

## XXXX Vs State Of Kerala

**Court:** High Court Of Kerala

**Date of Decision:** Oct. 22, 2024

**Acts Referred:** Code of Criminal Procedure, 1973 â€” Section 438, 438(4)

Indian Penal Code, 1860 â€” Section 376, 376(2)(n), 376AB

Protection of Children from Sexual Offences Act, 2012 â€” Section 3(b), 4(2), 5(m), 5(l), 5(n)

**Hon'ble Judges:** C.S.Dias, J

**Bench:** Single Bench

**Advocate:** S.Rajeev, V.Vinay, M.S.Aneer, Sarath K.P., Prerith Philip Joseph, Anilkumar C.R., K.S.Kiran Krishnan, Seetha S

**Final Decision:** Allowed

### Judgement

C.S.Dias, J

1. The application is filed under Section 438 of the Code of Criminal Procedure, 1973(in short, *Cr.P.C.*), for an order of pre-arrest bail.

2. The petitioner is the sole accused in Crime No.650/2024 of the Contonment Police Station, Thiruvananthapuram, which is registered against him for

allegedly committing the offences punishable under Sections 376, 376(2)(n), 376AB of the Indian Penal Code, 1860 and Secs.3(b), 4(2), 5(m), 5(l) &

5(n) of the Protection of Children from Sexual Offences Act.

3. The crux of the prosecution case, is that: the accused, the father of the survivor ( a minor girl aged 7 years and four months), who was granted

custody of the survivor and his younger daughter for seven days from 25.5.2024, between 10.00 a.m and 5.00 p.m, with the sexual intention, took the

survivor to the wash rooms of Lulu Mall, Mall of Travancore and Room No.8 of YWCA, and while washing the genitals of the survivor, inserted his

finger into her genitals. Thus the accused has committed rape and penetrative sexual assault on the survivor.

4. The petitioner has filed the application, inter alia, contending that he is totally innocent. The allegations are baseless. The allegations have been

levelled only to prevent the petitioner from having the interim custody of his children as ordered by the Family Court. The survivor is made as a tool by

the petitioner's wife, to wreck vengeance on him. The petitioner is a law abiding citizen and is willing to co-operate with the Investigation.

Therefore, the application may be allowed.

5. The survivor's mother has filed a bail objection report through her Counsel, inter alia, contending that the application is not maintainable in law in

view of the statutory embargo under Sec.438(4) of the Code. Since the petitioner has committed the offence under Sec.376AB of the IPC, he is not

entitled to an order of pre-arrest bail. It was the survivor who complained to the Doctor on 4.6.2024, that she has pain in her genitals. The Doctor on

being convinced that the survivor was sexually abused, intimated to the Peroorkada Police Station, and the crime was registered. Therefore, there is

no truth that the FIR is registered at the instigation of the survivor's mother. The medical examination report of the survivor coupled with her

Sec.164 Cr.P.C statement are sufficient to prove that the petitioner has committed the above offences. The petitioner being an influential person may

scuttle the investigation. In view of Sec.29 of the PoCSO Act, there is no presumption of innocence in favour of the petitioner. The petitioner's

custodial interrogation is necessary and his medical examination has to be conducted for the proper investigation of the crime. Therefore, the

application may be dismissed.

6. In addition to the above statement filed by the Counsel, the mother of the survivor (party-in-person), after disengaging the services of the Counsel,

has filed a supplementary statement, inter alia, contending that there are vital aspects that show the petitioner's involvement in the crime. She has

produced Annexures R2(1) to R2(8) documents to prove that she had made complaints against the petitioner before various Police Authorities. Even

then, the matter was not taken seriously. The survivor's mother had to run from pillar to post to get the crime registered. The

survivor's mother has suffered at hands of the petitioner, as his wife. If the petitioner is granted an order of pre-arrest bail, he would not only

sabotage the investigation, but he would also not be available for trial. Therefore, the application may be dismissed.

7. Heard; Sri. S Rajeev, learned counsel appearing for the petitioner, the mother of the survivor (party in person) and Smt. Seetha S., the learned

Senior Public Prosecutor

8. The learned counsel for the petitioner vehemently argued that the petitioner is innocent of the accusations leveled against him. The present crime is

registered solely at the instance of the survivor's mother who somehow wants to prevent the petitioner from getting the custody of the survivor.

The marital relationship between the petitioner and the survivor's mother is strained. The petitioner has filed OP No. 2575/2022 (Annexure-I) and OP

No.618/2023(Annexure-II) before the Family Court, Thiruvananthapuram to dissolve his marriage with the survivor's mother and also for the

custody of survivor and his younger daughter, respectively. The proceedings are pending for the last two years. By Annexure-III order, the Family

Court had given custody of the survivor and younger child to the petitioner from 19th to 23rd April, 2024 and 25th to 31st of May, 2024 during 10 a.m

and 5 p.m. The children were very happy in the petitioner's custody. It is after the interim custody period was over and the children were returned

to the survivor's mother, that she has got Annexure-IV FIR registered on 5.6.2024 by making unsubstantiated allegations against the petitioner.

The petitioner has treated his children with utmost love and affection. The petitioner is presently employed as a Wing Commander/Judge Adjutant

General in the Indian Air Force. The survivor's mother's sole intention is to somehow get the petitioner arrested and incarcerated, make him

lose his employment and wreak her vengeance on him. The petitioner is a law-abiding citizen without any criminal antecedents. It is unbelievable that

the petitioner would sexually abuse his daughter in the toilets, that too in public places, when he is given the interim custody of the children by the

Family Court. The petitioner is willing to abide by any stringent condition that may be imposed by this Court and also co-operate with the investigation.

Therefore, the application may be allowed.

9. The learned Public Prosecutor opposed the application. She submitted that the investigation is only at its preliminary stage. The petitioner's

custodial interrogation is necessary and his medical examination has to be conducted for the proper investigation of the crime. If the petitioner is

granted an order of pre-arrest bail, it may hamper the investigation. Hence, the application may be dismissed.

10. The survivor's mother reiterated the contentions in the bail objection report and the supplementary report . She submitted that it was the

survivor who complained against the petitioner. If the petitioner is granted an order of pre-arrest bail, he may influence the survivor and tamper with

the evidence. Therefore, the application may be dismissed.

11. The survivor's mother had raised a preliminary objection that the application is not maintainable in law, in view of the statutory prohibition under

Section 438 (4) of the Code, because the petitioner is alleged to have committed an offence under Section 376A B of the IPC. The above question is

no longer res-integra in view of the exposition of law in X vs State of Kerala [2023 6 KHC 158], wherein this Court has held that when patently false

or ill-motivated accusations are made, there is no bar in granting an order of pre-arrest bail. Thus, I repel the preliminary objection.

12. The petitioner was married to the survivor's mother on 23.9.2012. The couple has two children born in the wedlock, that is the survivor and a

younger daughter. The marriage is strained and the petitioner has filed Annexure-I proceeding on 6.10.2022 before the Family Court,

Thiruvananthapuram, to dissolve his marriage with the survivor's mother and Annexure-II proceeding on 3.3.2023, to appoint him as the legal

guardian and to get permanent custody of his two children. By Annexure-III order dated 15.4.2024 in Annexure-II proceedings, the Family Court

granted the petitioner interim custody of his two children from 10.30 a.m to 5 p.m on 19th to 23rd April, 2024 and 25th to 31st May, 2024. The children

were directed to be handed over in the Family Court premises. It is after the interim custody period was over, and the petitioner returned the children

to the survivor's mother, that Annexure-IV FIR is registered on 5.6.2024 for incidents that allegedly occurred between 25.5.2024 to 31.5.2024.

13. The prosecution allegation is that during the seven days that the petitioner had the custody of the survivor, he took the two children to the

washrooms of Lulu Mall, Mall of Travancore and Room No.8 in YWCA and inserted his fingers into the genitals of the survivor and caused pain to

her. On 4.6.2024, the survivor complained of pain and was taken to the Government Hospital, Peroorkada, and the Doctor intimated the matter to the

Investigating officer.

14. I have carefully gone through the entire materials placed on record including the case diary. Admittedly, the marital relationship between the

petitioner and the survivor's mother is strained for the last two years. The survivor's mother had refused to give the custody of the children to the

petitioner. It was on the petitioner's application that the Family Court passed Annexure-III order, granting interim custody of the children to the

petitioner for five days in April, 2024 and 7 days in May, 2024. Neither the survivor nor her mother had made any complaint before the Family Court

regarding sexual abuse, harassment or ill-treatment by the petitioner. It was after a week that the survivor alleged that she was having pain in her

genitals and was taken to the Doctor, and the Doctor intimated the matter to the Police and the present F.I.R has been registered. Prima facie, on an

appreciation of the rival contention, I find that the petitioner's theory of false implication to be probable. Nevertheless, these are matters to be

investigated and decided after trial.

15. In Bhadres Bipinbhai Sheth vs State of Gujarat and another [2015 KHC 4579], the Hon'ble Supreme Court has succinctly culled out the

principles to grant an order of pre-arrest bail in offences of a similar nature, by holding that the complaint made against the accused has to be

thoroughly examined at the stage of considering a bail application, especially to find out if it is a false or frivolous complaint. The courts should

examine whether there is any family dispute between the parties and whether the Investigating Officer is acting in connivance with the complainant.

The gravity of each charge and the exact role of the accused should also be properly comprehended. The discretion to grant an order of pre-arrest

bail must be exercised on the basis of the available materials and the facts of the particular case and there is no requirement that the accused must

make out a special case to exercise the power of grant of anticipatory bail. The discretion of the Court should be exercised with due care and

circumspection, and the frivolity in the prosecution should be examined, particularly whether any harassment, humiliation or unjustified detention of the

accused.

16. In a case of identical nature, a Division Bench of this Court in *Suhara v Muhammed Jaleel* [(2019) 2 KLT 960], has observed that there is a

growing tendency in the recent years to foist false crimes against biological fathers, alleging them of sexual abuse of their own children by misusing

the provisions of the PoCSO Act, especially when there is a serious fight for the custody of their children, which is pending resolution before the

Family Courts.

17. After bestowing my anxious consideration to the peculiar facts and circumstances of the case, the rival submissions made across the Bar, the

materials placed on record, and the law laid down in the aforecited decisions, and on comprehending the fact that the matrimonial proceedings are

pending between the petitioner and the survivor's mother, that the incident occurred during the validity of the interim custody period but no complaint

was made before the Family Court, that the alleged incident took place in wash rooms at public places and that the complaint was made nearly a week

after the incident, I am satisfied and convinced that the petitioner has made out valid grounds to invoke the discretionary jurisdiction of this Court under

Section 438 of the Code. Hence, I am inclined to allow the application, but subject to stringent conditions.

In the result, the application is allowed subject to the following conditions:

(i) The petitioner is directed to surrender before the Investigating Officer within one week from today.

(ii) In the event of the petitioner's arrest, the Investigating Officer shall release the petitioner on bail on him executing a bond for Rs.50,000/-

(Rupees fifty thousand only) with two solvent sureties for the like amount each;

(iii) The petitioner shall appear before the Investigating Officer between 9 a.m. and 11 a.m. for three days from the date of his release. The

Investigating Officer would be at liberty to interrogate the petitioner during the said period and also subject him to medical examination, including

conducting the potency test and such other statutory formalities that may be required, if felt necessary. The petitioner shall also appear before the

Investigating Officer as and when directed.

(iv) The petitioner shall not directly or indirectly make any inducement, threat or procure to the survivor or her witnesses or any person acquainted

with the facts of the case so as to dissuade them from disclosing such facts to the court or to any Police Officer or tamper with the evidence in any

manner, whatsoever;

(v) The petitioner shall surrender his passport before the jurisdictional court concerned within a period of one week from the date of his release on

bail. If he has no passport, he shall file an affidavit to the effect before the said court within the said period;

(vi) The petitioner shall not get involved in any other offence while on bail;

(vii) In case of violation of any of the conditions mentioned above, the jurisdictional court shall be empowered to consider the application for

cancellation of bail, if any filed, and pass orders on the same, in accordance with law.

(viii) Applications for deletion/modification of the bail conditions shall also be filed before the jurisdictional court.

(ix) Needless to mention, it would be well within the powers of the Investigating Officer to investigate the matter and, if necessary, to effect

recoveries on the information, if any, given by the petitioner even while the petitioner is on bail as laid down by the Hon'ble Supreme Court in *Sushila*

*Aggarwal v. State (NCT of Delhi) and another* [2020 (1) KHC 663].

(x) The observations made in this order are only for the purpose of considering the application and the same shall not be construed as an expression on

the merits of the case, which shall be decided by the competent Courts.