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SUMITHA PRADEEP

v.

ARUN KUMAR C.K & ANR.

(Criminal Appeal No. 1834 of 2022)

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OCTOBER 21, 2022

[SURYA KANT AND J. B. PARDIWALA, JJ.]

- Anticipatory bail: Case filed against respondent no.1 under ss.354(1)(i), (ii) and (iv), 354A(2) and 354A(3) IPC /w ss.7, 8, 9 and 11 of POCSO Act – Allegation against respondent no.1 was that he sexually assaulted his 12 years old niece – He asked the victim to sit on his lap and thereafter hugged her and kissed her on the cheeks and tried to kiss her on her lips – He further attempted to disrobe her and made lewd comments – The incident traumatized the victim to an extent that she slumped down in her course and performance although she was an excellent student giving good performances – She was taken to counselling but did not open up – In second counselling session, she disclosed the unfortunate incident – Thereafter, FIR was registered against respondent no.1 – Respondent no.1 approached Sessions Court but was declined the anticipatory bail, however High Court granted protection of anticipatory bail – Instant appeal by victim's mother – Held: In a case containing such serious allegations, the High Court ought not to have exercised its jurisdiction in granting protection against arrest, as the Investigating Officer deserves free hand to take the investigation to its logical conclusion – The fact that the victim was traumatized to such a high degree that her academic pursuits were adversely impacted alone, coupled with the legislative intent especially reflected through s.29 of the POCSO Act, are sufficient to dissuade a Court from exercising its discretionary jurisdiction in granting pre-arrest bail – There appears to be a serious misconception of law that if no case for custodial interrogation is made out by the prosecution, then that alone would be a good ground to grant anticipatory bail – Custodial interrogation can be one of the relevant aspects to be considered along with other grounds while deciding an application seeking anticipatory bail – However, even if custodial interrogation is not required or necessitated by itself cannot be ground to grant anticipatory bail – There may be many*

cases in which the custodial interrogation of the accused may not be required, but that would not mean that prima facie case against the accused should be ignored or overlooked and he should be granted anticipatory bail – The first and foremost thing that the court hearing an anticipatory bail application should consider is the prima facie case put up against the accused – Thereafter, the nature of the offence should be looked into along with the severity of the punishment – In the facts of this case, High Court ought not to have granted discretionary relief of anticipatory bail.

Joy v. State of Kerala (2019) 1 KLT 935 – referred to.

<u>Case Law Reference</u>	C
(2019) 1 KLT 935	referred to
	Para 8

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1834 of 2022.

From the Judgment and Orders dated 25.07.2022 of the High Court of Kerala at Ernakulam in Bail Appl. No. 5271 of 2022.

Gaurav Agrawal, Ms. Anu K. Joy, Alim Anvar, Arvind Gupta, Advs. for the Appellant.

Raghenth Basant, Ms. Zehra Khan, Ajay Krishna, Harshad V. Hameed, Dileep Poolakkot, Mrs. Ashly Harshad, Advs. for the Respondents.

The following Order of the Court was passed:

O R D E R

1. Leave granted.
2. The appellant is the mother of the victim who is a 12 years old girl child.
3. The appellant is aggrieved by the Order dated 25-7-2022 passed by the High Court of Kerala at Ernakulam, whereby Respondent No.1 has been granted protection of anticipatory bail in Crime No.442 of 2022 dated 27-5-2022 registered at Police Station Meenangadi District Wayanad under Sections 354A(1)(i),(ii) & (iv), 354 A-(2) and 354-A(3) of the Indian Penal Code read with Sections 7, 8, 9 and 11 of the Protection of Children from Sexual Offences Act, 2012 (for short, ‘POCSO Act’). The occurrence allegedly took place on 14-12-2021 when Respondent

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- A No.1 is alleged to have sexually assaulted his 12 years old niece. The allegations are that Respondent No.1 asked the victim to sit on his lap and thereafter he hugged her and kissed her on the cheeks and tried to kiss her on her lips. He further attempted to disrobe the victim and made lewd comments. The victim was an excellent student giving good performances both in curricular and co-curricular activities but the
- B incident traumatized her to an extent that she slumped down in her course and performance. She was taken to counselling but did not open up. The victim was taken for second counselling session and at that time, she disclosed the unfortunate incident, she had faced from her maternal uncle, namely, Respondent No.1. Thereafter, the subject First Information Report was immediately registered; medical examination was conducted and Statement of the victim under Section 164 of the Code of Criminal Procedure, 1973 was recorded. Apprehending his arrest, Respondent No.1 approached the learned Sessions Court but was declined anticipatory bail.
- D 4. Thereafter, Respondent No.1 approached the High Court and vide impugned Order dated 25-7-2022, the said Court granted him conditional anticipatory bail on the following terms:-

“12. Accordingly, I allow this application subject to the following conditions:

 - E (a) Petitioner shall appear before the Investigating Officer from 9 am to 6 pm on 29.07.2022, 30.07.2022, 01.08.2022 and 02.08.2022 and shall subject himself to interrogation.
 - (b) If after interrogation, the investigating Officer proposes to arrest the petitioner, then he shall be released on bail on him executing a bond for Rs.50,000/- (Rupees fifty thousand only) with two solvent sureties each for the like sum before the Investigating Officer.
 - (c) Petitioner shall appear before the Investigating Officer as and when required and shall also co-operate with the investigation.
 - (d) Petitioner shall not intimidate or attempt to influence the witnesses; nor shall he tamper with the evidence or
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5. The mother of the victim child being aggrieved has approached this Court.

6. We have heard learned counsel for the parties and gone through the record.

7. The Special Judge, Sessions Division, Kalpetta, Wayanad, while declining to grant anticipatory bail as prayed for by the respondent No 1 herein (original accused) vide order dated 4th of July, 2022 passed in Criminal Miscellaneous Case No. 512 of 2022, observed as under:-

"7. A careful perusal of the case diary shows that there are sufficient reasons to suspect that the sexual abuse as alleged by the prosecution has taken place at the instance of the petitioner. The perpetrator is none other than a close relative of the victim, i.e., her maternal uncle. Statements of the victim given to the police as well as to the learned Magistrate disclose the fact that the incident took place in the house of the petitioner while the victim and her mother paid a visit and stayed there for some days. The statements also show that the incident occurred in the bedroom of the petitioner while none else was there. Bedroom of the petitioner is situated up the stairs of the house. All other inmates were in the down stair portion of the house at the relevant time. Statements also show that the petitioner attempted to disrobe the victim, made her to sit on his lap, touched her breasts, kissed her by hugging and also attempted to kiss on her lips. It is further seen that when the petitioner attempted to remove her top, she started to raise cry and then, he released her. It is further seen that by making some kind of sexual comments, he tried to stimulate sexual feelings in the child. Taking into account the relationship between the victim and the petitioner and the manner in which the acts were committed, it is to be said that they are grievous in nature."

8. As rightly argued by the learned counsel for the petitioner, there was delay of about 6 months in reporting the crime. But, mere delay is not a factor to disbelief the prosecution

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- A case. In *Joy v. State of Kerala* (2019(1) KLT 935), it has been held that mere delay in reporting the matter to the authorities concerned, especially sexual assault on a minor girl is immaterial and it would not be fatal to the prosecution case. Moreover, the case diary clearly shows a good reason for the delay. Materials show that after the incident, the victim fell aback in her studies and appeared gloomy. A copy of her educational report has been made available. It shows that in her 6th standard, she secured Grade A1 or Grade A2 in all the subjects. But, in 7th standard, her performance had fallen down drastically. She secured C1 or C2 Grade in most of the subjects and in one subject, she secured B1 and in another subject, secured B2 Grade. The incident occurred while she was studying in 7th standard. Worried about her educational fall down, her parents consulted a counselor at Eranakulam. Statement of the counselor shows that the child was continuously weeping and was not ready to disclose the reason for the same in the first session. She was also found gloomy. Only in the second session of the counseling, she opened up and disclosed the incident. Because of fear, she did not disclose the incidents even to her mother. It is quite natural, since the perpetrator is the brother of her mother. Therefore, on the ground of delay, it cannot be said that the prosecution story is false.
9. An attempt is made by the learned counsel for the petitioner to show that this case is a retaliatory step taken by the mother of the victim in view of the property disputes between them. He relies on a crime registered as No.454/2022 of Meenangadi Police Station, wherein, the mother and stepfather of the child are accused. That F.I.R. was registered for the offences punishable under Sections 447, 323, 324, 354A(l)(i), 354A(l)(ii), 307 and 211 r/w 34 of IPC. But, that crime was registered only on 09.06.2022. i.e., after the registration of this crime. Moreover, the printout of "Watsapp" chats produced by the petitioner containing the chats between himself and the stepfather of the victim would go to show that there was no such discordiality between them even after the date of incident alleged in F.I.R. No.442/2022. So, there is every reason to believe that F.I.R. No.442/2022 might have

been initiated by the petitioner as an afterthought to shield A the prosecution in this crime.

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13. From the case diary I find prima facie materials in support of the prosecution case. If so, as held in Joy v. State of Kerala (2019 (I) KLT 935) presumption under Sec. 29 of the PoCSO Act is also to be taken into consideration by the courts while dealing with an application for bail. I have also considered the question as to whether custodial detention of the petitioner is necessary. According to the petitioner, there is nothing to be recovered and so custodial interrogation is not required. But learned counsel for the victim submits that the victim has not gained normalcy even now and granting of bail would adversely affect her mental condition and may feel helpless. Learned counsel also points out that the petitioner being an advocate has high influence and hold in the society and in the police and he is likely to interfere with smooth investigation. I find enough force in these submissions. If granting of bail is not in the interest of the victim, court has to refuse bail since the well being of the victim is also a relevant factor in PoCSO cases."

8. From the aforesaid, it is pertinent to note that the Special Judge relied upon the decision of the Kerala High Court in the case of *Joy v. State Of Kerala*,(2019) 1 KLT 935, wherein the Kerala High Court has taken the view that the courts shall take into consideration the presumption under Section 29 of the POCSO Act while dealing with an application for bail filed by a person who is accused of the offence under the Act.

9. In the case of *Joy* (supra), the Kerala High Court observed as under:-

"10. This court is not oblivious to Section 29 of the Act which contains a legislative mandate that the court shall presume commission of the offences by the accused unless the contrary is proved. Section 29 of the Act states that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may

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- A *be, unless the contrary is proved. The court shall take into consideration the presumption under Section 29 of the Act while dealing with an application for bail filed by a person who is accused of the aforesaid offences under the Act (See State of Bihar v. Rajballav Prasad, (2017) 2 SCC 178 : AIR 2017 SC 630).*
- B *11. However, the statutory presumption under Section 29 of the Act does not mean that the prosecution version has to be accepted as gospel truth in every case. The presumption does not mean that the court cannot take into consideration the special features of a particular case. Patent absurdities or inherent infirmities or improbabilities in the prosecution version may lead to an irresistible inference of falsehood in the prosecution case. The presumption would come into play only when the prosecution is able to bring on record facts that would form the foundation for the presumption.*
- C *Otherwise, all that the prosecution would be required to do is to raise some allegations against the accused and to claim that the case projected by it is true. The courts must be on guard to see that the application of the presumption, without adverting to essential facts, shall not lead to any injustice. The presumption under Section 29 of the Act is not absolute. The statutory presumption would get activated or triggered only if the prosecution proves the essential basic facts. If the accused is able to create serious doubt on the veracity of the prosecution case or the accused brings on record materials which would render the prosecution version highly improbable, the presumption would get weakened. As held by the Apex Court in Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 : AIR 2011 SC 312, frivolity in prosecution should always be considered and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of anticipatory bail. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. It should necessarily depend on facts and circumstances of each case in consonance with the legislative intention.”*
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10. The High Court, while granting anticipatory bail to the respondent No. 1 herein (original accused), observed in para 9 of the impugned order something which has really disturbed us. Para 9 reads thus:-

"9. With the above principle in mind, when the facts of the case are noticed, it is revealed that the petitioner is the maternal uncle of the victim to whose house the victim went in December, 2021. On 14.12.2021, the victim is alleged to have been asked to sit on the lap of the petitioner, who thereafter is alleged to have hugged and kissed the victim on her cheeks. Though on the one side, there is a possibility of such hugs and kisses being manifestations of affection by an uncle, one cannot ignore the possibility of such show of 'affections' being coloured by sexual overtones. However, those are all matters for investigation."

11. In our considered opinion, the observations made in Para 9 of the impugned order are totally unwarranted and have been made overlooking the specific allegations contained in the FIR, duly supported with the Statement of the victim – girl child under Section 164 of the Code.

12. In a case containing such serious allegations, the High Court ought not to have exercised its jurisdiction in granting protection against arrest, as the Investigating Officer deserves free-hand to take the investigation to its logical conclusion. It goes without saying that appearance before the Investigating Officer who, has been prevented from subjecting Respondent No.1 to custodial interrogation, can hardly be fruitful to find out the *prima facie* substance in the allegations, which are of extreme serious in nature.

13. The fact that the victim – girl is traumatized to such a high degree that her academic pursuits have been adversely impacted alone, coupled with the legislative intent especially reflected through Section 29 of the POCSO Act, are sufficient to dissuade a Court from exercising its discretionary jurisdiction in granting pre-arrest bail.

14. It may be true, as pointed out by learned counsel appearing for Respondent No.1, that charge-sheet has already been filed. It will be unfair to presume on our part that the Investigating Officer does not require Respondent No.1 for custodial interrogation for the purpose of further investigation.

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- A 15. Be that as it may, even assuming it a case where Respondent No.1 is not required for custodial interrogation, we are satisfied that the High Court ought not to have granted discretionary relief of anticipatory bail.
- B 16. We are dealing with a matter wherein the original complainant (appellant herein) has come before this Court praying that the anticipatory bail granted by the High Court to the accused should be cancelled. To put it in other words, the complainant says that the High Court wrongly exercised its discretion while granting anticipatory bail to the accused in a very serious crime like POCSO and, therefore, the order passed by the High Court granting anticipatory bail to the accused should be quashed and set aside. In many anticipatory bail matters, we have noticed one common argument being canvassed that no custodial interrogation is required and, therefore, anticipatory bail may be granted. There appears to be a serious misconception of law that if no case for custodial interrogation is made out by the prosecution, then that alone would be a good ground to grant anticipatory bail. Custodial interrogation can be one of the relevant aspects to be considered along with other grounds while deciding an application seeking anticipatory bail. There may be many cases in which the custodial interrogation of the accused may not be required, but that does not mean that the *prima facie* case against the accused should be ignored or overlooked and he should be granted anticipatory bail. The first and foremost thing that the court hearing an anticipatory bail application should consider is the *prima facie* case put up against the accused. Thereafter, the nature of the offence should be looked into along with the severity of the punishment. Custodial interrogation can be one of the grounds to decline anticipatory bail.
- C F However, even if custodial interrogation is not required or necessitated, by itself, cannot be a ground to grant anticipatory bail.
- D 17. Before we close this matter one more clarification is necessary. We have referred to the decision of the Kerala High Court rendered in the case of *Joy* (*supra*). The case of *Joy* (*supra*) deals with Section 29 G of the POCSO Act. When the learned Judge decided the anticipatory bail application, the decision of the coordinate Bench in the case of *Joy* (*supra*) was binding to him. He could not have ignored a binding decision. It is a different thing to say that if he may disagree with the view taken and accordingly refer it to a larger Bench. However, without looking into the dictum as laid in *Joy* (*supra*), the observations made by the High H

Court in para 9 of its impugned order referred to above could be said to A
be absolutely unwarranted and not one befitting a High Court.

18. We are not going into the issue of Section 29 of the POCSO Act in the present case. Even without the aid of Section 29 of the POCSO Act, we are convinced that the High Court committed a serious error in exercising its discretion in favour of the respondent No. 1 herein (original B accused) while granting anticipatory bail.

19. For the reasons afore-stated, and without expressing any views on merits of the case, we allow this appeal; set aside the impugned Judgment and Order dated 25-7-2022 passed by the High Court granting anticipatory bail to Respondent No.1. C

20. Investigating Officer is granted liberty to proceed further in accordance with law.

21. Suffice to say that law will take its own course.

Devika Gujral

Appeal allowed.