

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

Bail Appl..No. 6391 of 2015 ()

O.R. NO. 3/2015 OF ATHIRAPILLY FOREST STATION , ERNAKULAM DISTRICT

PETITIONER(S)/ACCUSED 11, 12 AND 13:

- 1. SHOJA PRISTON,
W/O. PRISTON SILVA, AGED 43 YEARS,
T.C-36/246, PETTAH VILLAGE,
KOTHAMANGALAM TALUK, TRIVANDRUM.**
- 2. RAVI,S/O. KOCHUKRISHNAN, AGED 64 YEARS,
CHENTHILMUDAMBIL HOUSE,
CHAKKA BHAGAM, TRIVANDRUM.**
- 3. WILLAM SILVA,AGED 54 YEARS,
DREAM LAND, PETTAH VILLAGE, TRIVANDRUM.**

BY ADV. SRI.P.M.HABEEB

RESPONDENT :

**STATE OF KERALA,
REP. BY DEPUTY RANGE OFFICER,
ATHIRAMPALLY FOREST STATION,
THROUGH PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

BY ADDL.DGP. SRI.TOM JOSE PADINJAREKARA

**THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION
ON 13-10-2015 , ALONG WITH BA.NO.5583 OF 2015 AND CONNECTED
CASES, THE COURT ON 02-11-2015 PASSED THE FOLLOWING:**

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A.HARIPRASAD, J.

**B.A. Nos.5583, 5589, 5616, 5617, 5622, 5632,
5633, 6126, 6164, 6165, 6166, 6167, 6175,
6176, 6177, 6178, 6179, 6180, 6389,
6390, 6391 of 2015**

Dated this the 2nd day of November, 2015

COMMON ORDER

Applications under Section 438 of the Code of Criminal Procedure, 1973 (in short, "Cr.P.C.").

2. Since common facts and questions of law arise in these bail applications, I heard them together. They can be conveniently disposed by this common order. Petitioners apprehend arrest in forest crimes registered under the Kerala Forest Act, 1961 and Wild Life Protection Act, 1972. In fact, some of them had been arrested earlier in connection with other crimes of a similar nature and some were enlarged on bail. According to the petitioners, they are falsely implicated in these cases and they apprehend detention in custody and physical torture.

3. Heard Shri Suman Chakravarthy, Shri Gilbert George Correya, Shri M.B.Sandeep, Shri Vipin Narayan and Shri P.M.Habeeb, learned counsel appearing for the petitioners and Shri Tom Jose Padinjarekkara, learned Additional Director General of Prosecution for the State.

4. Case diaries have been placed for perusal. The files pertaining to O.R.No.1 of 2015 of Edamalayar Forest Station are also among them. I

have carefully gone through the materials placed before the Court.

5. O.R.No.1 of 2015 of Edamalayar Forest Station was registered under Section 27(1) e (iv) of Kerala Forest Act, 1961 and Sections 2(16) and 51(1) of Wild Life (Protection) Act, 1972. This case was registered on the basis of a report by the Deputy Range Forest Officer, Edamalayar Forest Station. On 31.05.2015 while the Deputy Range Forest Officer was on patrol in the reserve forest, he found a putrefied dead body of an elephant with tusks missing. After ascertaining the position of the carcass by the help of GPS, they returned to the office on that day as he could not complete the preparation of mahazar due to insufficiency of light. On the next day a detailed inspection was conducted. Investigation revealed that the animal was poached for extracting its tusks. As the investigation advanced, some of the accused persons were arrested. Confession statements were recorded after complying with the legal formalities.

6. O.R.No.2 of 2015 of Edamalayar Forest Station was registered on the basis of the confession of the third accused in O.R.No.1 of 2015 of Edamalayar Forest Station. This case was also registered under Section 27 I (iv) of Kerala Forest Act, 1961 and Sections 2(16), (35), (36) 9, 39, 51 and 52 of Wild Life Protection Act, 1972.

7. As per the confession statement of some of the accused in O.R.No.1 of 2015 of Edamalayar Forest Station, the Forest Officers

received information relating to the poaching of wild elephants within the limits of Karimbani Forest Station and therefore, O.R.Nos.5 to 9 of 2015 were registered. There also the offences alleged against the accused are under Sections 2(2) (16), (35), (36) 9, 39, 49b, 51 and 52 of Wild Life Protection Act, 1972.

8. After registering O.R.No.3 of 2015 of Karimbani Forest Station, some of the accused therein confessed about their complicity in hunting an elephant within the limits of Athirappilly Forest Station. Therefore, O.R.Nos. 1 to 3 of 2015 of Athirappilly Forest Station too were registered consequent to the confession of the accused. In all these matters, the investigation is gradually advancing.

9. B.A.Nos.5622 and 6177 of 2015 are relating to O.R.No.2 of 2015 of Edamalayar Forest Station. Learned counsel appearing for the petitioners contended that they are falsely implicated in the case. It is their further contention that they were arraigned as accused in O.R.No.1 of 2015 of Edamalayar Forest Station and O.R.No.3 of 2015 of Karimbani Forest Station. Forest Officers kept them in custody for long time and they got bail in both the matters. Petitioners would contend that while they were in custody, other crimes had already been registered implicating them and the Forest Officers, without formally arresting them while in custody, are trying to victimise the accused without any valid reason. According to the learned

counsel, the Forest Officers, having said to have received the information about the complicity of the petitioners in the crime, could have formally arrested them while in custody in other cases and they, without doing so, are illegally attempting to restrain the freedom of the petitioners. The allegation in O.R.No.2 of 2015 is that the accused persons confessed on 25.07.2015 to the Deputy Forest Officer, Malayattoor about their involvement in the poaching of a wild elephant.

10. Petitioners in B.A.Nos.6389, 6390 and 6391 of 2015 are the accused in Athirappilly Forest Station crimes O.R.Nos.1, 2 and 3 of 2015 respectively. These petitioners are arraigned as accused in the case on the basis of confessions made while in custody in other cases. Here also the petitioners raise the same contention that the Forest Officers could have recorded a formal arrest and they could have completed the investigation in these cases as well while the accused were in custody in other cases. It is therefore contended that arrest and detention of the petitioners is not necessary for advancement of the investigation in these cases.

11. B.A.Nos.6176 and 6126 of 2015 are filed in O.R.No.5 of 2015 of Karimbani Forest Station. B.A.Nos.6164 and 6179 of 2015 are filed in O.R.No.6 of 2015 of Karimbani Forest Station. Petitioners in B.A.No.6165 and 6178 are the accused in O.R.No.7 of 2015 of the said Forest Station.

Petitioners in B.A.Nos.6166 and 6180 are the accused in O.R.No.8 of 2015 of the said Forest Station. Accused in O.R.No.9 of 2015 of Karimbani Forest Station are the petitioners in B.A.Nos.6167 and 6175 of 2015. Petitioners herein also raised similar contentions and contended that arrest of them is not necessary. On perusal of the case diary, it is seen that these cases were also registered on the basis of the confessions extracted while the accused were in custody.

12. Learned counsel for the petitioners contended that they have no direct involvement in the alleged hunting of wild elephants. Some of the petitioners are artisans engaged in carving and creating artifacts. Some others are traders in handicraft items. Yet others are relatives of the main accused Vasu. According to the accused persons, they are falsely implicated in the case on the basis of untrue informations said to have been elicited from some of the accused persons.

13. Main contention raised by the petitioners in all these cases is that most of them have undergone custodial interrogation in O.R.No.1 of 2015 of Edamalayar Forest Station and some other cases. Therefore there is no need to interrogate them further in connection with the cases registered subsequent to the commencement of the above proceedings. It is also their contention that most of the accused were in custody for a long time. Even at that time, some of the cases have been registered. However,

Forest Officers did not make a formal arrest or demand for custody for interrogation. This, according to the petitioners, is an oblique motive on the part of the Forest Officers which makes them entitled to claim for a pre-arrest bail under Section 438 Cr.P.C.

14. Per contra, learned Additional Director General of Prosecution contended that many of the cases were at a nascent stage when O.R.No.1 of 2015 of Edamalayar Forest Station was registered and while the accused were in custody. Only later the Forest Officers could unearth facts revealing the complicity of the petitioners in many other crimes. Further, there is no legal mandate compelling the investigating agency to make a formal arrest of an accused in custody the moment a second case is registered and wherein his involvement is suspected. Only after ascertaining the details and getting the particulars of his involvement, an accused can be sought to be formally arrested while in custody. Therefore, learned Additional Director General of Prosecution contended that there is no bad motive or illegality in the proceedings adopted by the investigating agency. It is also submitted that in the light of the new revelations, custodial interrogation of the accused is highly essential to bring out the complete facts. That apart, the contention regarding custodial torture is totally incorrect.

15. Section 267 Cr.P.C. deals with the power of a court to require

attendance of prisoners. Relating to this subject, we will find provisions in the Criminal Rules of Practice as well. Cr.P.C. does not prescribe any provision for a formal arrest of an accused in custody. The practice that has come to stay is that in such cases the Officer who is wanting an arrest of the accused would make a request before the Court under whose orders the accused is kept in custody and after obtaining the permission, the arrest will be made. After that the investigating agency would make an application to the court having jurisdiction over the second crime to issue a production warrant under Section 267 Cr.P.C. Although there is no specific law, this practice is in vogue for a long time. In this case, the investigating agency, if it had gathered all the materials, could have requested the competent court to permit them to have a formal arrest of the accused and also requested the court having jurisdiction to issue an order of production warrant for remanding the accused in the subsequent case. The argument of the learned Additional Director General of Prosecution is that in the absence of gathering enough materials to implicate the accused in the subsequent crime, the investigating agency could not have resorted to such remedies. It is true that the investigating agency has discretion to decide when the arrest should be made, especially when making the arrest of a person on the basis of insufficient materials has been deprecated by various pronouncements. Therefore, I am of the view that one cannot

attribute motives to the investigating agency for not seeking custody of the accused persons in the subsequent crimes although they were in custody in a former crime.

16. In the matter of issuance of production warrant, a Division Bench decision of this Court in **Bineesh v. State of Kerala (2006 (3) KLT 364)** has been cited at the Bar. The decision says that when a person is in remand in a criminal case and when he gets involved in another case, the Magistrate having jurisdiction over the second case can issue production warrant under Section 267 Cr.P.C. requiring the production of the person already in remand for the purpose of the investigation. Learned Single Judge of this Court in **Ashish Arora v. State of Kerala (2013 (3) KLT 429)** has already held as follows:

“The question is whether an accused formally arrested while he continued in judicial custody in a different crime can seek bail from the magistrate under the section claiming that his formal arrest has to be treated as 'arrested' under the above section. Arrest as already indicated is always coupled with custody. In a formal arrest, arrest is only in form sans custody. The word “arrested” under S.437 of the Code necessarily has to be understood as 'under arrest' and thereby in custody when he seeks bail. Arrest of an accused formally but without the custody under the control of police cannot fall within the term 'arrested'

unless after such formal arrest his physical presence is effected before court in execution of production warrant by the Magistrate.”

It is therefore clear that without effecting a formal arrest and producing the accused before the court, the accused cannot move for bail in a case. That by itself cannot be taken as a reason to find that the legal right of the accused had been infringed by the investigating agency. The right of the investigating agency to implicate a person in a crime based on legally acceptable materials is an unquestionable right.

17. It is well settled by the pronouncement by the Apex Court in **Central Bureau of Investigation, Special Investigation Cell-I, New Delhi v. Anupam J. Kulkarni (AIR 1992 SC 1768)** and subsequent decisions that no accused shall be given in custody of the Police beyond the period of fifteen days prescribed in Section 167(2) proviso of the Cr.P.C.. Upshot of the discussion is that in the absence of a formal arrest and production of the accused in compliance of a production warrant, they do not get a right to move for bail. The embargo of seeking Police custody within first fifteen days of remand will not be attracted unless the accused has been formally arrested and produced before a competent court.

18. Learned Additional Director General of Prosecution contended that the accused persons are engaged in offences adversely affecting the environment and wild life. In such cases jurisdiction vested under Section

438 Cr.P.C. shall not be exercised mechanically. To buttress these contentions, a decision of this Court in **Sulaiman v. State of Kerala (2010 (1) KLT 264)** is pressed into service. Following observations are relied on:

“S.438 of the Code of Criminal Procedure is not a refuge for the offenders who indulge in grave and heinous crimes. Offences affecting the mankind, the environment, the forest wealth, the people at large, the safety and security of the nation, the economic stability of the country and the like are to be distinguished from the offences affecting individuals as a result of the crime committed by another. In the case of the former, the Court would be slow to exercise the discretion in favour of the accused, while dealing with an application under S.438 of the Code of Criminal Procedure.”

In the 41st report, the Law Commission suggested that necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes getting them detained in jail. A Constitution Bench decision of the Supreme Court in **Gurbaksh Singh v. The State of Punjab (AIR 1980 SC 1632)** considered elaborately the possible conflict between personal liberty and investigational powers of Police. It is well settled that power to issue pre-arrest bail under Section 438 Cr.P.C. has to be exercised with great amount of circumspection,

prudence, care and caution. In **Siddharam Satlingappa Mhetre v. State of Maharashtra (AIR 2011 SC 312)** and subsequently in **Bhadresh Bipinbhai Sheth v. State of Gujarat and others (2015 (9) SCALE 401)** some parameters have been mentioned which are relevant for dealing with anticipatory bail applications.

19. Learned counsel for the petitioners contended that the principle in **Sulaiman's** case (supra) runs contrary to the decisions of the Apex Court on the subject. I am afraid, I cannot agree with that contention. Settled law is that power to grant pre-arrest bail under Section 438 Cr.P.C. is discretionary. Of course the discretion has to be exercised with great care and caution and it must be judiciously exercised. There cannot be any hard and fast rule regarding the grant of pre-arrest bail because the facts and circumstances in each case will play a pivotal role. Starting from **Gurbaksh Singh** (supra), we find a lot of decisions to support a proposition that no blanket order shall be passed under Section 438 Cr.P.C. preventing arrest of a person (see **Union of India v. Padam Narain Aggarwal Etc. (AIR 2009 SC 254)** and **Rashmi Rekha Thatoi v. State of Orissa ((2012) 5 SCC 690)**). In **Maruti Nivrutti Navale v. State of Maharashtra and another ((2012) 9 SCC 235)**, the Apex Court ruled that if in a case custodial interrogation is necessary to bring out all the material informations, then pre-arrest bail under Section 438 Cr.P.C. cannot be

granted.

20. Learned Additional Director General of Prosecution relying on **Union of India v. Zavaray S.Poonawala and others ((2015) 7 SCC 347)** contended that the Apex Court had taken note of the dwindling animal population in the forest and mentioned that it is the duty of the mankind to save wild life. The importance of preserving wild life and forests has been restated in the said decision. It is, therefore, contended that the accused in this case, right from the poacher to the end user of the ivory, have violated not only the man made laws but also the rules of nature. Such persons are not entitled to claim pre-arrest bail is the contention of the prosecution.

21. After hearing elaborately the counsel on both sides and on perusal of the materials before the Court, I am of the view that the prosecution cannot be blamed for not making a formal arrest of the accused in a subsequent case while they were in custody in a previous case. The discretion vested in the investigating agency shall not be questioned, unless it is established by cogent reasons that they did so with an oblique motive. Nobody can contend that a person could be made an accused with insufficient materials. Therefore, there is nothing wrong in the investigating agency collecting materials to implicate a person in a subsequent case, who is accused of another crime.

22. Yet another apprehension of the petitioners is that when they

were in custody in the previous case, they were manhandled by Forest Officers brutally and some of them had to be admitted to hospital. It is beyond any doubt that no third degree methods can be permitted by any authority established by law. Investigation has to be done in a civilized manner. Therefore, apprehension of the petitioners that if they are taken in custody, they will be tortured is well taken note of. Certainly there should be measures to avoid such a complaint. If that be so, it cannot be taken as a reason to grant pre-arrest bail without regard to the requirement of custodial interrogation and other attending circumstances like recovery, etc.

23. Considering the entire facts and circumstances, I am of the view that the petitioners are not entitled to get pre-arrest bail by invoking the jurisdiction of this Court under Section 438 Cr.P.C. in this case. They shall surrender before the respective investigating agency within a period of one week and submit themselves for interrogation. Thereafter, the investigating officer in each case shall produce each accused before the court having jurisdiction. If one accused person is involved in more crimes of different Forest Stations coming within the jurisdiction of different courts, then he can surrender before any one of the investigating officers dealing with any one of the crime. Petitioners are free to move for bail before the Magistrate having jurisdiction. In that event, the learned Magistrate shall consider the bail applications on merits and pass appropriate orders by

invoking power under Section 437 Cr.P.C. as expeditiously as possible. It is made clear that in the course of investigation, the Officers should not give any room for complaint that they used third degree measures for eliciting evidence from the accused.

With these observations, the applications are disposed of.

A. HARIPRASAD, JUDGE.

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