail and the ultimate finding should be untrammelled by what is observed above.

Under the circumstances, the application is allowed. In the event of their arrest, the applicants shall be released on bail on execution of bond for ₹ 50,000/- (Rupees fifty thousand only) each with two solvent sureties, for like amount each, to the satisfaction of the arresting officer, and on following further conditions:-

1. They shall appear before the investigating officer as and when called for and co-operate with the investigation.

2. They shall not tamper with evidence, intimidate or influence witnesses.

3. They shall not get involved in offences of similar nature during the currency of the bail.

Breach of the bail conditions shall entail in cancellation of bail on an application being filed by the prosecution before the jurisdictional Court.

Sd/-

ASHOK MENON
JUDGE

jg