

Salim vs State Of Kerala on 30 January, 2019

Author: V Raja Vijayaraghavan

Bench: V Raja Vijayaraghavan

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

WEDNESDAY, THE 30TH DAY OF JANUARY 2019 / 10TH MAGHA, 1940

Bail Appl..No. 8808 of 2018

CRIME NO. 297/2017 OF NEDUMBASSERY POLICE STATION,
ERNAKULAM DISTRICT

PETITIONER/5TH ACCUSED:

SALIM, AGED 23 YEARS,
S/O HASSAN, PULIKKAPARAMBIL HOUSE, KUNNUMPURAM,
V.I. PADY, EDAPPALLY NORTH, ERNAKULAM.

BY ADV. SRI.K.V.SABU

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

OTHER PRESENT:

SRI. SUMAN CHAKRAVARTHI - SENIOR PUBLIC PROSECUTOR

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 30.01.2019,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

BA:8808/18

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ORDER

This application is filed under Section 439 of the Cr.P.C.

2. The applicant herein is the 5th accused in Crime No.297 of 2017 registered at the Nedumbassery Police Station on 18.2.2017 under Sections 120-B, 342, 366, 376-D, 506(i), 212, 201 r/w. Section 34 of the IPC and Sections 66E, 67A of the Information Technology Act, 2000. He was arrested in connection with the said crime on 19.2.2017 and has been in custody since then. The investigation was completed and final report was laid before the Judicial Magistrate of the First Class, Angamaly on 17.4.2017. Later, a supplementary charge sheet was laid before the court below on 22.11.2017. The case is now pending consideration of the Principal Sessions Court, Ernakulam as S.C. No.118 of 2018.

3. This is a case of kidnapping and rape of an actor by a group of persons in pursuance of a meticulously planned conspiracy.

4. According to the prosecution, on 17.2.2017, the survivor, after finishing her work at Thrissur, was on her way to Ernakulam in a car driven by the 2nd accused, her designated driver. In pursuance of the devious plan hatched by the accused, the 1st accused along with his henchmen laid wait in a tempo traveler and when they saw the vehicle in which the actor was traveling, they stealthily followed the car, waiting for the right time to strike. When the vehicle reached Athani, the 1st accused dashed his vehicle on the back side of the vehicle in which the actor was travelling. As previously planned, the 2nd accused stopped the car as if to inspect the same. At this point of time, the accused Nos.3 and 4 entered the victim's car and wrongfully confined her. Her mobile phone was snatched from her possession and the car proceeded to Ernakulam as if nothing had happened.

5. The applicant herein and the 6th accused laid wait near the Appolo Junction, Kalamassery. When the car reached Kalamassery, the applicant approached the vehicle and gave an update to the 1st accused. The 4th accused then got down from the victim's car at Kalamassery and entered the tempo traveler. The 6th accused took his place and confined her. It is further alleged that when the car reached Palarivattom, the 6th accused got out of the car and the applicant entered and sat beside the victim and confined her. The 4th accused also entered into the victim's car which was being driven by the 2nd accused all through. Later, the 1st accused took charge of the car and the 2nd accused got out. The applicant and the 3rd accused are alleged to have sat on either sides of the victim and confined her. The accused Nos.2, 4 and 6 followed the victim in the tempo traveler which was driven by the 6th accused. Thereafter, the 1st accused went and sat on the back seat of the vehicle and the applicant was asked to drive the vehicle. The victim was allegedly confined by accused Nos.1 and 3 in the back seat. When the vehicle reached in front of the hotel Kamadenu at Chitethathukara, the applicant was asked to purchase a bottle of water by the 1st accused. As instructed by the 1st accused, the applicant is alleged to have taken a mobile phone from the tempo traveler and the same was handed over to the 1st accused. Thereafter, the accused Nos.2, 4, 5 and 6 followed the victim's car in the tempo traveler. The 1st accused, who was inside the car, criminally intimidated the victim and she was asked to accede to record her obscene videos. She was undressed by using force and she was made to do oral sex. This was recorded on the mobile phone. During the commission of the offensive act, the car was being driven by the 3rd accused. Later, when the car reached Padamugal, the 2nd accused got out from the tempo traveler and took the driver seat of the victim's car. The

victim was later dropped in the house of another actor at 11 p.m. The accused, after commission of the offence, destroyed material evidence and absconded.

6. The learned counsel appearing for the applicant submitted that the applicant has been languishing in custody for about two years with no prospects of trial taking place in the near future. The prosecution has no case that he was present inside the car when the victim was subjected to sexual abuse. The main overt act is attributed to the 1st accused and the car was driven by some other person. Referring to the decision of the Apex Court in *Sanjay Chandra v. CBI* [(2012) 1 SCC 40], it was argued by the learned counsel that it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. He would vehemently urge 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 under trial for the purpose of giving him a taste of imprisonment as a lesson. It was urged that the fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Referring to a recent judgment of the Hon'ble Apex Court in *Dataram Singh v. State of Uttar Pradesh* [2018 (3) SCC 22], it was submitted that though the grant or denial of bail is entirely the discretion of the Judge, in the facts and circumstances of each case, the exercise of judicial discretion has been circumscribed by the decisions of the Apex Court as well as this Court. The jurisdiction must be exercised judiciously, in a humane manner and compassionately without being carried away by the severity of the allegations, submits the learned counsel.

7. The learned counsel would also place heavy reliance on the decision of the Apex Court in *State of Kerala v. Raneef* [(2011) 1 SCC 784] and it was argued that when under-trial prisoners are detained in jail custody for an indefinite period, Article 21 of the Constitution is violated. It was then pointed out that his application for bail was rejected by the learned Sessions Judge more than a year ago and this Court had confirmed the said order on 21.2.2018. According to the learned counsel, the main conspirator, who is a prominent actor, has already been granted bail by this Court. The learned counsel further submitted that the likelihood of the applicant interfering with the prosecution witnesses or otherwise polluting the process of justice can be totally extenuated by imposing appropriate conditions. The long period of detention undergone by the applicant is highlighted by the learned counsel to persuade this Court to release him on stringent conditions.

8. The learned Public Prosecutor has very strenuously refuted the submissions. It is submitted that different Benches of this Court had denied bail to the rest of the accused and they were directed to move the trial court after the examination of main prosecution witnesses are completed. The bail application filed by the applicant herein was also dismissed holding so. According to him, there is no need to take a different view at this stage. The learned Public Prosecutor would then point out the sequence of events and the brutality of the crime committed by the accused on the survivor and it is contended that the case had created an outrage among the peace loving people of the State.

9. I have considered the submissions advanced and have perused the materials which were made available. I have carefully scrutinized the role assigned to the applicant. It was the 1 st accused, who had committed the offensive act on the survivor. At that point of time, the car was being driven by the 3rd accused. The 2nd accused, who was the driver of the car in which the victim was traveling, also appears have a major role when compared to that of the applicant. Though the prosecution has a case that the applicant had also entered the car and had confined the victim for some time, the victim was not subjected to any abuse at that point of time. The applicant has been in custody for about two years and more than a year has elapsed after the dismissal of his earlier application. After carefully delineating the specific role attributed to the applicant, I am of the view that he falls in a different category from that of accused Nos.1 to 3. Furthermore, the accused Nos.6 to 11 have already been released on bail.

10. Having considered all the relevant aspects, including the nature of accusations, the severity of the punishment which conviction would entail, the character, behaviour, means and standing of the applicant, circumstances which are peculiar to him, reasonable possibility of securing his presence at the stage of trial, and the reasonable apprehension of the witnesses being tampered with, I am of the view that the further detention of the applicant in custody is not necessary. He can be granted bail by imposing stringent conditions. It is made clear that any expression of opinion for the purpose of deciding this bail application shall not be regarded as an expression on merits of the case.

In the result, this application will stand allowed. The applicant shall be released on bail on his executing a bond for Rs.1,00,000/- (Rupees One lakh only) with two solvent sureties each for the like sum to the satisfaction of the court having jurisdiction. The above order shall be subject to the following conditions:

- 1). The applicant shall continue to appear before the Investigating Officer on the first Monday of every month between 9 a.m. and 11 a.m. until the said condition is modified by the trial Court at the appropriate stage.
- 2). He shall not intimidate or attempt to influence the witnesses; nor shall he tamper with the evidence. He shall not contact the victim or her family members in any manner.
- 3). He shall not enter the limits of Ernakulam and Thrissur revenue districts for a period of six months, except for complying with the conditions of this order. If for any extraordinary reason the applicant requires to enter the limits, previous permission has to be obtained from the jurisdictional Court.
- 4). He shall not commit any similar offence while on bail.
- 5). He shall not leave India without the permission of the Court and if having passport, shall deposit the same before the Trial Court within a week; If release of the passport is required at a later period, the applicant shall be at liberty to move appropriate application before the Court having jurisdiction.

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.

Sd/-

RAJA VIJAYARAGHAVAN V., JUDGE KRJ //TRUE COPY// P.A. TO JUDGE