

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

THURSDAY, THE 24TH DAY OF NOVEMBER 2022 / 3RD AGRAHAYANA, 1944

BAIL APPL. NO. 8772 OF 2022

Crime No.698 of 2022 of Infopark Police Station, Ernakulam

PETITIONER/ACCUSED:

MOHAMMED FERVIN BAITHER
AGED 30 YEARS
NEDIODATH HOUSE, KONNANTHAI , EDAPPALLY, ERNAKULAM, PIN
- 682024
BY ADVS.
V.JOHN SEBASTIAN RALPH
VISHNU CHANDRAN
RALPH RETI JOHN
APPU BABU
SHIFNA MUHAMMED SHUKKUR
GIRIDHAR KRISHNA KUMAR
VISHNUMAYA M.B.

RESPONDENTS/COMPLAINANT:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
PIN - 682031
- 2 STATION HOUSE OFFICER
INFOPARK POLICE STATION, KAKKANAD, ERNAKULAM, PIN -
682030
- 3 JEENA (SOUGHT TO BE IMPEADED)
D/O RAJAN O., RESIDING AT ODATHALAYOTTIL HOUSE,
KARUVANPOYIL P.O, KODUVALLY, KOZHIKODE DISTRICT, PIN -
673 572; NOW RESIDING AT: FLAT NO. D4, HILL AVENUE
APARTMENTS, THRIKKAKARA MUNICIPLAITY, OPP. NOEL FOCUS
KAKKANAD, ERNAKULAM (SOUGHT TO BE IMPEADED)
BY ADVS.
PUBLIC PROSECUTOR
P.T.SHEEJISH

OTHER PRESENT:

PP SRI.NOUSHAD K.A

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
24.11.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

BECHU KURIAN THOMAS, J.

B.A.NO. 8772 of 2022

Dated this the 24th day of November, 2022

ORDER

This is an application for pre-arrest bail filed under Section 438 of the Code of Criminal Procedure, 1973.

2. Petitioner is the accused in Crime No.698 of 2022 of Infopark Police Station, Ernakulam District, alleging offences under Sections 328, 376, 376(2)(j), 376(2)(n), 330, 470 and Section 323 of the Indian Penal Code, 1860 apart from Sections 66E of the Information Technology Act, 2000.

3. The victim is an Assistant Director in the film industry, while the accused is an Associate Cameraman. According to the prosecution, on 27-10-2021, when they stayed together in a hotel near Ernakulam, the accused raped the victim after giving her a chocolate pursuant to a promise to marry and continued to do so on several days and even in an apartment where they were living together and when the victim became pregnant, the accused forced her to abort the pregnancy and also that their private moments were videographed without her consent and later, the accused backed out of his promise to marry and thereby committed the offences alleged.

4. Sri. John S. Ralph, the learned counsel for the petitioner, contended that the entire prosecution case and the statement given by the defacto complainant are totally false. It was primarily argued that an acquaintance which turned into a romance and then into a consensual physical relationship is being attempted to be projected as rape, obviously for ulterior purposes. He relied upon the averments in W.P.(CrI)No.863/2022 filed by the victim herself before this Court, seeking a writ of Habeas Corpus to produce the petitioner, who was alleged to have been detained by his own parents. The learned counsel also referred to the judgment dated 06-10-2022 in the said writ petition, produced as Ann-2, wherein a Division Bench of this Court observed, while disposing of the said writ petition, that, petitioner is not under any illegal detention. According to the learned counsel, the allegation of rape now raised by the victim is consequent to the disposal of the aforesaid writ petition, which indicates an afterthought and a machination to create a situation that will lead to the incarceration of petitioner. The learned counsel submitted that, the attempt of the victim is nothing but an act of revenge, misusing the process of Court. Learned counsel also relied upon a complaint filed by the victim before the Thrikkakara Police Station on 15-09-2022 and which was produced along with the writ petition wherein no allegation of rape was levelled against the petitioner.

5. Sri. Ralph further submitted that the victim was living together with the petitioner from October 2021 till September 2022 and that they had even taken an apartment together, at her insistence and in her name, at a place near Ernakulam. The learned counsel also submitted that the victim is a widow and has two children from her earlier marriage and that, for some reason their relationship could not be continued or result in a marriage, due to which, their consensual physical union is now being attempted to be converted as instances of rape. The learned counsel also pointed out that petitioner is willing to abide by any conditions that may be imposed upon him.

6. Sri.P.T.Sheejesh, the learned counsel for the defacto complainant, on the other hand, submitted that petitioner had on the very first instance forced her to consume a chocolate which rendered her practically incapable of any resistance and thereafter raped her, which forced her to enter into a relationship with the petitioner. According to the learned counsel, the said incident itself reveals an instance of rape and that the victim did not raise any complaint then, since, thereafter they started to live together. It was also pointed out that once the victim became pregnant, petitioner manipulated her and forced her to consume certain tablets resulting in termination of her pregnancy and that petitioner had also taken videographs of their private moments without her consent and all these and more could

be revealed only by custodial interrogation. It was further submitted that even in the complaint filed and produced along with the Habeas Corpus petition, she had specifically mentioned that there are other complaints against the petitioner which will indicate that, though complaint of rape was not mentioned earlier, the victim was aggrieved with the conduct of the petitioner and had only reserved her complaints.

7. Sri. Noushad K.A, the learned Public Prosecutor opposed the grant of anticipatory bail and also submitted that the allegations are serious and that without custodial interrogation the truth will not be unravelled. According to the prosecutor, the instances of rape mentioned by the victim can only be brought out through detailed interrogation for which custody of the petitioner is essential.

8. I have considered the rival contentions and have also gone through the various evidence produced, including the Whatsapp chats between the petitioner and the victim and also the writ petition filed by the victim apart from the complaints submitted by her.

9. The admitted case of both parties reveal that they were living together for almost four months. The victim is a widow with two children, while the petitioner is a 31 years old. Both are involved in the film industry and are mature, persons. The apartment in which they were living together for several months was jointly taken but in

the name of the victim. The Whatsapp chats produced by the petitioner during the period 15-10-2021 onwards, do not reveal any indication of a forcible physical relationship. This Court do bear in mind the contention of the petitioner that even if the entire allegations are assumed to be accepted still it would reveal only a consensual relationship.

10. In this context it is relevant to mention the decisions of the Supreme Court in **Deepak Gulati v. State of Hayana** (2013) 7 SCC 675, **Maheshwar Tigga v. State of Jharkand** (2020) 10 SCC 108 and **Pramod Suryabhanu Pawar v. State of Maharashtra** (2019) 9 SCC 608,. It was observed in those decisions that there is a clear distinction between consensual sex and rape. The instances of sexual intercourse arising out of love and passion has to be viewed differently from consent to sex obtained purely on the basis of a promise to marry.

11. Relationships that started with physical attraction followed by love or affection or vice versa cannot be later treated as rape, merely because it failed to culminate in a marriage. This is more so when two matured persons live together for months and indulge in a physical relationship repeatedly without any complaint. In such circumstances, it would be difficult to impute, atleast prima facie that the consent to sex was procured on the basis of a promise to marry alone.

12. Taking into consideration, the entire circumstances and the various documents produced, I am of the view that though the allegations are serious in nature. However, considering the circumstances brought out as mentioned earlier limited custody of the petitioner, as held in **Gurbakshsingh Sibbia v. State of Punjab** (1980) 2 SCC 565 and **Sushila Aggarwal and others v. State (Nct Of Delhi)** and another (2020) 5 SCC 1 would be sufficient for the purpose of investigation.

Accordingly, this application is allowed on the following conditions:

(a) Petitioner shall appear before the Investigating Officer for four days from 30-11-2022 to 03-12-2022 and shall subject himself to interrogation from 9.am to 6.pm.

(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 produce before the Investigating Officer, the two mobile phones which he was using during the relevant period and the contents of the said mobile phone shall be protected and maintained without being destroyed.

(d) Petitioner shall appear before the Investigating Officer as and when required and shall also co-operate with the investigation.

(e) Petitioner shall not intimidate or attempt to influence the witnesses; nor shall he tamper with the evidence or contact the victim or her family members.

(f) Petitioner shall not under any circumstances whatsoever reveal the identity of the victim before any authority.

(g) Petitioner shall not enter into the jurisdictional limits of the Thrikkakara Police Station for the purpose of investigation.

(h) Petitioner shall not commit any similar offences while he is on bail.

(i) Petitioner shall not leave India without the permission of the Court having jurisdiction.

(j) It is clarified that the observations made in this order purely for the purpose of disposing of the bail application and the same shall not prejudice the cause of either the petitioner or the victim or the prosecution at any other stage of the proceedings.

In case of violation of any of the above conditions, the jurisdictional Court shall be empowered to consider the application for cancellation, if any, and pass appropriate orders in accordance with the law, notwithstanding the bail having been granted by this Court.

**BECHU KURIAN THOMAS
JUDGE**

APPENDIX OF BAIL APPL. 8772/2022

PETITIONER ANNEXURES

Annexure 2	TRUE COPY OF THE ORDER DATED 06.10.2022 IN W.P (CRL) 863/ 2022 OF THIS HON'BLE COURT
Annexure 3	TRUE COPY OF THE AIR TICKET WITH BOOKING REFERENCE NO. Q75KF3, BOOKED ON 29.10.2022
Annexure 1	THE CERTIFIED COPY OF THE WRIT PETITON BEARING NO.WP (CRL) NO.863/2022 ALONG WITH THE AFFIDAVIT OF THE DEFACTO COMPLAINANT.

//TRUE COPY//

PA TO JUDGE