



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT, MADURAI

(Criminal Jurisdiction)

Date on which reserved : 25/06/2019

Date on which pronounced : 03 /07 /2019

PRESENT

The Hon`ble Mr.Justice P.RAJAMANICKAM

CRL OP(MD) . No.7894 of 2019

Rajagopal,

... Petitioner/Sole Accused

Vs

State rep.by

The Inspector of Police,,

All Women Police Station,

Sivagangai.

Crime No.10/2019.

... Respondent/Complainant

For Petitioner : M/s.G.Karuppasamy Pandiyan,
Advocate.

For Respondent : Mr.V.Neelakandan,
Additional Public Prosecutor,

PETITION FOR ANTICIPATORY BAIL Under Sec.438 of Cr.P.C

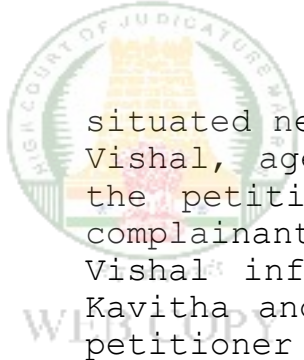
PRAYER :-

For Anticipatory Bail in Crime no.10/2019 on the file of the respondent police.

ORDER : The Court Made the following order :-

This petition has been filed by the petitioner/accused, seeking anticipatory bail for the alleged offences punishable under Sections 11 (i), (ii) and Section 12 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act) in Crime No.10 of 2019.

2.The case of the prosecution is that on 31.05.2019 at about 4.00 p.m, the defacto complainant's 5 years old daughter was playing along with her friends in front of Mariamman Temple and later, the said child went to the petitioner's house, which is

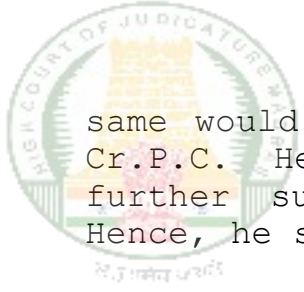


situated nearer to the said temple. Subsequently, one child by name Vishal, aged about 11 years found that in the petitioner's house, the petitioner was standing in a nude position and the defacto complainant's child was also standing in a nude position. The said Vishal informed the said fact to the defacto complainant's wife Kavitha and thereafter, the said Kavitha went to the house of the petitioner and found that her child was standing in the Veranda (front yard) of the house without any dress in a crying condition and she took the child and went to her house and informed the said fact to her husband (defacto complainant) and that the defacto complainant lodged a complaint before the respondent Police on 02.06.2019 at 07.00 p.m.

3.The learned counsel appearing for the petitioner has submitted that in the POCSO Act, nowhere, it is specifically stated that the offences under the said Act are bailable or non-bailable. He further submitted that since the POCSO Act is a Special Act, Part II of the Schedule I of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C) will apply. He further submitted that the offence under Section 11(i),(ii) of the POCSO Act is punishable under Section 12 of the Act. He further submitted that since the offence punishable under Section 12 of the POCSO Act provides for a punishment of imprisonment of either description for a term which may extend to 3 years and also be liable to fine, same will not fall in Category 2, but in Category 3 of Part-II of Schedule-I of Cr.P.C and would be thus a bailable offence. He further submitted that even if it is assumed that the offence punishable under Section 12 of the Act is non-bailable, the averments made in the FIR would not attract Section 11(i),(ii) of the POCSO Act. He further submitted that due to property dispute, defacto complainant has lodged a false complaint against the petitioner. He further submitted that the petitioner is aged about 70 years and at this age, it is highly unbelievable that the petitioner has committed any offence. He further submitted that the victim child has not stated anything about the alleged offence in the statement recorded under Section 164 Cr.P.C and therefore, he prayed to grant anticipatory bail to the petitioner.

4.The learned counsel for the petitioner, in support of the aforesaid contentions, relied upon the decision in **Sivaji Hi-Tec Foods Private Limited, rep. By its Director, KSS Karunakaran, Chennai-600117, reported in (2019) 2 MLJ (Cr1) 313.**

5.Per contra, the learned Additional Public Prosecutor appearing for the respondent has submitted that since the petitioner was standing in a nude position in front of 5 years old female child and the said child was also found in nude position, the said act would fall under Section 11(i),(ii) of the POCSO Act and the same is liable to be punished under Section 12 of the POCSO Act. He further submitted that since the offence punishable under Section 12 of the POCSO Act provides for a punishment of imprisonment of either description for a term which may extend to 3 years and fine, the



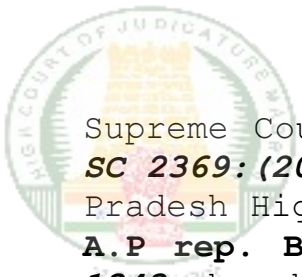
same would fall within the Category 2 of Part II of Schedule I of Cr.P.C. Hence, the said offence is cognizable and non-bailable. He further submitted that the investigation is at initial stage. Hence, he strongly opposed this petition.

6.I have considered the submissions made on behalf of the respective parties, materials made available for my perusal as well as relevant legal provisions and the case laws relied upon on behalf of the petitioner.

7.First of all, it is to be considered whether the offence for the petitioner has been accused in the present case is bailable and he is entitled to be released on bail as of right without considering the merits of the case.

8.Clause (a) of Section 2 of Cr.P.C provides which offence is bailable and which is non-bailable offence. According to this provision, "bailable offence" means an offence which is shown as bailable in the I-Schedule or which is made bailable for any other law for the time being in force; "non-bailable offence" means any other offence. So, it is clear that unless an offence expressly or impliedly made bailable by any other law for the time being in force, the question whether an offence is bailable or not is to be determined, as provided in the I-Schedule of the Code. In the POCSO Act, nowhere, it is stated that the offences under the said Act are either bailable or non-bailable. Under the said circumstances, the I-Schedule of Cr.P.C will apply. The I-Schedule of Cr.P.C is in two parts. The I-Part of the same provides for the offences under the I.P.C, whereas the Part II of the Schedule classifies the offences against other Laws. Category 3 of Part II of the Schedule provides with an offence punishable with imprisonment for less than 3 years or with fine only is non-cognizable and bailable. Category 2 of Part II of the Schedule provides with an offence punishable with imprisonment for 3 years and upwards, but not more than 7 years is cognizable and non-bailable. In the present case, the petitioner is accused of the offence punishable under Section 12 of the POCSO Act. Section 12 of the POCSO Act provides for a punishment of imprisonment of either description for a term which may extend to 3 years and also fine. It is thus clear that for the aforesaid offence, the Court is empowered to pass sentence of imprisonment of 3 years also and therefore, it cannot be said that for such offence, sentence of imprisonment for less than is provided and therefore, the aforesaid offence would fall within the Category 2 of Part II of the I-Schedule. As the offence for which the petitioner is accused in the present case is punishable with imprisonment for a term which may extend to 3 years, it cannot be held to be bailable entitling the petitioner to be released on bail as of right.

9.In **Sivaji Hi-Tec Foods Private Limited, rep. By its Director, KSS Karunakaran, Chennai-600117** (cited supra), a Single Judge of this Court referring to the decision of the Honourable



Supreme Court in **Rajeev Chaudhary Vs State (NCT) of Delhi AIR 2001 SC 2369: (2001) 5 SCC 34:LNIND 2001 SC 1182** and the decision of Andhra Pradesh High Court in **Amarnath Vyas @ Vijay Prakash Vyas V. State of A.P rep. By its Public Prosecution CDJ 2007APHC 617:LNIND 2006 AP 1343**, has held as follows:-

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"13.Hence, as per the law laid down by Hon'ble Supreme Court in Rajeev Chaudhary's case (supra) and by Andhra Pradesh High Court in Amarnath Vyas's case (supra), the expression "imprisonment for a term which may extend up to 3 years" would not come within the expression "imprisonment for 3 years and upwards". Therefore, the offence punishable under Section 63 and 68A of the Act of 1957 cannot be considered as cognizable offence."

10.In **Rajeev Chaudhary Vs State (NCT) of Delhi** (cited supra), the Honourable Supreme Court, has held as follows:

"In this context, the expression "not less than" would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more. Under [Section 386](#) punishment provided is imprisonment of either description for a term which may extend to 10 years and also fine. That means, imprisonment can be for a clear period of 10 years or less. Hence, it could not be said that minimum sentence would be 10 years or more. Further, in context also if we consider clause (i) of proviso (a) to [Section 167\(2\)](#), it would be applicable in case where investigation relates to an offence punishable (1) with death; (2) imprisonment for life; and (3) imprisonment for a term of not less than ten years. It would not cover the offence for which punishment could be imprisonment for less than 10 years. Under Section 386 of the IPC, imprisonment can vary from minimum to maximum of 10 years and it cannot be aid that imprisonment prescribed is not less than 10 years."

11.From the aforesaid decision, it is clear that the Honourable Supreme Court has dealt with the Clause (i) of Proviso (a) to Section 167(2) of Cr.P.C and held that the expression "imprisonment for a term of not less than 10 years" occurring in the said clause would mean that the imprisonment should be 10 years or more and would cover only those offences for which punishment of imprisonment could be for a clear period of 10 years or more.

12.The language used in the Proviso to Section 167(2) of Cr.P.C is totally different from the language employed in the Categories 2 and 3 of Part II of Schedule I of Cr.P.C.



"167: Procedure when investigation cannot be completed in twenty-four hours:

.....
.....

Provided that -

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding, -

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years.

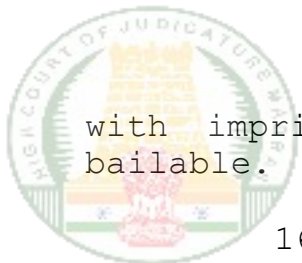
....."

14. Part-II of Schedule-I of Cr.P.C reads as under:

"II- Classification of Offences against other Laws"

Offence	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
1	2	3	4
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	Cognizable	Non-bailable	Magistrate of the first class
If punishable with imprisonment for less than 3 years or with fine only	Non-cognizable	Bailable	Any Magistrate

15. A plain reading of the aforesaid provisions of law would show that the words "imprisonment for a term of not less than 10 years" have been used in clause (i) of Proviso (a) to Section 167(2) Cr.P.C, whereas in Category 2 of Part II of Schedule-I of Cr.P.C, the words "if punishable with imprisonment for 3 years and upwards not more than 7 years" have been used. So, the expression, "if punishable with imprisonment for 3 years" used in category-2 of Part II of Schedule-I of Cr.P.C cannot be equated with the expression "imprisonment for a term of not less than 10 years" which is used in clause (i) of Proviso (a) to Section 167(2) Cr.P.C. Therefore, the decision in **Rajeev Chaudhary's case (cited supra)** cannot be applied for deciding the issue as to whether the offence which is punishable



with imprisonment for 3 years or upwards is bailable or non-bailable.

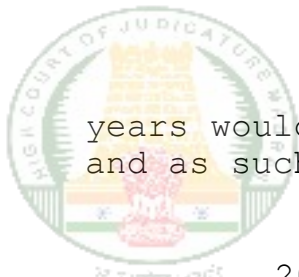
16. In **Amarnath Vyas @ Vijay Prakash Vyas Vs. State of A.P. rep. By its Public Prosecution** (cited supra), the Andhra Pradesh High Court, relying upon the aforesaid decision of the Honourable Supreme Court in **Rajeev Chaudhary case (cited supra)**, has held that the offence punishable under Section 63 of the Copy Right Act cannot be considered as non-bailable one. Since I hold that the decision in **Rajeev Chaudhary's case** (cited supra) will not apply for deciding the issue as to Category 2 of Part II of Schedule-I of Cr.P.C., the decision in **Amarnath Vyas @ Vijay Prakash Vyas Vs. State of A.P. rep. By its Public Prosecution** (cited supra) also will not apply to decide the said issue.

17. In **Hridayananda Sharma V. State of Assam, CDJ2003 Assam HC 374**, a Honourable Division Bench of the Gauhati High Court (Judgment was authored by the present Honourable Chief Justice of India MR.JUSTICE RANJAN GOGOI as his Lordship was then), after referring to the decision of the Honourable Supreme Court in **Rajeev Chaudhary's case** (cited supra), held that the punishment prescribed under Section 68A of the Copy Right Act being for imprisonment which may extend to the period of 3 years, the punishment prescribed cannot be said to be less than 3 years as required under Part II of Schedule-I of Cr.P.C to make the offence bailable. Consequently, His Lordship has held that the offence under Section 68A of the Copy Right Act is a non-bailable offence.

18. In **Abdul Sathar V. Nodal Officer, Anti Piracy Cell, Kerala Crime Branch Office & Another, CDJ 2007 Ker HC 977**, in paragraph No.7, it is held as follows:

"7. The offence on hand, the one under [Section 63](#) of the Copyright Act, is punishable with imprisonment for a period of 3 years. There can therefore, be no doubt that this falls under category 2 referred above and is consequently cognizable. No contra principle or precedent has been pressed into service before me. The attempt to rely on the decision of the Supreme Court in [Rajeev Chaudhary v. State \(NCT\) of Delhi](#) cannot at any rate help the petitioners as the language used in the proviso to [Section 167\(2\)](#) is totally different from the language employed in the Schedule to the Code of Criminal Procedure."

19. From the aforesaid decision also, it is clear that in **Rajeev Chaudhary's case (cited supra)**, the question arose was as to interpretation of Proviso to Section 167(2) of Cr.P.C and the language used in the said proviso is totally different from the language employed in the Schedule to the Code of Criminal Procedure. Further, it is clear that the offence under Section 63 of the Copy Right Act which is punishable with imprisonment for a period of 3



years would fall under Category 2 of Part II of Schedule-I of Cr.P.C and as such, the said offence is cognizable and non-bailable.

20. In **Santhosh Mandal V. State, (Bail Application No.1763/2016), dated 28.09.2016**, the Delhi High Court, has dealt with the provisions of Section 12 of the POCSO Act. In that case also relying upon the decision of the Honourable Supreme Court in **Rajeev Chaudhary' case (cited supra)**, contended that it cannot be said that the offence punishable under Section 12 of the POCSO Act is a non-bailable offence. The Delhi High Court, after referring to Section 19 of POCSO Act, has held in paragraph No.11 as follows:

"11. Thus, the decisions of Supreme Court in case of Rajeev Chaudhary and Avinash Bhosale (supra) have no application to the facts of the case as discussed in detail by three Judge Bench in Om Prakash (supra) holding that the offences under Section 9 of Central Excise Act 1944 and Section 135(1)(ii) of the Customs Act 1962 were non-cognizable and thus bailable offences. Considering the gravity of the offences and the special mechanism provided under POCSO Act to hold that the offences are bailable though cognizable and would fall in category 3 would be rendering an interpretation to the classification provided in second part of First Schedule of Cr.P.C contrary to the object of the special enactment. Thus offences punishable under POCSO Act including Section 12 are cognizable and non-bailable offences."

21. From the said decision also, it is clear that the offence punishable under Section 12 of the POCSO Act falls within the Category 2 of Part II of Schedule I of Cr.P.C and hence, the said offence is cognizable and non-bailable.

22. In view of the aforesaid decisions, I am unable to persuade myself to endorse and follow the view of the learned Judge of this Court in **Sivaji Hi-Tec Foods Private Limited, rep. By its Director, KSS Karunakaran, Chennai-600117** (cited supra). In the light of the legal position propounded in the above cited decisions, I am of the considered view that the offence punishable under Section 12 of the POCSO Act is cognizable and non-bailable.

23. On coming to the merits of the case, the defacto complainant is not an eye witness. As per the F.I.R, the victim child went to the house of the petitioner and one Vishal found that the petitioner herein was standing in a nude position in his house and the victim child also was standing in a nude position and the said fact was informed to the defacto complainant's wife and therefore, the defacto complainant's wife went to the house of the



petitioner and found that the victim child was standing in the veranda (front yard) of the house of the petitioner without any dress and in crying condition. It is also stated that no injury was found on the body of the victim child and it is not stated that the defacto complainant's wife has seen the petitioner. Further in the F.I.R itself, it is stated that age of the petitioner is about 70 years. Further, for the alleged offence said to have occurred on 31.05.2019 at 4.00 p.m, the complaint was lodged only on 02.06.2019 at 7.00 p.m. Further, when the victim child was produced before the Judicial Magistrate for recording a statement under Section 164 Cr.P.C, she has not stated anything about the occurrence.

24. Taking into consideration of all the aforesaid facts, this Court is inclined to grant anticipatory bail to the petitioner, by imposing conditions.

25. Accordingly, the petitioner is ordered to be released on bail in the event of arrest or his appearance, within a period of fifteen days from the date of receipt of a copy of this order, before the learned Special Judge Cum Mahila Judge, Sivagangai on condition that the petitioner shall execute a bond for a sum of Rs.10,000/- (Rupees ten thousand only) with two sureties each for a like sum to the satisfaction of the respondent Police or to the Police Officer, who intends to arrest or to the satisfaction of the learned Magistrate concerned and on further condition that:

[a] if the petitioner fails to surrender before the concerned Magistrate within a period of 15 days, this order shall stand automatically cancelled.

[b] the petitioner shall report before the respondent Police, daily at 10.30 a.m for a period of three weeks and thereafter, as and when required for the interrogation.

[c] the petitioner shall not tamper with evidence or witness either during investigation or trial.

[d] the petitioner shall not abscond either during investigation or trial.

[e] On breach of any of the aforesaid conditions, the learned Magistrate/Trial Court is entitled to take appropriate action against the petitioner in accordance with law as if the conditions have been imposed and the petitioner released on bail by the learned Magistrate/Trial Court himself as laid down by the Hon'ble Supreme Court in P.K.Shaji vs. State of Kerala [(2005)AIR SCW 5560].

[f] If the accused thereafter absconds, a fresh FIR can be registered under Section 229A IPC.

sd/-

03/07/2019

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1 THE SPECIAL JUDGE CUM MAHILA JUDGE,
SIVAGANGAI.

2 THE INSPECTOR OF POLICE,
ALL WOMEN POLICE STATION,
SIVAGANGAI.

3 THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

+1cc to Mr.G.KARUPPASAMY PANDIAN, Advocate in SR.No.73047

ORDER
IN
CRL OP(MD) No.7894 of 2019
Date :03/07/2019

VS
AE/JC/SAR-II (09.07.2019) 9P 5C