

(2023) 04 KL CK 0019

In the High Court Of Kerala

Case No : Criminal Miscellaneous Petition No. 2446 Of 2023

Dr P K Asokan

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 04-04-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 34, 308, 323, 325, 427, 506
Kerala Healthcare Service Persons and Healthcare Service Institutions (Prevention of Violence and Damages to Property) Act, 2012 — Section 3, 4, 4(4)

Citation : (2023) 04 KL CK 0019

Hon'ble Judges : Bechu Kurian Thomas, J

Bench : Single Bench

Advocate : S.Rajeev, V.Vinay, Sarath K.P., M.S.Aneer, Prerith Philip Joseph, Anilkumar C.R., Noushad K.A, Public A.Ranjith Narayanan, T.Shajith, A.Simi

Final Decision : Allowed

Judgement

Bechu Kurian Thomas, J

1. The trembling hands of a surgeon and the shivering mind of a physician do not augur well for the patients at large. Doctors continue to face threats, when a mishap occurs to a patient. Even for the slightest provocation, health personnel are attacked. Despite legislation prevailing in the State of Kerala and the repeated court orders to treat attacks on health personnel as a serious crime, violence against them recur. The casual approach adopted by the courts while dealing with instances of attacks on health personnel also contribute to the tendency to resort to such violence.

2. Petitioner is a doctor. He is alleged to have been assaulted on 04.03.2023 by respondents 2 and 3 along with three other persons and a crime was registered as FIR No.250 of 2023 of Nadakkavu Police Station. The offences alleged are under sections 323, 325, 427, 506 and 308 r/w section 34 of the Indian Penal Code, 1860, apart from sections 3 and 4 of the Kerala Healthcare Service

Persons and Healthcare Service Institutions (Prevention of Violence and Damages to Property) Act, 2012 (for short 'the Healthcare Act').

3. According to the prosecution, on 04.03.2023, six persons attacked the petitioner and his hospital due to an enmity relating to the death of a foetus. When Naja Salman - the wife of the second respondent gave birth to a still-born child at the Fathima Hospital, Kozhikode, where the petitioner's wife was the Gynaecologist, due to the enmity, accused destroyed the glass and flowerpots of the hospital and attacked the petitioner causing a fracture to his nasal bone.

4. Respondents 2 and 3 are accused 4 and 5. The anticipatory bail applications filed by them were dismissed on 17.03.2023 by the 1st Additional Sessions Court, Kozhikode after observing that custodial interrogation is necessary. It is also relevant to mention that on the same day, the regular bail applications of accused 1 to 3 were dismissed by the 1st Additional Sessions Judge, Kozhikode by an order in CrI.M.C No.429 of 2023.

5. After the anticipatory bail application of respondents 2 and 3 were dismissed, they surrendered before the Principal Sessions Court, Kozhikode on 20-03-2023. On the day of surrender itself, by the impugned order, the learned Sessions Judge granted regular bail to respondents 2 and 3. The order of the learned Sessions Judge is very brief and is necessary to be extracted as below:

"Accused Surrendered. The only offence which is non bailable is U/s.308 IPC. The report of the police shows that the dispute was with respect to death on an infant at Fathima hospital, Kozhikode. The defacto complainant is the doctor who is leading the Gynaecology department, The 1st accused is the husband of the lady who give birth to the child. They allege medical negligence on the part of the doctor. Any way there is no material to attract Sec.308 IPC. No custodial interrogation is also necessary. There is no specific allegation against those accused persons. Hence bail granted. Execute a bond of Rs.50,000/- with two solvent sureties. They shall appear before SHO, Nadakkavu on all Mondays at 10 A.M. for a period of one month."

6. The aforesaid order is impugned by the defacto complainant contending that the grant of bail to respondents 2 and 3 is without any application of mind and without considering the seriousness of the allegations.

7. Adv.S.Rajeev, learned counsel appearing for the petitioner submitted that a reading of the impugned order reveals its perversity and the non-application of mind. According to him, even the offences under the Healthcare Act has not been referred to and no reasoning of any nature has been given for the grant of bail. According to the counsel, bail was granted on the day of surrender itself by the Principal Sessions Court without even considering that three days ago the Additional Sessions Judge had rejected the bail application specifically mentioning that custodial interrogation of the accused is essential.

8. Sri.T.Shajith and Sri.A.Ranjith Narayanan, learned counsel for respondents 2

and 3 submitted that the learned Sessions Judge had considered the bail application and the order was issued after hearing the Public Prosecutor. It was further pointed out that the second respondent was the father of the foetus which died during childbirth and therefore any act committed by him was only an emotional outburst and cannot be characterised as a criminal act. It was further submitted that there was no assault or any violence and that a flowerpot had fallen down, and it merely scraped the back of one of the persons, which is now being projected as an attack against the doctor. The learned counsel also submitted that the medical records regarding the fracture of the nasal bone and the other injuries are all concocted and has no connection with the incident.

9. The learned Public Prosecutor was also heard.

10. Respondents 2 and 3 had approached the court with an application for anticipatory bail as CrI.M.C No.420 of 2023 and 430 of 2023. Both applications were dismissed on 17.03.2023 after observing that custodial interrogation is essential. It was also observed that attacks on doctors cannot be justified even if there is negligence on their part and that the wide meaning to the word 'violence' cannot be ignored while considering an application for pre-arrest bail.

11. This Court had in *Arun P. v. State of Kerala and Others* (MANU/KE/2421/2022) held that every harm, intimidation, obstruction or hindrance to a healthcare service person in discharge of duty is treated as violence and is made non-bailable as per section 4(4) of the Act and prohibited under section 3 of the Healthcare Act. This Court had also observed that if a physician with trepidation, a surgeon with trembling hands and a disquiet nurse can lead to wrong diagnosis, failed surgeries and improper nursing care, life of several patients could fall into peril, and consequently, the public at large can become prejudiced. This Court also observed that if the Act is to achieve its purpose, Courts must bear in mind the wide definition of the term 'violence' which is nestled under the umbrella of a non-bailable offence.

12. Despite these observations, the learned Sessions Judge, without verifying even the nature of offences alleged in the FIR, which also included sections 3 and 4 of the Healthcare Act, observed that the only offence which is non-bailable is under section 308 IPC and granted bail. No reasoning of any nature is seen stated. Non-application of mind is glaringly evident. The circumstances that led to the crime or the factual narration of the crime have not been mentioned. All these and more compel this Court to observe that perversity is writ large in the order of the learned Sessions Judge.

13. In the decision in *Shajil M.K. v. State of Kerala and Another* (2016 (2) KLT 511) this Court had observed, relying upon the decision of the Supreme Court in *Mansab Ali v. Irsan and Another* [(2003) 1 SCC 632], that in granting or refusing bail, courts are required to indicate, even though briefly, the reasons for grant or refusal of bail. It was also observed that reasons are always based on the facts of the case and therefore without mentioning the facts no reasons can be recorded.

The court went on to state that reasons are interlinked with the facts of the case and hence it is necessary to mention the facts in brief before mentioning the reasons in the order granting or refusing bail by the courts. It was also observed that facts would include inter alia the date of arrest, surrender of the accused, rank of the accused etc.

14. In *Mauji Ram v. State of Uttar Pradesh and Another* [(2019) 8 SCC 17] and in *Preet Pal Singh v. State of Uttar Pradesh and Another* [(2020) 8 SCC 645] the Supreme Court observed that reasons even though brief must be stated while granting or refusing bail.

15. In the decision in *Kamla Devi v. State of Rajasthan and Another* [(2022) 6 SCC 725] the Supreme Court had observed that the court while deciding a bail application cannot completely divorce its decision from material aspects of the case such as the allegations made against the accused; severity of the punishment, frivolity of the prosecution case, reasonable apprehension of the witnesses and the prima facie satisfaction of the court in support of the charge against the accused. In the decision in *Mahipal v. Rajesh Kumar Alias Polia and Another* [(2020) 2 SCC 118] it was observed that where a court considering an application for bail fails to consider relevant factors, an appellate court may justifiably set aside the order granting bail. It was further observed that when an order fails to provide reasons there is a presumption that there was non-application of mind.

16. A glance at the impugned order reveals that neither has the learned Sessions Judge mentioned the facts of the case, or the date of surrender, or the provisions under which offences have been alleged nor even any reasons for granting bail. The offence alleged is also not fully correct and even the factual aspects mentioned, like defacto complainant leading the gynaecology department are also wrong. The question whether custodial interrogation is required or not and the nature of injury sustained by the defacto complainant are all matters that were relevant but were conspicuously omitted to be even mentioned. Even the observation of the Additional Sessions Judge that custodial interrogation is essential was not taken into reckoning. In view of the above, I am satisfied that perversity is writ large in the impugned order, and the same is liable to be set aside.

In the above circumstances, this petition under section 482 Cr.P.C is allowed. The bail granted to respondents 2 and 3 is set aside. The bail bonds, if any, executed by them, shall also stand set aside. They shall forthwith surrender and the learned Sessions Judge shall reconsider the bail application afresh after granting an opportunity of hearing to all the necessary parties and in accordance with the law.