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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

THURSDAY, THE 17TH DAY OF SEPTEMBER 2020 / 26TH BHADRA, 1942

Bail Appl..No.5831 OF 2020

AGAINST THE ORDER/JUDGMENT IN CMP 427/2020 DATED 09-09-2020 OF
ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN
& CHILDREN)

CRIME NO.1017/2020 OF Njarakkal Police Station, Ernakulam

(Crime No.751/2020 of Munambam Police Station)

PETITIONER/ACCUSED:

MUHAMMED SHIFAS
AGED 28 YEARS
SON OF SAKARIA, KOTEPPADY HOUSE, EDAVANAKKAD P.O.,
ERNAKULAM DISTRICT
682502

BY ADV. SRI.K.I.ABDUL RASHEED

RESPONDENT/S:

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

R1 BY PUBLIC PROSECUTOR

OTHER PRESENT:

SRI.AJITH MURALI, PP

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
17.09.2020, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

CR

P.V.KUNHIKRISHNAN, J

B.A.No.5831 of 2020

Dated this the 17th day of September, 2020

O R D E R

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

2. Petitioner is the accused in Crime No.1017/2020 of Njarackal Police Station. It was initially registered at Munambam Police Station and subsequently transferred to Njarackal Police Station. (It is wrongly mentioned in the cause title of the Bail Application as Crime No.751/2020 of Munambam Police

Station). The offences alleged against the petitioner are under Sections 370, 376, 376(2) (n), 509, 506 IPC and Section 6 r/w Section 5, 5(l), 13, 14 and 15 of the Protection of Children from Sexual Offences Act 2012 (POCSO Act, 2012) and also under Section 66 (E) of the Information Technology Act.

3. The prosecution case is that the petitioner and the victim girl were in love. On 22.12.2018, the accused took her to a resort at Cherai beach under the pretext of giving her a birthday gift and committed forcible rape. It is also alleged that the petitioner captured nude photos of the victim. It is also alleged that he threatened her that if the incident is disclosed to anybody, he will circulate her nude pictures on social media. It is alleged that the petitioner committed rape on the victim girl about six occasions after that incident by showing the nude photos. It is also alleged that on 31.07.2020, the petitioner created a fake Facebook account by name 'Rilsila Richus' and posted the pictures of the victim and demanded Rs.1 lakh from the victim

to delete the above-said photos.

4. Heard the counsel for the petitioner and the learned Public Prosecutor.

5. The counsel for the petitioner submitted that the allegation against the petitioner is false. The counsel submitted that the petitioner is in custody from 23.8.2020 onwards. The counsel submitted that the alleged incident happened on 22.12.2018 and the F.I.statment was given only on 14.8.2020. The counsel also submitted that the petitioner is now aged 23, and the victim is aged 19. According to the counsel, they were in love. Their parents also fixed the marriage of the petitioner and the victim girl. Subsequently, because of some reason, the victim withdrew from the marriage. The counsel submitted that the petitioner is ready to marry the victim girl even now. The counsel submitted that the petitioner is prepared to abide by any conditions if this Court grants him bail.

6. The learned Public Prosecutor seriously opposed the bail application. The Public Prosecutor

submitted that the petitioner not only committed rape, but also took nude photos of the victim and circulated the same in social media. The Public Prosecutor submitted that the petitioner may not be released on bail at this stage.

7. It is an admitted fact that the petitioner is now aged 23 years and the victim girl is now aged 19 years. It is also an accepted fact that the petitioner and the victim girl were in love. The victim admits these facts in her F.I statement itself. According to the victim girl she went along with the petitioner on a motor bike on her birthday. Petitioner took her to a resort at Cherai beach. He took her to a room. Thereafter, according to the victim, the petitioner committed rape on her without her consent. Subsequently, on 6 occasions the petitioner took the victim to the same resort and committed rape. The last incident, according to her, was in November 2019. The main grievance of the victim is that the petitioner took her nude photos. The victim says that the petitioner posted some photos of the

victim on social media. Therefore, the victim's main grievance is that the petitioner is circulating the photographs of the victim girl in social media.

8. Petitioner is aged only 23 years, and the victim is also now major. She admits her love affair with the petitioner. Her main grievance is that the petitioner posted her photographs on Face Book. In such circumstances, considering the special facts and circumstances of the case, if bail is granted, why not there be a condition in the bail order directing the petitioner not to use social media like Face Book, Whatsapp, Twitter, Instagram etc., till the case is finally concluded?

9. Whether a bail court can impose such a condition is also a question to be decided. In my opinion in appropriate cases, in the interest of justice, the court can impose any such conditions if it considers necessary in the facts and circumstances of the case. There cannot be a straight jacket formula regarding conditions that can be imposed in a bail order. Each case is to be

decided separately, considering the facts and circumstances of that particular case. But the conditions imposed in a bail order should be reasonable and effective in the pragmatic sense, but of course, the condition should not defeat the bail order itself.

10. Section 439 Cr.P.C gives special powers to the High Court and Sessions Court regarding bail. Section 439 (1)(a) Cr.P.C says about the conditions that can be imposed.

439. Special powers of High Court or Court of Session regarding bail.*(1) A High Court or Court of Session may direct- (a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in subsection (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that subsection;*

A reading of the above Section, it is clear that High Court or Court of Session may direct that any person accused of an offence and in custody be released on bail

and if the offence is of the nature specified in subsection (3) of Section 437 Cr.P.C may impose any condition which it considers necessary for the purpose mentioned in that Section. Admittedly, the offences alleged against the petitioner in this case will come within the purview of Section 437 (3) Cr.P.C. Section 437(3) Cr.P.C reads like this.

437 When bail may be take in case of non-bailable

offence (3) *When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII or the Indian Penal Code(45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub- section (1), the Court shall impose the conditions,-*

(a) that such person shall attend in accordance with the conditions of the (bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused or suspected , of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence,

and may also impose, in the interests of justice, such other conditions as it considers necessary.

11. The offences alleged under the Indian Penal Code in this case are the offences included in Chapter XVI of the Indian Penal Code. Therefore, while granting bail in cases mentioned in Section 437(3) Cr.P.C, the court, in addition to the conditions mentioned in clause (a) to (c) in that subsection, also impose in the interest of justice such other conditions as it considers necessary. So it is clear that in the interest of justice, any other conditions can be imposed if it is found necessary. But the conditions should always be reasonable. Since it is specifically stated in Section 439 (1)(a) Cr.P.C and in Section 437 (3) Cr.P.C that any other conditions can be imposed "only if it considers necessary" a finding is necessary for imposing such other conditions. The bail court should pass a speaking order if any other conditions are imposed.

12. In this case the main grievance of the victim

is that the petitioner is circulating the photographs of the victim girl in social media. It is also the case of the victim that the petitioner is threatening the victim to the effect that he will publish the photographs of the victim girl. The allegation is that the petitioner is even demanding money. In such circumstances, there is nothing wrong in imposing a condition that the accused shall not use social media like Face Book, Whatsapp, Twitter, Instagram etc., till the investigation in Crime No.1017/2020 of Njarackal Police Station is completed. I also make it clear that if any final report is filed against the petitioner before the court concerned after investigation and the court concerned took cognizance of the same, the above condition will continue till the trial of the above case is over. With such a condition, this bail application can be allowed. Heavens will not fall down if a condition is imposed in a bail order restraining the accused in a rape case in using social media, especially when it is to protect the victim girl's privacy. There can be a

direction to the investigating officer to inform the victim also about this condition and if any complaint in this regard is received from the victim, the investigating officer will act in accordance to law. I also make it clear that, While granting bail in this case, I considered the fact that the petitioner is only aged 23 years, and he is in detention.

13. Moreover, considering the need to follow social distancing norms inside prisons so as to avert the spread of the novel Corona Virus Pandemic, the Hon'ble Supreme Court in **Re: Contagion of COVID-19 Virus In Prisons case (Suo Motu Writ Petition(C) No.1 of 2020)** and a Full Bench of this Court in **W.P(C)No.9400 of 2020** issued various salutary directions for minimizing the number of inmates inside prisons.

14. Moreover, it is a well accepted principle that the bail is the rule and the jail is the exception. The Hon'ble Supreme Court in **Chidambaram. P v Directorate of Enforcement (2019 (16) SCALE**

870), after considering all the earlier judgments, observed that, the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial.

15. Considering the dictum laid down in the above decision and considering the facts and circumstances of this case, this Bail Application is allowed with the following directions:

1. petitioner shall be released on bail on executing a bond for Rs.50,000/- (Rupees Fifty Thousand only) with two solvent sureties each for the like sum to the satisfaction of the jurisdictional Court.
2. The petitioner shall appear before the Investigating Officer for interrogation as and when required. The petitioner shall co-operate with the investigation and shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer.
3. Petitioner shall not leave India without

permission of the jurisdictional Court.

4. Petitioner shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected.

5. The petitioner shall strictly abide by the various guidelines issued by the State Government and Central Government with respect to keeping of social distancing in the wake of Covid 19 pandemic.

6. The petitioner shall not use social media like Face Book, Whatsapp, Instagram etc., till the investigation in Crime No. 1017/2020 of Njarackal Police Station is completed. If any final report is filed against the petitioner in this case after investigation and the court concerned took cognizance of the same, the above condition will continue till the trial in that case is over. The investigating officer will intimate about this condition imposed on the petitioner to the victim in this case. If any violation of this condition is reported by the victim, the investigating officer will do the needful in accordance to law.

7. If any of the above conditions are violated by the petitioner the jurisdictional Court can cancel

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the bail in accordance to law, even though the bail is granted by this Court.

The registry will forward a copy of this order to the investigating officer in this case.

Sd/-

P.V.KUNHIKRISHNAN, JUDGE

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