

(2022) 11 KL CK 0280
In the High Court Of Kerala
Case No : Bail Application No. 7673 Of 2022

XXX XX

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 24-11-2022

Acts Referred:

Code of Criminal Procedure, 1973 — Section 2(a), 438
Indian Penal Code, 1860 — Section 376(2)(n), 376AB
Protection of Children from Sexual Offences Act, 2012 — Section 3(b), 3(d), 4, 5(f),
5(l), 5(m), 6(1), 19(2), 20, 21

Citation : (2022) 11 KL CK 0280

Hon'ble Judges : Bechu Kurian Thomas, J

Bench : Single Bench

Advocate : Nireesh Mathew, M.K.Pushpalatha

Final Decision : Dismissed

Judgement

Bechu Kurian Thomas, J

1. Is section 21 of the Protection of Children from Sexual Offences Act, 2012 bailable or non-bailable? The said question arises for consideration in this application for anticipatory bail filed under section 438 of the Code of Criminal Procedure, 1973.

2. Petitioners are accused 2 to 4 in Crime No.425 of 2022 of Cheruthuruthi Police Station. Initially, there was only one accused against whom offences punishable under sections 376(2)(n) and 376AB of the Indian Penal Code, 1860, apart from sections 4, 3(b), 3(d), 6(1), 5(f), 5(l) and 5(m) of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') are alleged. Later, an additional report was filed, arraying petitioners as accused 2 to 4, after including section 21 of the POCSO Act as committed by them

3. Prosecution alleges that in the month of May 2022, the first accused took the victim, aged 9 years, to the bathroom of a Yathimkhana, and sexually assaulted

the minor girl by sucking and inserting his finger into her private parts and repeated the offensive conduct on many days. Petitioners are alleged to have failed to report the offence even after becoming aware of the said offensive conduct.

4. Sri. Nireesh Mathew learned counsel for the petitioners, contended that the prosecution allegation against petitioners herein does not make out any offence at all, as they have no involvement in the main offences alleged. The learned counsel also pointed out that petitioners are roped in as accused only under Section 21 of the POCSO Act, on an assumption that they were aware of the incident of sexual exploitation committed by the first accused and that they failed to intimate the police. According to the learned Counsel, petitioners were unaware of the incident and the moment they became aware of it, they acted in accordance with law. The learned counsel further submitted that, even though the offence under section 21 of the POCSO Act is a bailable offence, the police are proceeding to initiate steps to arrest the petitioners and therefore, they apprehend arrest in the crime.

5. Smt.M.K.Pushpalatha, learned Public Prosecutor though opposed the grant of bail, contended that the petitioners are alleged to have committed a serious offence since they failed to intimate the incident of rape even after it came to their knowledge and, therefore, custodial interrogation is essential.

6. I have considered the rival contentions and have also perused the statement given by the victim.

7. According to the victim, the first accused had sexually assaulted her, and on hearing her cries, accused 2 to 4 came over and tried to console her. Later, accused 2 to 4 had sent away the first accused from the Yathimkhana but failed to report the crime to the police.

8. On a reading of the prosecution case, it is evident that the investigating officer does not have a case that accused 2 to 4 had either committed any sexual assault or even abetted the offence committed by the first accused. Petitioners are alleged to have committed only the offence under section 21 of the POCSO Act. The said section makes the failure to report an offence punishable with imprisonment upto six months or if the person is in charge of an institution or company, imprisonment upto one year.

9. Recently, the Supreme Court had, in *State of Maharashtra and Anr. v. Dr. Maroti s/o Kashinath Pimpalkar* (2022 LiveLaw (SC) 898) held that the offence under section 21 of the POCSO Act is a very serious offence. Relying upon the decision in *Shankar Kisanrao Khade v. State of Maharashtra* [(2013) 5 SCC 546]] it was observed that "The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting, they are screening the offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.' It

was further observed that "Prompt and proper reporting of the commission of offence under the POCSO Act is of utmost importance and we have no hesitation to state that its failure on coming to know about the commission of any offence thereunder would defeat the very purpose and object of the Act. We say so taking into account the various provisions thereunder."

10. There is no doubt that the offence under section 21 of the POCSO Act, which deals with failure to report the offence against a child, is a serious offence. However, the question whether the offence is bailable or non-bailable is not determined merely by the seriousness of the crime but by reference to the statutory provisions.

11. While considering the question as to whether the offence under section 21 of the POCSO Act is bailable or not, it is necessary to advert to the said statutory provision and therefore, section 21 is extracted as below:

"S.21. Punishment for failure to report or record a case.-(1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions of sub-section (1) shall not apply to a child under this Act."

12. Section 2(a) of Cr.P.C. defines bailable offence as " an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force." Thus an offence is classified as bailable or non-bailable by two methods. If the statute declares a particular offence as bailable or non-bailable, the said offence has to be treated in the said manner. However, if the statute does not declare so, reference has to be made to the schedule attached to the Cr.P.C. Part II of First Schedule dealing with the classification of offences under other laws, as specified in the Cr.P.C., is as below:

II. CLASSIFICATION OF OFFENCES AGAINST OTHER LAWS

Offence

Cognizable or non-

cognizable

Bailable or non-bailable

By what court triable

If punishable with death, imprisonment for life, or imprisonment for

more than

7 years

Cognizable.

Non- bailable.

Court of Session.

If punishable with imprisonment for 3 years, and upwards but not more than 7 years

Ditto

Ditto

Magistrate of the first class.

If punishable with

imprisonment for less than 3 years or with fine only.

Non- cognizable.

Bailable.

Any Magistrate

13. Section 21 of POCSO Act makes contravention of section 19 and section 20 of the Act to be punishable. A perusal of the provisions of the POCSO Act reveals that the statute does not, by itself, declare section 21 to be a non-bailable offence. As mentioned earlier, when there is no reference in the statute treating a particular offence as bailable or non-bailable, reliance has to be placed on the Schedule to the Cr.P.C. A reading of the Schedule to Cr.P.C. extracted above evidences that if, under other laws, the offence is punishable with imprisonment for less than three years or with fine only, the offence is bailable and non-cognizable. It is thus evident that section 21 of the POCSO Act, which provides for a punishment of six months or a maximum of one year, is a bailable offence.

14. It is also elementary that an application for anticipatory bail is not maintainable when the offence is bailable. In cases where the offence alleged is only bailable, bail is a right, and it cannot be denied. In such circumstances, application for anticipatory bail is not maintainable as an accused, if arrested for a bailable offence, the investigating officer has to mandatorily release him on bail.

15. Since the petitioners are alleged to have committed only a bailable offence, the question of apprehension of arrest does not even arise and therefore, this bail application is dismissed.