IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

MONDAY, THE 07TH DAY OF DECEMBER 2020 / 16TH AGRAHAYANA, 1942

Crl.MC.No.4603 OF 2020(E)

AGAINST THE ORDER IN CRMP 1217/2020 DATED 18-09-2020 OF THE SESSIONS COURT, KASARAGOD

CRIME NO.471/2020 OF BEKAL POLICE STATION, KASARGOD

PETITIONER/VICTIM:

X

BY ADVS.
SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY
SRI.K.ANAND (A-1921)

RESPONDENTS/ACCUSED/STATE:

1 **STATE OF KERALA**
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,ERNAKULAM-682031.
(CRIME NO.471/2020 OF BEKAL POLICE STATION, KASARGODE DISTRICT).

2 **MUHAMMED ASHARAF,**
AGED 32 YEARS
S/O.MOHAMMED .M.A,ALIKANDAVALAPPU,BEEVORI,
UDUMA VILLAGE AND POST,
HOSDURG TALUK,KASARAGODE DISTRICT-671315.

3 **CIRCLE INSPECTOR OF POLICE,**
OFFICE OF THE S.H.O.,BAKAL,
KASARAGODE DISTRICT-671318.

4 **DISTRICT POLICE CHIEF,**
PARAKATTA ,VIDYANAGAR-ULIYATHADKA ROAD,KUDLU,KASARAGOD-671121.
R2 BY ADV. SRI.SALIM V.S.
R2 BY ADV. SRI.P.E.SAJAL
SRI.SAIGI JACOB PALATTY, PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 07.12.2020, ALONG WITH Crl.MC.4630/2020(G), Crl.MC.4638/2020(H), Crl.MC.4644/2020(A), THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

MONDAY, THE 07TH DAY OF DECEMBER 2020 / 16TH AGRAHAYANA, 1942

Crl.MC.No.4630 OF 2020(G)

AGAINST THE ORDER IN CRMP 1220/2020 DATED 18.09.2020 OF THE SESSIONS COURT, KASARAGOD

CRIME NO.473/2020 OF BEKAL POLICE STATION, KASARGOD

PETITIONER/DE FACTO COMPLAINANT:

X
BY ADVS.
SRI.V.VINAY
SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.K.ANAND (A-1921)

RESPONDENTS/ACCUSED/STATE:

1 **STATE OF KERALA**
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM - 682031, (CRIME NO. 473/2020 OF BEKAL POLICE STATION, KASARAGOD DISTRICT)

2 **MUNEER K V**
AGED 35 YEARS
S/O.K.V. ABDULLA, KOVVAL VALAPPU, UDUMA PADINHAR, UDUMA VILLAGE AND POST, HOSUDRG TALUK, KASARAGOD DISTRICT,PIN - 671315.

3 **CIRCLE INSPECTOR OF POLICE**
OFFICE OF THE S.H.O. BEKAL, KASARAGODE DISTRICT, PIN - 671318.

**4 DISTRICT POLICE CHIEF
PARAKATTA, VIDYANAGAR-ULIYATHADKA ROAD, KUDLU,
KASARAGOD, PIN – 671121**

**R2 BY ADV. SRI.SALIM V.S.
R2 BY ADV. SRI.P.E.SAJAL
SRI.SAIGI JACOB PALATTY, PUBLIC PROSECUTOR**

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 07.12.2020, ALONG WITH Crl.MC.4603/2020(E), Crl.MC.4638/2020(H), Crl.MC.4644/2020(A), THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

MONDAY, THE 07TH DAY OF DECEMBER 2020 / 16TH AGRAHAYANA, 1942

Crl.MC.No.4638 OF 2020(H)

AGAINST THE ORDER IN CRMP 1219/2020 OF SESSIONS COURT, KASARAGOD

CRIME NO.472/2020 OF BEKAL POLICE STATION, KASARGOD

PETITIONER/VICTIM/INFORMANT:

X

BY ADVS.
SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY
SRI.K.ANAND (A-1921)

RESPONDENTS/ACCUSED NO.1/STATE:

1 **STATE OF KERALA**
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM 682 031
(CRIME NO. 472/2020 OF BEKAL POLICE STATION, KASARGODE DISTRICT)

2 **ABDUL RAHIMAN P.M,**
AGED 33 YEARS
S/O. NAFEESA, PADINHAR HOUSE, UDUMA PADINHAR, UDUMA VILLAGE AND POST, HOSDURG TALUK, KASARGODE DISTRICT PIN 671 315

3 **CIRCLE INSPECTOR OF POLICE,**
OFFICE OF THE S.H.O , BEKAL, KASARAGODE DISTRICT 671 318

**4 DISTRICT POLICE CHIEF,
PARAKATTA, VIDYANAGAR-ULIYATHADKA ROAD, KUDLU,
KASARAGOD 671 121**

**R2 BY ADV. SRI.SALIM V.S.
SRI.SAIGI JACOB PALATTY, PUBLIC PROSECUTOR**

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 07.12.2020, ALONG WITH Crl.MC.4603/2020(E), Crl.MC.4630/2020(G), Crl.MC.4644/2020(A), THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

MONDAY, THE 07TH DAY OF DECEMBER 2020 / 16TH AGRAHAYANA, 1942

Crl.MC.No.4644 OF 2020(A)

AGAINST THE ORDER IN CRMP 1218/2020 DATED 18-09-2020 OF SESSIONS COURT, KASARAGOD

CRIME NO.474/2020 OF BEKAL POLICE STATION, KASARGOD

PETITIONER/VICTIM/INFORMANT:

X

BY ADVS.
SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY
SRI.K.ANAND (A-1921)

RESPONDENTS/ACCUSED/STATE:

1 **STATE OF KERALA,**
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-682031.
(CRIME NO.474/2020 OF BEKAL POLICE STATION, KASARAGOD DISTRICT)

2 **MOHAMMED ASIF K.,**
AGED 34 YEARS, S/O. ABDULLA, NARCHIKUNDIL HOUSE, UDUMA PADINHAR, UDUMA VILLAGE AND POST, HOSDURG TALUK, KASARAGOD DISTRICT-671315.

3 **CIRCLE INSPECTOR OF POLICE,**
OFFICE OF THE SHO, BEKAL, KASARAGOD DISTRICT-671318.

**4 DISTRICT POLICE CHIEF,
PARAKATTA, VIDYANAGAR, ULIYATHADKA ROAD, KUDLU,
KASARAGOD-671121.**

**R2 BY ADV. SRI.SALIM V.S.
R2 BY ADV. SRI.P.E.SAJAL
SRI.SAIGI JACOB PALATTY, PUBLIC PROSECUTOR**

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 07.12.2020, ALONG WITH Crl.MC.4603/2020(E), Crl.MC.4630/2020(G), Crl.MC.4638/2020(H), THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

(CR)

ALEXANDER THOMAS, J.

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**Crl.M.C Nos.4603, 4630,
4638 & 4644 of 2020**

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Dated this the 07th day of December, 2020

COMMON ORDER

The aforecaptioned four Criminal Miscellaneous Cases have been filed under Sec.482 of the Cr.P.C seeking to set aside the anticipatory bail orders granted by the Sessions Court, Kasaragod on 18.09.2020 to the 2nd respondent/accused concerned in respect of their involvement in each of the four separate crimes registered against them by the Kasaragod BEKAL Police Station for various offences as per Secs.376(2)(n), 506 & 34 of the Indian Penal Code. As each of these accused person concerned were initially arrayed as accused persons in the first crime registered in relation to series of instances in question, in which accused Thufail was arrayed as accused No.2 in each of these four FIRs/crimes, have been split up later from the initial First Information Report, viz. Crime No.468/2020 of Bakel Police Station and as the incidents in these cases are now said to have close nexus with the incident in the said abovesaid first FIR in these cases and as the lady de facto complainant in each of these cases is the same

person and as many of the issues raised in these petitions are common, these cases are disposed of on the basis of this common order.

2. Initially it may be pertinent to refer briefly to the facts in respect of the abovesaid first FIR, viz., Crime No.468/2020 of Bakel Police Station as well as the facts in Crl.M.C No.4603/2020, which arises out of the anticipatory bail plea granted in favour of accused No.1 in Crime No.471/2020 of Bakel Police Station, which is the subject matter of the said Crl.M.C No.4603/2020. It is to be noted that the accused No.1 in Crime No.468/2020, who is the accused No.2 in the other crimes, has not applied for or secured anticipatory bail, as he is now stated to be abroad. Initially, Annexure-I Crime No.468/2020 of Bakel Police Station was registered as against five accused persons (viz., Thufail, Asharaf, Abdul Rahiman, Muneer and Asif). The said Annexure-I FIR (referred for convenience as the first FIR) or the first crime, is stated to have been registered on 31.08.2020 on the basis of the First Information Statement given by the petitioner herein (lady de facto complainant) in respect of the alleged incidents which happened from March, 2016 onwards, etc. Later, the police authorities have split up the cases by separately registering FIR in relation to the involvements of the abovesaid A2 to A5 in the first FIR by

registering Crime Nos.471/2020 (in which the abovesaid Asharaf, has been arrayed as A1), Crime No.472/2020 (in which the said Abdul Rahman has been arrayed as A1) & Crime No.473/2020 (in which the abovesaid Muneer has been arrayed as A1 therein) and Crime No.474/2020, in which the said Asif has been arrayed as A1 therein. These cases have been split up and separately registered on the basis of the same First Information Statement on the basis of which the first FIR was registered. Later it appears that 13 other crimes have also been separately registered in regard to the involvement of 13 other persons in relation to the similar allegations of rape said to have been committed against the abovesaid lady de facto complainant. It is also to be noted that the abovesaid Thufail (A1 in the first FIR), has been arrayed as A2 in each of other subsequently registered crimes. For the sake of convenience, the abovesaid Thufail will be referred for short as A2, as he has been arrayed as A2 in the abovesaid subsequently registered crimes. Whereas, each of the accused persons, who have secured anticipatory bail in these cases will be referred for short as A1 in the respective crimes concerned.

3. The brief of the prosecution case in pursuance of the abovesaid First Information Statement is that the lady de facto complainant is now aged about 25 years and that she is a married lady, who is having three children and studied upto plus two and that earlier, her husband was in Qatar and about four years back, he left his job in the Gulf country and had setup a shop near the beach of Kozhikode. It appears that the lady victim, who was staying in the place at Kasaragode, became acquainted with the abovesaid Thufail and his wife, as he happened to be a friend of her husband. That she also got friendly with the wife of Thufail and used to contact through telephone. That Thufail was in a Gulf country and when he had come down to his native place, he along with his wife had come to visit the lady. On the next day, she got a call in her mobile from the mobile of Thufail's wife between 9.30 p.m-10.30 p.m. and then it was revealed that it was Thufail speaking. He spoke on friendly terms and later he used to frequently telephoned her. After that on a day, he had called her at 9.30 p.m. in the night and asked her to keep her door open at 2 a.m. in the midnight and she did that and that he came to her house and had sexual relationship with her on that day. Later, he again told her to keep the door of her house open and he used to come on few other occasions as well.

Then she had opposed it and he threatened her that he is having her naked video pictures and that he would divulge it, if she does not conceive to his demands. Later he used to come on certain days and give her some rose colour beverage, which was sour in taste and she objected to drinking it. Then he had slapped on her face and forced her to drink it and he had also forced her to smell some white powder and when she refused, he had severely assaulted her. Later on 28.03.2016, he had threatened and had forcible sexual intercourse with her, etc. Various other allegations are made therein and had forced her to smoke and taken its video and that later on 12.04.2016, he (Thufail) had called her and then came to her house at 2a.m. along with one Asharaf and Abdul Rahman and then Asharaf had forcibly raped her and that too in the presence of Abdul Rahman. Later on 2-3 occasions, the said Abdul Rahman had forcible sexual intercourse with her. Later, Thufail had called her on 15.06.2016 and asked her to keep her door open at 2 a.m. and at that time one Muneer had come there and he threatened that he would divulge her obscene video pictures regarding sexual incidents, etc. Later, Thufail had again asked her to keep her door open and on that day, Asif had come there and again threatened about divulging her obscene video pictures and on account of the threat, he had

forcible sexual intercourse with her. Later, he also used to come on few other occasions. Thus it appears that the case set up in the FIS is that though the first sexual incident was with the consent and on later occasions, the said Thufail had threatened her to divulge her obscene video pictures and had also used force by making a drink of certain beverages and also to smoke and inhale some powders, etc. and that based on his threat, the other accused persons had forcible sexual intercourse with the lady victim, etc.

4. As mentioned hereinabove, as per the registration of the first FIR, in which Thufail and the four respondent/accused persons herein were arrayed as five accused therein. Later, the case was split up and separate crimes have been registered as Crime Nos.471, 472, 473 & 474 of 2020, in which the abovesaid Asharaf, Abdul Rahman, Muneer & Asif have been arrayed as 1st accused (A1) respectively in each of these cases and the 2nd accused (A2) in each of these four cases is the abovesaid Thufail (who thereafter appears to have been arrayed as the sole accused in the first FIR Crime No.468/2020). Further it appears that Sec.164 Cr.P.C statement of the lady de facto complainant was also recorded on 01.09.2020 by the Judicial First Class Magistrate's Court-I, Hosdurg. After registration of the

first FIR on 31.08.2020, the statement of the lady de facto complainant under Sec.164 Cr.P.C has been recorded on the next day (01.09.2020) before the learned Magistrate concerned.

5. Each of the abovesaid accused No.1 in the abovesaid Crime Nos. 471, 472, 473 & 474 of 2020, viz. Asharaf, Abdul Rahman, Muneer & Asif, had thereafter filed applications seeking anticipatory bail under Sec.438 of the Cr.P.C before the Sessions Court, Kasaragode. The anticipatory bail applications concerned have been numbered as Crl.M.P.Nos.1217/2020, 1219/2020, 1220/2020 & 1218/2020 respectively, from which the present Crl.M.C Nos.4603/2020, 4638/2020, 4630/2020 & 4644/2020 respectively have been filed before this Court.

6. The Sessions Court has rendered separate orders on the same day (viz., 18.09.2020), have allowed the plea for anticipatory bail of each of these accused persons concerned. Annexure-4 is a copy of the impugned order dated 18.09.2020 rendered by the learned Sessions Court in each of these anticipatory bail applications. It is this order at Annexure-4 allowing the anticipatory plea of each of these respondent/accused persons concerned, that is under challenge in these petitions filed under Sec.482 of the Cr.P.C

7. Heard Sri.V.Vinay, learned counsel appearing for the petitioner (lady de facto complainant), Sri.Saigi Jacob Palatty, learned Public Prosecutor appearing for the official respondents and Sri.V.S.Salim, learned counsel appearing for the contesting respondent No.2 (accused person concerned), in each of these cases has raised various contentions. It is contended that the Sessions Court has not applied its judicial mind to any of the crucial and relevant aspects in the matter and has been carried away by the mere fact that there is delay of about $4^{1/2}$ years in lodging of the FIR and without discussing even the allegations in the FIR and without even examining and considering the statement given by the lady victim on 01.09.2020 before the learned Magistrate under Sec.164 Cr.P.C and without making any application of judicial mind, the Sessions Court has mechanically come to the conclusion that the alleged sexual incidents would have happened only on the basis of consent. In that regard, it is pointed out that though the first sexual incident is stated to be on the basis of consent, all the other series of incidents involving the various accused persons have been clearly stated to be on the basis of threat, intimidation, blackmail and force and that these aspects are all the more evident from the materials in Sec.164 Cr.P.C statement given by the lady victim on

01.09.2020. The elementary factual aspects of the case has not been considered and the various case laws on the subject to decide, as to whether the sexual incidents have happened on the basis of consent or on the basis of force, etc., the Sessions Court has mechanically come to the conclusion that the incident could have happened only on the basis of consent. Further, the learned Public Prosecutor has also made submissions stating that there are various flaws and infirmities in the prosecution version, etc., without properly presenting the correct and relevant factual aspects borne out from the CD files containing vital materials. Still further, the Sessions Court has very liberally allowed the anticipatory plea without facing any stringent conditions to ensure that the accused persons does not abscond or go abroad or that they have not got any opportunity to intimidate and threaten the witnesses, more particularly, the lady victim, which was a very serious possibility. Though some of the accused persons had taken up the plea that they were abroad, the Sessions Court has not placed any condition that they should surrender their passport and that they shall not leave the State or the country, without the prior permission of the court, etc. In that regard, all what has been ordered as a condition is that they may furnish a copy of the passport at the time of execution of bond and that if the accused

is not a passport holder, he may file an affidavit to that effect.

8. Further, the learned counsel for the petitioner would point out that the investigation in this case has been sought to be manipulated by the then Investigating Officer concerned one Sri.S.Nissam, by colluding with the accused persons and further that the lady victim had narrated correct factual aspects and since the events are taken place quite some time ago, she had not given any specific dates and that the then Investigating Officer had doctored the FIS by stating therein about the dates of the alleged incidents, after earlier consulting with the accused persons to ensure that those days are days on which the accused persons concerned are actually abroad and then to enable them to put up an alibi to wriggle out of from their serious criminal culpability. Further that, very many crucial aspects stated by the victim has been deleted from the FIS registered on 31.08.2020 in these cases, in view of the illegal improvisation of the then Investigating Officer. Further that, the lady victim had come to the police station by about 11 a.m. on 31.08.2020 and the then Investigating Officer had made her to wait till about 6p.m. to 6.30 p.m. on the same day and had taken steps for the formal lodging of the FIS and the registration of the FIR only by about 6.30 p.m. on 31.08.2020. Further it is alleged that this has

been done by the abovesaid Investigating Officer to help Ashraf to get a crime registered at his instance raising allegations against her, her husband and some other persons and that the said crime at the instance of Ashraf was registered as Crime No.467/2020 of the Bakel Police Station, in which Ashraf is shown as the de facto complainant. That though the records have now been created to show as if, the said Crime No.467/2020 has been registered at 4.30 p.m., the copy of the said FIR has actually reached the jurisdictional Magistrate's Court concerned only on 03.09.2020, whereas the FIR in Crime No.468/2020, in which Thufail has been arrayed as accused, was thus belatedly registered on 31.08.2020 at 6.30 p.m., in order to make it appear as if the crime got registered at the instance of Thufail was in an earlier point of time. But that the instant FIR No.468/2020, in which the lady victim herein is the de facto complainant, has reached the Magistrate's Court on 01.09.2020 itself.

9. The petitioner's counsel has also made certain allegations that later, the lady victim and her husband had questioned the then Investigating Officer about his acts of manipulation to help the accused persons, escape from the clutches of law and he had confided certain aspects in a mobile cell conversation, which has been recorded by the lady victim

and that transcript of the said audio recorded mobile conversation of the said Investigating Officer is with the lady victim, etc. Further that, the Close Circuit Television (CCTV) maintained at the Bakel Police Station would clearly show that the lady victim was present in the said police station from 11 a.m. onwards and still the FIR was belatedly registered on the same day only at 6.30 p.m. That the lady victim had made repeated requests to the then Investigating Officer to give her copies of the transcripts of the CCTV in respect of the said police station for the day in question (31.08.2020) and since he was taken an adamant stand, she was forced to make an application on 05.10.2020 under the Right to Information Act, requesting to give all the transcript of the CCTV of the day in question, in order to prove that she was actually present in the police station on that day from 11 a.m. onwards. That the said request for getting transcripts/footages of the CCTV on the day in question has been rejected by the police authorities concerned. Further that, it is now reliably learnt that the CCTV footages of that station for the day in question has been manipulated or has been made to disappear, in order to help the then Investigating Officer to escape from the serious allegations against him, more particularly, about the deliberate belated registration of the lady

victim's FIR.

10. Further it is contended by the petitioner's counsel that the accused in Crime No.471/2020 (Muhammed Asharaf, R2 in Crl.M.C.No.4603/2020 has not stated in his anticipatory bail application filed before the Sessions Court about the so called registration of FIR No.467/2020. Further, the learned counsel for the petitioner would also point out that it is by now well settled in serious and grave offences as per Sec.376 of I.P.C, etc., though there is no statutory requirement for the Sessions Court to afford opportunity of personal hearing to the victim of sexual offences while considering the plea for anticipatory bail filed by the accused, in very grave and heinous cases, the Sessions Court has an obligation and a duty to exercise the judicial duties fairly and consciously and therefore, it cause an obligation of the Sessions Court to seriously consider whether to exercise discretion to issue notice to the victim concerned and that in the facts and circumstances of the case, in the light of the said onerous judicial duty to act fairly, the court should have afford an opportunity of being heard to the victim, especially as even the prosecutor had taken a stand in favour of the accused. That the act on the part of the Sessions Court in mechanically allowing the anticipatory bail

pleas in these cases and without even affording any opportunity of being heard to the lady victim, would vitiate the decision. Further that, there was no practical difficulty for the Sessions Court to issue notice of hearing to the petitioner, inasmuch as such notice of hearing could have been already served through the police authorities concerned and no time would have been lost in issuing notice and hearing the victim. Further that, a reading of each of these four impugned orders passed by the Sessions Court and that too on the same day (18.09.2020) granting anticipatory bail to each of these four accused persons concerned would make it clear like the day light that except stating the facts of these cases in just about two or three sentences and recording the aspect that even the prosecutor has stated that there are infirmities in the prosecution version, the Sessions Court has mechanically taken the view that the incidents could only be a case of consent and that therefore anticipatory bail has been granted by the Sessions Court, as a matter of course and not after any serious analysis of factual aspects and the legal issues and after due consideration of various aspects of the matter. Further that, a reading of the impugned orders would make it clear that the Sessions Court has not even called for and examined the CD files or has even examined the full import of the First

Information Statement and has not even perused through Sec.164 Cr.P.C statement given by the victim on 01.09.2020. Further, if the CD files have been called for, it would have been revealed that series of representations have been given by the petitioner to the police authorities concerned and that any reasonable and prudent court would have then be alerted about the seriousness and gravity of the factual aspects, etc. That thus the impugned decision is vitiated by total non-application of judicial mind and decision has been taken rather in a callous and indifferent manner, without any respect for the rights of the victim. Further that, an additional statement has also been given later by the lady victim under Sec.164 Cr.P.C before the learned Magistrate in these cases on 24.10.2020.

11. Sri.V.S.Salim, learned counsel appearing for the 2nd respondent/accused in these cases has also made his detailed submissions in the matter. He would point out that there is a long and unexplained delay of about 4 1/2 years in lodging of the FIS and the registration of the FIR and that no reasons whatsoever has been put forward either by the prosecution or by the lady de facto complainant to explain such inordinate delay. Further that, it is highly improbable that the alleged incidents would have occurred, in view of the aspect that the scene

of occurrence is the residence of the de facto complainant, where others are also residing. Further Sri.V.S.Salim, learned counsel for the accused would point out that the lady victim in these cases is A6 in Crime No.467/2020 registered on 31.08.2020 at the same police station, in which allegations are to the effect that the accused persons therein have attacked and caused injuries including fracture on the right leg and right arm and other vital parts of the body of the abovesaid Muhammed Asharaf and Muneer and that the accused in the said Crime No.467/2020 are the lady victim's husband, his friends and relatives and the lady victim herself. Sri.V.S.Salim, learned counsel for the respondent/accused herein would allege that the said crime has been committed as part of honey trap gang for extortion of money by blackmailing. Further, he would point out that except the original A1 in Crime No.468/2020, presumably whereby implying, no other accused persons had any direct or indirect previous connection with the lady victim or her family members and that the present prosecution initiated at the behest is with the view to misuse it as an act of harassment or with ulterior motives to pressurize the accused persons and that the Sessions Court has rightly maintain a balance between interior rights and liberty of the victim by passing the impugned orders and that the

very version of the lady victim in the FIS lacks credibility and believability.

12. Further, he would also urge that there is no statutory requirement in the criminal procedure code or in any other enactment that a victim in a case like this has the statutory right to be heard by the Sessions Court concerned before taking a decision on the plea for anticipatory bail by the accused. Therefore, it is left to the discretionary choice of the Sessions Court, who is considering the bail application to decide whether or not to hear the alleged victim before passing an order and the decision of the Sessions Court in not hearing the victim in the facts of this case, cannot be said to be illegal or improper. Further that, the victim has made improvements in her case after waiting for several days and therefore, this aspect has to be seriously considered in the light of the long and inordinate delay of about 4 1/2 years in the very registration of the FIR. Further that, two of the accused persons concerned herein, Muhammed Asharaf and Muneer were abroad at the time of the alleged incidents and that copies of the passports have also been annexed along with their respective anticipatory bail applications filed before the Sessions Court and that this aspect would clearly show that allegations have been made voluntarily and falsely and the fact that such false allegations have

been made as against two accused persons concerned, would also throw light on the very believability and credibility of the lady victim as regards her other allegations as against the other accused persons concerned,etc.

13. The learned Public Prosecutor has pointed out that subsequent to the grant of anticipatory bail in these cases as per the impugned order rendered by the Sessions Court on 18.09.2020, an additional statement of the lady victim on the basis of Sec.164 Cr.P.C statement has also been recorded before the learned Magistrate concerned on 24.10.2020. Further that, 13 other separate crimes viz., Crime Nos.721 to 733 of 2020 have also been registered in Kasaragode Bakel Police Station, in which based on the complaint of the present lady victim and A1 in each of those 13 cases are other accused persons concerned and that there are two accused persons in Crime No.721/2020, in which A1 is one Shahabaz and A2 is Asharaf and that sole accused has been arrayed in each of the other 12 newly registered crimes and that altogether there are 18 FIRs registered on the basis of the complaint/First Information of the petitioner/lady victim, out of which, the first five are inclusive of the abovereferred first FIR and the other four FIRs are the present four FIRs involving each of these four Crl.M.Cs. While hearing these cases on the previous occasion, this Court had requested the

learned Public Prosecutor to ascertain and more particularly, taking note of the submission of learned counsel for the petitioner/lady victim that she has filed representation/petitions both before the District Police Chief, Kasaragode as well as before the State Police Chief, praying that the investigation in each of these 18 crimes be entrusted to a different agency and the then the Investigating Officer-Nissam is having undue influence over the police personnel in Bakel Police Station. This Court had then requested the learned Public Prosecutor to ascertain and get instructions from the State Police Chief, as to whether the investigation in respect of these 18 cases as well as in the abovesaid Crime No.467/2020, in which the lady victim's husband and others are arrayed as accused at the instance of Asharaf and Muneer. So also, this Court had also requested the learned Public Prosecutor to get instructions from the District Police Chief, Kasaragode, as to whether the CCTV footages of the Bakel Police Station on the day in question (31.08.2020) could be retrieved and if so, the same may be kept in the safe custody of the District Police Chief, etc. Later, when the matter has come for consideration on the subsequent day, Sri.Saigi Jacob Palatty, learned Public Prosecutor has submitted on the basis of written instructions that after considering various aspects of the matter, the State

Police Chief of Kerala has issued letter No.U4 (a)-151334/2020/PHQ dated 02.12.2020 addressed to the Deputy Inspector General of Police, Kannur Range, *inter alia* ordering that the investigation in respect of the abovesaid 18 cases (the first five cases viz., Crime Nos.468/2020, 471/2020, 472/2020, 473/2020 & 474/2020 & the subsequently registered 13 cases viz., Crime Nos.721 to 733 of 2020) have been ordered to be entrusted to a Special investigation Team (SIT) comprising of at least 10 officers, including women officers lead by an Additional Superintendent of Police/Dy.SP and that the team members of the said SIT shall be from outside Kasaragode District and that the investigation in those cases should be under the personal supervision and monitoring of the abovesaid Deputy Inspector General of Police, Kannur range and that the investigation should be completed within three months and monthly progress report shall be furnished to the Police Headquarters in due course. Though there is a mention in the said letter dated 02.12.2020 about Crime No.467/2020 of Bakel Police Station, in which the lady victim's husband, etc., have been arrayed as accused. It is not clear whether the said crime has also been entrusted to the aforesaid Special Investigation Team. Hence, this Court had requested the learned Public Prosecutor to get further instructions

from the State Police Chief, as to whether the said Crime No.467/2020 could also be entrusted to the SIT along with the 18 cases registered on the basis of the FIS of the lady victim herein. Later, the learned Public Prosecutor has submitted on the basis of instructions of the State Police Chief that steps would also be taken to ensure that the said Crime No.467/2020 of Bakel Police Station is also transferred for investigation at the hands of the abovesaid SIT, which will be under the supervision and monitoring of the Deputy Inspector General of Police, Kannur and to be conducted by the members of the abovesaid SIT to be constituted from outside the Kasaragode District, etc.

14. As regards, the CCTV footages at Bakel Police Station on 31.08.2020, the learned Public Prosecutor has submitted that he had discussed the matter with the District Police Chief, Kasaragod, who after ascertaining the details has informed him that the CCTV footages are available for a fixed period and the hard disk of the system may not be able to accommodate more data and the software and the system is designed in such a manner that after a particular period, the data gets automatically deleted/overwritten and that as of now, the CCTV footages for the day in question (31.08.2020) is no longer available and only CCTV footages only

for the period much thereafter is now available, etc. Earlier, the learned counsel for the petitioner had also placed reliance on the directions and orders passed by this Court in the judgment dated 27.10.2017 in W.P(C)No.29332/2017 (produced as Annexure-17 in Crl.M.C No.4603/2020), wherein in an apparently similar case, this Court had directed the superior police concerned (DIG of Police) to get expert opinion, as to whether the CCTV footages of the events that happened on 23.06.2017 could be decoded from the system installed in the police station concerned and if so, urgent steps shall be taken to retrieve the footages and to preserve it. Further, the learned Public Prosecutor would submit that the State Police Chief and the Deputy Inspector General of Police, Kannur Range have ensured that all reasonable endeavours would be taken to ensure that the investigation by the Special Investigation Team will be conducted in an efficient and fair manner and will be attempted to be concluded within about three months or so, if it is so feasible and that the investigation will be under the direct supervision and monitoring of the Deputy Inspector General of Police and that the team members of the SIT will be from outside Kasaragode District, since various allegations have been made by the victim and her family members against the present

Investigating Agency. Further that, he does not have any factual instructions, more particularly, about the technical aspects about the feasibility of decoding of the CCTV footage, as mentioned in the abovesaid judgment dated 27.10.2017 in W.P(C)No.29332/2017 and in that judgment also this Court has specifically directed that expert opinion may be obtained, as to whether such decoding is feasible and steps to retrieve and to preserve the CCTV footages may be taken, if it is feasible and that he is not now in a position to apprise this Court as to whether it has been found feasible and that the learned Prosecutor will discuss the matter with both the District Police Chief as well as the Deputy Inspector General of Police, Kannur range and the team head of the SIT to ensure the feasibility of decoding and retrieval of the CCTV footages on the day in question and without knowing about the technical feasibility, it may not be possible to make any submissions on those aspects and those matters may be left to the consideration of the competent police official concerned and the technical personnel, if any available for handling such issues. Further, the learned Public Prosecutor would point out that the official respondents would abide by any decision that may be taken by this Court on the issue as to the legality and propriety on the impugned anticipatory bail orders

granted by the Sessions Court.

15. Sri.V.Vinay, learned counsel for the petitioner has started his submissions by quoting from the judgment of the Apex Court rendered by Justice V.R.Krishna Iyer, in the case in ***Niranjan Singh & another v.Prabhakar Rajaram Kharote & ors.*** [1980 SCC (2) 559 = 1980 SCC (Cri.) 508 = AIR 1980 SC 785], wherein his Lordship in paragraph No.12 of the said judgment has extracted the words of Henry Clay, as follows:

> *"The arts of power and its minions are the same in all countries and in all ages. It marks its victim, denounces it; and excites the public odium and the public hatred, to conceal its own abuses and encroachments."*

The learned counsel for the petitioner has also relied on the observations in paragraph No.12 of the said judgment that it has to be remembered that a democratic state is the custodian of the people's interest and not only police interest and that the question should always be asked as to one whose side is the State and that the Rule of law is not one way traffic and the authority of the State is not for the police and against the people, etc.

16. The learned counsel for the petitioner has also placed reliance on the judgment rendered by this Court recently on 29.06.2020 in the case in ***Thankappan v. State of Kerala*** [2020 (4) KLT 709], wherein it has been held in paras 14 & 15 thereof that mere act of helpless resignation in

the face of inevitable compulsion, quiescene, non-residence, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be "consent" and that consent on the part of the lady victim as defence of the charge of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but having freely exercised a choice between resistance and assent and that consent must be an act of reason and deliberation, after weighing good and evil in each side and with the existing power to withdraw assent according to one's will and pleasure. That a legal system committed to gender equality, only sexual intercourse which are welcomed by the woman could be accepted as consensual, in order to relieve criminal culpability of rape. It will be profitable to refer to para Nos.14 to 16 of the decision of this Court in **Thankappan's case** (supra) [2020 (3) KLT 709], which reads as follows :

> *"14. It is now settled that mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive givin in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law and the consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. In other words, the consent in order to relieve an act of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the*

assent according to one's will or pleasure (See Rao Hamarain Singh Sheoji Sing v. State (1957 KLT OnLine 1424 (P & H) = 1958 Crl.L.J.563) and Uday v. State of Karnataka (2003 (1) KLT OnLine 1108 (SC) = (2003) 4 SCC 46).

15. That apart, as stated in the Declaration on the Elimination of Violence against Women made by the United Nations, violence against women, including sexual assaults, are manifestations of historically unequal power relations between men and women, which has led to domination of men over women, Sexual assaults including rape are therefore crimes of gender inequality. In social reality, sex that is actually desired by a woman is never termed consensual, for when a sexual interaction is equal, consent is not needed and when it is unequal, the consent cannot make it equal. In Meritor Savings Bank, FSB v. Mechelle Vinson et al. (477 US. 57 (1986)), the United States Supreme Court held that welcomeness and not consent, shall be the standard for sex that does not violate the rights of women consistent with gender equality. The relevant passage reads thus.

> "The fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII.... The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."

In other words, in a country like ours committed to gender equality, only sexual intercourse which are welcomed could be construed as not violative of the rights of the victim, and accepted as consensual.

16. Reverting to the facts, in the poor social background in which the victim girl was brought up, as suggestive from the name 'Thankappanachan' used by the victim girl to call the accused, the accused was a fatherly figure for the victim girl. Leaving apart the doubt created as to the age of the victim girl, there is no dispute to the fact that the victim girl was studying in 8th Standard during the relevant period. The accused was aged about 59 years and a grandfather. It has come out that the victim girl used to visit the house of the accused for watching television. It is taking advantage of the said situation that the accused had made sexual advances to her. The victim girl has given categoric evidence that while she was watching television one day, the accused closed the door of the house, pulled her to the adjacent room and had sex with her. She was also categoric in her evidence that though she attempted to make a noise, the accused prevented her from doing so by closing her mouth using his hand. The accused has no case that the first instance of sexual

intercourse was consensual. The case put forward by the accused is only that the admitted conduct of the victim girl in going to the house of the accused as and when desired by him subsequently would indicate that the latter instances of sexual intercourse were consensual. Insofar as it is established that the first instance of sexual intercourse spoken to by the victim girl was not consensual, it is immaterial as to whether the subsequent instances of sexual intercourse was consensual. Be that as it may. The victim girl deposed that she did not disclose the incidents to her mother due to fear. Similarly, she deposed that she did not disclose the incidents to anyone as she was afraid that the accused would do something to her mother and sister. In other words, it is clear from the materials on record that the victim girl was under a social and psychological hierarchical threat. In a situation of this nature, according to me, the conduct on the part of the victim girl in surrendering before the accused as and when desired by him cannot be said to be unusual or abnormal and such surrender can never be construed as consensual acts of sexual intercourse. I am fortified in this view by the observation made on rape survivors by Judith Lewis Herman, an American Psychiatrist and Researcher on Traumatic Stress in her book, Trauma and Recovery. The relevant observation reads thus:

> *"When a person is completely powerless, and any form of* resistance is futile, she may go into a state of surrender. The system of self-defense shuts down entirely. The helpless person escapes from her situation not by action in the real world but rather by altering her state of consciousness....."

Needless to say, there is no merit in the contention advanced by the learned counsel for the appellant."

17. The learned counsel for the petitioner has pointed out that, the case of the counsel for the accused that, two of the accused persons were abroad at the time of alleged incident, may not be tenable. Further that, on being queried regarding those aspects, the learned Prosecutor has pointed out that, going by the objections given by the accused "Asif" in Crl.M.P. No. 1218/2020 before the court below, as can be seen from para No.6 thereof is

that, he was employed abroad and that he was abroad on the date of alleged incident on 27.7.2016, etc. Whereas, the case set up in the written objections filed by accused "Muneer" before the court below in Crl.M.P. No. 1220/2020 as can be seen from para No.7 thereof is that, he was employed abroad and that he had gone to UAE on 7.2.2016 and returned from UAE on 15.8.2016, and that as on the date of alleged incident, he was abroad.

18. The counsel for the petitioner would point out that, no details are given by accused "Asif" as to when he had gone abroad and period he had stayed, except stating that, as on the date of alleged incident on 27.7.2016 he was abroad, whereas, the date of alleged incident therein is 27.6.2016. Further it is also submitted that, the Sessions Court in all impugned orders has stated that the one of the incident is said to have happened at 2 P.M. in the afternoon, whereas, as per FIS, it is 2 A.M. in the morning. Further it is also stated by the Sessions Court in the impugned orders that, the first FIR has been registered on 1.9.2020 whereas, in fact, it has been registered on 31.8.2020. The counsel for the petitioner would point out that, these are crucial aspects which would show that there has been total non application of judicial mind by the Sessions Court even in examining the basic factual aspects of the case, as

emerging from the materials on record.

19. At the outset it may be pertinent to refer to the scope and ambit of power of this Court to consider the plea for quashment or setting aside of a bail order granted by a subordinate like the Sessions Court, jurisdictional Magistrate Court concerned, etc. It is now too elementary to stated that, there is a fine and substantial distinction between the plea made for cancellation of bail granted in favour of an accused by the competent criminal court on the ground that, the bail conditions have been violated by the accused or some supervening incidents have happened which justify the cancellation of bail on one hand, and a plea made for setting aside, cancellation or quashment of a bail order granted by a Court on the ground that it is illegal, perverse or improper, etc. As indicated above, in the former, the task at hand is to consider as to whether the bail granted to an accused by a competent court is to be cancelled on account of misconduct of accused, like serious violation of bail conditions, or some such other supervening events which justify the cancellation of bail, as otherwise the investigation process or the trial process may be detrimentally affected. On the other hand, in the latter class, the plea is not that the bail or bail order granted to the accused is liable for cancellation on the ground of

misconduct of accused as above, but that the very bail order granted by the criminal court concerned in favour of the accused is vitiated by serious illegality or perversity, impropriety, etc.

20. The said issue has been the subject matter of consideration of a catena of decisions of the Apex Court and various High Courts including this Court. In a recent judgment rendered on 15.12.2019 in the case in ***Mahipal v. Rajesh Kumar and Ors [2020 (2) SCC 118]*** it has been held *inter alia* in paragraph No.15 thereof that, the considerations that guide the power of a superior court in assessing the correctness of an order granting bail stand on a different footing from an assessment of an application for the cancellation of bail. The correctness of an order granting bail is tested on the anvil of whether there was an improper or arbitrary exercise of the discretion in the grant of bail. The est is whether the order granting bail is perverse, illegal or unjustified. On the other hand, an application for cancellation of bail is generally examined on the anvil of the existence of supervening circumstances or violations of the conditions of bail by an accused to whom bail has been granted. Their Lordships of the Supreme Court have also relied on and reaffirmed therein the legal principles laid down by the Apex Court in the decision in ***Neeru***

Yadav v. State of U.P. And Another [(2015) 15 SCC 422].

21. Further, it has been held by the Apex Court in paragraph No.16 of the ***Mahipal's case supra [2020 (2) SCC 118]*** that, where a court considering an application for bail fails to consider relevant factors, a superior/appellate court may justifiably set aside the order granting bail and the said court is thus required to consider whether the order granting bail suffers from a non-application of mind or is not borne out from a prima facie view of the evidence on record. It is thus necessary for the superior court to assess whether, on the basis of the evidentiary record, there existed a prima facie or reasonable ground to believe that the Accused had committed the crime, also taking into account the seriousness of the crime and the severity of the punishment, etc. It has also been held by the Apex Court in paragraph No.25 of ***Mahipal's case supra [2020 (2) SCC 118]*** that, where an order refusing or granting bail does not furnish the reasons that inform the decision, there is a presumption of the non-application of mind which may require the intervention of the superior court.

22. In ***Neeru Yadav v. State of U.P. and Another [(2014) 16 SCC 508],*** Their Lordships of the Apex Court in paragraph No.13

thereof has held that, it is well settled in law that cancellation of bail after it is granted because the accused has misconducted himself or of some supervening circumstances warranting such cancellation have occurred is in a different compartment altogether than an order granting bail which is unjustified, illegal and perverse. If in a case, the relevant factors which should have been taken into consideration while dealing with the application for bail and have not been taken note of bail or it is founded on irrelevant consideration, indisputably the superior court can set aside the order of such a grant of bail. Such a case belongs to a different category and is in a separate realm. While dealing with a case of second nature, the Court does not dwell upon the violation of conditions by the accused or the supervening circumstances that have happened subsequently. It, on the contrary, delves into the justifiability and the soundness of the order passed by the Court.

23. This Court in the decision in ***State of Kerala v. P.Aboobacker [2019 (1) KHC 656 = ILR 2019 (2) Ker. 488]*** (See paragraph No.15 of KHC Report) has *inter alia* examined the issue as to whether there is any bar for this Court in exercising the powers under Sec.482 of the Cr.P.C. to set aside an order which has been passed without

ascribing any valid reasons. It has been held therein that, it needs no special emphasis to state that there is a distinction between the parameters for grant of bail and cancellation of bail. There is also a distinction between the concept of setting aside an unjustified, illegal or perverse order and cancellation of an order of bail on the ground that the accused has misconducted himself or due to the happening of certain supervening circumstances warranting such cancellation. If the order granting bail is a perverse one or passed on irrelevant materials, it can be annulled by the superior court.

24. It has been held by the Apex Court in the decision in ***Puran v. Rambilas and Another [2001 (6) SCC 338 = AIR 2001 SC 2023]*** that the High Court in exercise of powers under Sec.482 of the Cr.P.C. can interfere with the order which causes miscarriage of justice or is palpably illegal or unjustified.

25. It has also been held by this Court in the decision in ***Geetha v. State of Kerala and Another [2020 (3) KHC 238 = 2020 (3) KLT 264]*** that, it is well settled in the decisions of the Apex Court as in ***Gurcharan Singh v. State (Delhi Administration) AIR 1978 SC 179 = 1978 (1) SCC 118 = 1978 SCC (Cri) 41]*** that, in the light of the

position of the Court of Session vis-a-vis the High Court, the High Court is empowered under Sec.439(2) of the Cr.P.C. To commit a person released on bail by the Court of Session to custody, if it thinks appropriate to do so, if the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed. The relevant passage of the judgment in ***Gurcharan Singh's case supra*** dealing with said aspect reads thus:

> *".....Similarly under Section 439(2) of the new Code, the High Court or the Court of Session may direct any person who has been released on bail to be arrested and committed to custody. In the old Code, Section 498(2) was worded in somewhat different language when it said that a High Court or Court of Session may cause any person who has been admitted to bail under subsection (1) to be arrested and may commit him to custody. In other words, under Section 498(2) of the old Code, a person who had been admitted to bail by the High Court could be committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This restriction upon the power of entertainment of an application for committing a person, already admitted to bail, to custody, is lifted in the new Code under Section 439(2). Under Section 439(2) of the new Code a High Court may commit a person released on bail under Chapter XXXIII by any Court including the Court of Session to custody, if it thinks appropriate to do so. It must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the High Court. If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a- vis the High Court."*

This Court in paragraph No.10 of the decision in ***Geetha's case supra***

[2020 (3) KHC 238] held that, it is thus evident that if the order granting bail by the Court of Session is vitiated by arbitrary and wrong exercise of discretion by the Court, the same can be set at naught by the High Court under Sec.439(2) of the Cr.P.C. In other words, in order to invoke Sec.439(2) of the Cr.P.C. , it is not necessary that there shall be supervening circumstances warranting cancellation of bail not shall there be any case for the prosecution that the accused has abused the freedom by enjoying the concession of bail during the trial. An interpretation to Sec.439(2) of the Cr.P.C. as put forward by the learned counsel for the accused would lead to a situation where there will not be a remedy for the State and for persons aggrieved by orders granting bail which are vitiated by erroneous and arbitrary exercise of discretion. This Court in the decision in ***Geetha's case supra [2020 (3) KHC 238]*** then considered the question whether the impugned bail order therein is vitiated by arbitrary and wrong exercise of discretion by the Court so as to warrant interference by this Court (High Court) under Sec.439(2) of the Cr.P.C. After detailed consideration this Court held that, the impugned grant of bail in the said case on the very same day on which the accused was produced before the Court would never be in consonance with the scheme

and spirit of the POCSO Act and would be against the welfare of the children. In short, this Court held that there is no hesitation to hold that the impugned order is vitiated by erroneous and arbitrary exercise of discretion by the Court below. Though it is true that the prosecution has no case that the accused has either abused the freedom granted to him in terms of the order or violated the conditions imposed in terms of the order and the said aspect has no consequence since it is found that the order is vitiated by erroneous and arbitrary exercise of power and that even the conditions imposed in terms of the order were not adequate and sufficient to ensure a fair trial in the case. In the result, this Court allowed the plea in the Criminal Miscellaneous Cases and the impugned bail order was set aside and this Court directed to arrest the accused and commit him to custody, etc.

26. It is also pertinent to note that this Court in the decision in ***State of Kerala v. Ramesh and Others [2020 (5) KHC 285 = ILR 2020 (3) Ker. 1133]*** as held in paragraph No. 10 thereof by reiterating the dictum laid down in afore cited ***Puran v. Rambilas and Another [2001 (6) SCC 338 = AIR 2001 SC 2023]*** that, the grant of bail in a heinous crime ignoring the materials and evidence would be one of the

additional grounds on which cancellation of bail could be sought, since such an order would be against the principles of law. The legal position emerging from the precedents is that, while considering a bail application, Courts should weigh all relevant factors and should keep in mind the societal concern also. The absence of such consideration would definitely enable cancellation of bail by the higher Court, in exercise of the power under Sec.439(2) of the Cr.P.C. Further this Court in **Ramesh's case supra [2020 (5) KHC 285]** has held in paragraph No.11 thereof that, the learned Magistrate omitted to consider the fact that further investigation regarding the involvement of other accused was under way. The fact that the Sessions Court, as well as this Court had rejected the bail applications submitted by A1 to A4 and A10 was also not considered. The failure on the part of the learned Magistrate to consider these relevant factors has definitely rendered the order indefensible.

27. Now, it will also be pertinent to refer to some of the decisions regarding the issue as to whether victim has to be heard for the grant of anticipatory bail, especially grave offences as in serious cases of sexual violence, etc. At the outset it has been noted that the Apex Court in the case in ***State of Gujarat v. High Court of Gujarat [rendered by His***

Lordship Justice K.T.Thomas reported in (1998) 7 SCC 392 = AIR 1998 SC 3164] has *inter alia* observed that "*criminal justice would look hollow if justice is not done to the victim of crime*".

28. Their Lordships in the Division Bench of this Court in the case in ***George Muthoot M.G. v. State of Kerala and Others [2010 (1) KHC 329 = 2010 (1) KLT 399 = ILR 2010 (1) Ker. 441]*** has *inter alia* noted in paragraph no.34 thereof that, in the considered view of Their Lordships, the recommendations made by Dr.Justice V.S.Malimath Committee in this regard requires immediate implementation. Some of the recommendations of the committee like active participation of victim in the progress during investigation especially in heinous crimes, his participation at the time of consideration of grant of bail and being represented by a counsel even during trial are worth considering.

29. In this regard it is also very pertinent to refer to the decision of this Court rendered by the Hon'ble Justice K.Hema in the case in ***Kunhiraman K.C . v. State of Kerala [2005 KHC 673 = 2005 (2) KLT 685]*** wherein it has been held in paragraph No.12 thereof that, no court dispenses with a notice to the Prosecutor in an application under Sec.438 of the Cr.P.C., though the section does not distinctively

contemplate issuance of notice to Prosecutor or hearing of either the Prosecutor or the petitioner. There is nothing in the section to indicate that the said power can be exercised by hearing the petitioner and the Public Prosecutor alone. So, if the court feels that one more person viz., the injured or the aggrieved must also be heard, no provision in the code prohibits the court from doing so. Anyway, prohibition and restrictions in Sec.301 and other related provisions apply not to an application under Sec.438 Cr.P.C. The power vested in the Court under Sec.438 Cr.P.C. can be exercised by hearing the petitioner as well as such other party as the court may deem fit and proper, depending on the facts and circumstances of each case. It will be more pertinent to refer to the observations made by this Court in paragraph No.13 of ***K.C.Kunhiraman's case supra [2005 KHC 673 = 2005 (2) KLT 685]*** which reads as follows:

> *"13. Learned counsel appearing for the petitioner submitted that by hearing the de facto-complainant, it is likely that the Court will be prejudiced since a private complainant will be swayed with emotions to get an order in his favour and therefore, the complainant cannot be given a right of hearing. I cannot disagree with the counsel to the limited extent that an aggrieved person will be interested in his own cause and hence he will be moved by emotions. But, the court will be in a position to understand his emotions and even his over-anxiety if any, in opposing the bail application. Tears of aggrieved, whether genuine or not, cannot mystify the judicial vision and none of such matters can outweigh the court's decision to hear a party to exercise the jurisdiction in a fit and proper manner under Section 438 Cr.P.C. By allowing a complainant or an aggrieved to be heard, it cannot be said that the Court will be influenced by the emotions of the aggrieved or get prejudiced against a deserving accused. The courts can act balanced even if all the parties concerned are heard. In fact hearing of all parties concerned can only aid the Court in taking a right decision and not otherwise. Looking at the issue from any angle therefore, I find that there*

> *is no bar for hearing the complainant or the aggrieved also in an application for anticipatory bail."*

This Court in the afore cited decision in ***Geetha's case supra [2020 (3) KHC 238]*** has *inter alia* dealt within paragraph Nos. 11 & 12 thereof about the various relevant aspects in Protection of Children from Sexual Offences Act, 2012 (POCSO) and dealt with a case wherein the accused was a teacher of the school where the victim aged 11 years, an intellectually disabled girl, was studying in the same school, and held that the order of the Sessions Court granting bail was erroneous and specifically observed that the Judges need to change their mindset and should be sensitive in matters of this nature, for, lack of sensitivity would create distance between justice seeker and justice provider.

30. Now, to deal with the cases on hand, this Court at the outset is of the considered view that, after hearing both sides and after taking into consideration various aspects of the matter, there is no necessity for this Court to consider the issue as to whether this is a fit case to exercise the discretion under Sec.439(2) of the Cr.P.C., so as to cancel the bail granted by the Sessions Court and to direct the arrest of accused persons and to commit them to custody, as envisaged in that provision. This Court would only embark upon the limited task as to whether the impugned orders

rendered by the Sessions Court on 18.9.2020 granting anticipatory bail to the accused in these 4 cases is unjustified, and thus eschewing out crucial and relevant aspects of the matter, or whether it is vitiated by not taking into account the relevant aspects, etc. In that regard, this Court would limit its enquiry as to whether the decision making process on the part of Sessions Court, which led to the impugned orders rendered on 18.9.2020 is thus vitiated by illegality, impropriety or perversity, eschewing out relevant considerations, etc.

31. On examination of impugned orders as well as the various materials now placed before this Court by both sides, this Court is of the considered view that, it is true that there is delay of 4½ years in registration of FIR. However, a mere reading of the impugned order rendered by the Sessions Court on 18.9.2020 would make it clear like the day light that, other than holding that, the sexual incidents would have happened on the basis of consent of the lady victim, there is not even a remote discussion anywhere therein as to the case of the lady victim in the FIS, and also atleast in her first Sec.164 Cr.P.C. Statement given before the learned Magistrate on 1.9.2020, which a day after the registration of FIR dated 31.8.2020, and other attendant facts and circumstances to consider

the crucial issue as to whether the sexual incidents would have happened only on the basis of consent, and also as to the believability and credibility of the version of lady victim, and if it lacks believability and credibility, the reasons thereof based on the materials on hand. No such considerations is seen effected by the Sessions Court from a mere reading of the impugned orders. The Sessions Court has not made any reasonable endeavours to assess the factual materials and to decide on the issue as to the applicability or otherwise of the dictum laid down by this Court in decisions as in ***Thankappan's case supra [2020 (4) KLT 709, paras 14 & 15]*** to the facts and circumstances of this case on the crucial issue of consent.

32. It will be pertinent to refer to the aspects dealt with by the Sessions Court in arriving at the conclusion in favour of the accused for grant of anticipatory bail. Paragraph Nos.7 to 9 of the impugned order dated 18.9.2020 on Crl.M.P. No. 1217/2020 (arising out of Crime No. 471/2020 of Bakel Police Station) reads as follows:

> "*7. The Point:- The apprehension of the petitioner/first accused is that he would be tortured in the police custody, in case, he is arrested.*
>
> *8. The learned counsel for the petitioner/first accused submitted that if at all there were some instances of sexual intercourse between the petitioner/first accused and the prosecutrix, it would not amount to rape, as the prosecutrix was always be a consenting party. She is a house wife aged 25 years. Moreover, the alleged instances of rape took place during the month of March 2016. The defacto complainant lodged the complaint with the police on 1.9.2020. The police admitted that she gave some vague allegations under the guise of lodging complaint to them. Therefore, it was*

argued that there is absolutely no material to believe that the first accused had criminally intimidated the prosecutrix and raped her repeatedly as alleged.

9. The learned Public Prosecutor also fairly conceded that there are material flaw and infirmity in the prosecution version. In the said view of the matter, I am of the opinion that conditional bail can be granted to the first accused. The point is answered accordingly.

In the result, the petition is allowed and anticipatory bail is granted to the petitioner/first accused as follows:-

1. *The petitioner/first accused is directed to surrender before the investigating officer within 10 days from this day.*
2. *In the event of his arrest, he shall be released on bail by the Investigating Officer himself on executing bond for ₹.1,00,000/- (Rupees One lakh only) with two solvent sureties each for the like sum for the purpose of securing his presence for investigation/interrogation, if it is required.*
3. *The petitioner/first accused shall furnish a copy of his passport to the investigating Officer at the time of execution of the bond. If he is not a passport holder, he shall file an affidavit to that effect before the Investigating Officer.*
4. *The petitioner/first accused shall report before the Investigating Officer on very Saturday between 10 am and 11 am for a period of three months from today or till the final report in the case is filed, whichever is earlier.*"

33. Paragraph Nos.7 to 9 of the impugned order dated 18.9.2020 on Crl.M.P. No.1220/2020 (arising out of Crime No. 473/2020 of Bakel Police Station) reads as follows:

"*7. <u>The Point</u>:- The apprehension of the petitioner/first accused is that he would be tortured in the police custody, in case, he is arrested.*

8. The learned counsel for the petitioner/first accused submitted that if at all there were some instances of sexual intercourse between the petitioner/first accused and the prosecutrix, it would not amount to rape, as the prosecutrix was always be a consenting party. She is a house wife aged 25 years. Moreover, the alleged instances of rape took place during the month of June 2016. The defacto complainant lodged the complaint with the police on 1.9.2020. The police admitted that she gave some vague allegations under the guise of lodging complaint to them. Therefore, it was argued that there is absolutely no material to believe that the first accused

had criminally intimidated the prosecutrix and raped her repeatedly as alleged.

9. The learned Public Prosecutor also fairly conceded that there are material flaw and infirmity in the prosecution version. In the said view of the matter, I am of the opinion that conditional bail can be granted to the first accused. The point is answered accordingly.

In the result, the petition is allowed and anticipatory bail is granted to the petitioner/first accused as follows:-

1. *The petitioner/first accused is directed to surrender before the investigating officer within 10 days from this day.*
2. *In the event of his arrest, he shall be released on bail by the Investigating Officer himself on executing bond for ₹.1,00,000/- (Rupees One lakh only) with two solvent sureties each for the like sum for the purpose of securing his presence for investigation/interrogation, if it is required.*
3. *The petitioner/first accused shall furnish a copy of his passport to the investigating Officer at the time of execution of the bond. If he is not a passport holder, he shall file an affidavit to that effect before the Investigating Officer.*
4. *The petitioner/first accused shall report before the Investigating Officer on very Saturday between 10 am and 11 am for a period of three months from today or till the final report in the case is filed, whichever is earlier.*"

34. Paragraph Nos.7 to 9 of the impugned order dated 18.9.2020 on Crl.M.P. No.1218/2020 (arising out of Crime No. 474/2020 of Bakel Police Station) reads as follows:

"*7. <u>The Point</u>:- The apprehension of the petitioner/first accused is that he would be tortured in the police custody, in case, he is arrested.*

8. The learned counsel for the petitioner/first accused submitted that if at all there were some instances of sexual intercourse between the petitioner/first accused and the prosecutrix, it would not amount to rape, as the prosecutrix was always be a consenting party. She is a house wife aged 25 years. Moreover, the alleged instances of rape took place during the month of June 2016. The defacto complainant lodged the complaint with the police on 1.9.2020. The police admitted that she gave some vague allegations under the guise of lodging complaint to them. Therefore, it was argued that there is absolutely no material to believe that the first accused had criminally intimidated the prosecutrix and raped her repeatedly as

alleged.

9. The learned Public Prosecutor also fairly conceded that there are material flaw and infirmity in the prosecution version. In the said view of the matter, I am of the opinion that conditional bail can be granted to the first accused. The point is answered accordingly.

In the result, the petition is allowed and anticipatory bail is granted to the petitioner/first accused as follows:-

1. *The petitioner/first accused is directed to surrender before the investigating officer within 10 days from this day.*
2. *In the event of his arrest, he shall be released on bail by the Investigating Officer himself on executing bond for ₹.1,00,000/- (Rupees One lakh only) with two solvent sureties each for the like sum for the purpose of securing his presence for investigation/interrogation, if it is required.*
3. *The petitioner/first accused shall furnish a copy of his passport to the investigating Officer at the time of execution of the bond. If he is not a passport holder, he shall file an affidavit to that effect before the Investigating Officer.*
4. *The petitioner/first accused shall report before the Investigating Officer on very Saturday between 10 am and 11 am for a period of three months from today or till the final report in the case is filed, whichever is earlier.*"

35. Paragraph Nos.7 to 9 of the impugned order dated 18.9.2020 on Crl.M.P. No.1219/2020 (arising out of Crime No. 472/2020 of Bakel Police Station) reads as follows:

"*7. <u>The Point</u>:- The apprehension of the petitioner/first accused is that he would be tortured in the police custody, in case, he is arrested.*

8. The learned counsel for the petitioner/first accused submitted that if at all there were some instances of sexual intercourse between the petitioner/first accused and the prosecutrix, it would not amount to rape, as the prosecutrix was always be a consenting party. She is a house wife aged 25 years. Moreover, the alleged instances of rape took place during the month of April 2016. The defacto complainant lodged the complaint with the police on 1.9.2020. The police admitted that she gave some vague allegations under the guise of lodging complaint to them. Therefore, it was argued that there is absolutely no material to believe that the first accused had criminally intimidated the prosecutrix and raped her repeatedly as alleged.

9. The learned Public Prosecutor also fairly conceded that there are material flaw and infirmity in the prosecution version. In the said view of the matter, I am of the opinion that conditional bail can be granted to the first accused. The point is answered accordingly.

In the result, the petition is allowed and anticipatory bail is granted to the petitioner/first accused as follows:-

1. *The petitioner/first accused is directed to surrender before the investigating officer within 10 days from this day.*
2. *In the event of his arrest, he shall be released on bail by the Investigating Officer himself on executing bond for ₹.1,00,000/- (Rupees One lakh only) with two solvent sureties each for the like sum for the purpose of securing his presence for investigation/interrogation, if it is required.*
3. *The petitioner/first accused shall furnish a copy of his passport to the investigating Officer at the time of execution of the bond. If he is not a passport holder, he shall file an affidavit to that effect before the Investigating Officer.*
4. *The petitioner/first accused shall report before the Investigating Officer on very Saturday between 10 am and 11 am for a period of three months from today or till the final report in the case is filed, whichever is earlier.*"

36. It is also well settled by a series of rulings of the Apex Court in cases as in ***Ram Govind Upadhyay v. Sudarshan Singh [(2002) 3 SCC 598]*** that though an order granting bail is a discretionary order and not as a matter of course, and shall be supported by cogent reasons. It has been held by the Apex Court in the decisions as in ***Prasanta Kumar Sarkar v. Ashis Chatterjee [(2010) 14 SCC 496],*** including that in ***Neeru Yadav v. State of U.P. and Another [(2014) 16 SCC 508],*** that while considering an application for bail, the court has to exercise its discretion cautiously, judiciously and strictly in compliance with the

relevant aspects. It has been held in such cases that the factors to be borne in mind while considering an application for bail are multifarious and would also include aspects as

i. whether there is any *prima facie* or reasonable ground to believe that the accused had committed the offence;
ii. nature and gravity of the accusation;
iii. severity of the punishment in the event of conviction;
iv. danger of the accused absconding or fleeing, if released on bail;
v. character, behaviour, means, position and standing of the accused;
vi. likelihood of the offence being repeated;
vii. reasonable apprehension of the witnesses being influenced; and
viii. danger, of course, of justice being thwarted by grant of bail.

37. Thus it is clear that, no proper application of judicial mind has been made by the learned Sessions Court to atleast deal with the elementary factual aspects arising out of the impugned criminal materials, and the other attendant circumstances, to atleast make a minimum discussion about the issues of consent and to make atleast findings on that crucial issue as of consent as well as the issues of credibility and believability of versions of the prosecutrix, and to make a *prima facie* assessment of the case on hand to arrive at conclusions made in the impugned order. Therefore this Court is not hesitant to hold that the

decision making process which led to the impugned finding regarding alleged consent, is vitiated by grave illegality, perversity and impropriety in rendering such broad conclusions without even a minimum discussion. It is really painful to note that, not even a discussion of the aspects borne out from the FIS, has been made. It appears that, the impugned order does not even reflect that the Sessions Court has examined the CD files. At any rate it appears that the Sec.164 Cr.P.C. statement given by the lady victim on 1.9.2020 has not been examined or discussed. This the Court would say, on a perusal of FIS would make it clear that, though the 1st incident appears to be on the basis of consent, the victim would state the factual details of the series of subsequent incidents involving various other accused persons, and that it was done on the basis of force, intimidation and blackmail, etc. This Court is making such observation only to highlight the nature of the decision making process which led to the impugned decision.

38. True, that there is delay of 4½ years in lodging the FIR. But, that does not necessarily imply that the Sessions Court is absolved from its serious judicial and statutory duties and responsibilities cast on its shoulder to consider those aspects regarding the issue of consent judiciously and judicially. Therefore, on this point alone the impugned

orders are liable for interdiction at the hands of this Court. This the Court would say without examining the merits of the issue in any manner, but only looking at the nature of decision making process which led to the impugned orders.

39. In that regard, it is also profitable to refer to the decision of the Apex Court rendered in Criminal Appeal No. 2087/2008 wherein it has been *inter alia* held as follows:

> *"It is now a settled law that complainant can always question the order granting bail if the said order is not validly passed. It is not as if once a bail is granted by any Court, the only way is to get it cancelled on account of its misuse . The bail can be tested on its merits also."*

40. In conjunction with abovesaid aspects, it is also relevant to note that the Sessions Court has not made any discussion about the aspects borne out the FIS of the victim or the Sec.164 Cr.P.C. statement given by the victim before the learned Magistrate on the next day. This is all the more important, as the Sessions Court has recorded that the learned Prosecutor who appeared the Court below has taken the stand that the prosecution version is suffering from certain infirmities and lacunas, etc. Then, certainly the judicial duty and obligations was more onerously cast

on the shoulders of the Sessions Court in examining the CD files in its proper perspective, and then deal with the said issue, rather than mechanically jumping into conclusions and merely recording the stand of the Prosecutor.

41. It is not known the nature of details of submissions made by the learned Prosecutor to justify his view, about the alleged infirmity in prosecution version. True that, the delay in lodging FIR is 4½ years. But, what exactly was the nature of submissions made by the learned Prosecutor with reference to atleast the FIS and other relevant materials, to state that there is serious infirmity, is not known to this Court. Therefore, it is all the more incumbent upon the Sessions Court to deal with those submissions of the Prosecutor, and then should have examined the CD files, and then should have judiciously and judicially discharge onerous statutory duties and responsibilities in a case like this, which involves allegations of serious sexual violence, and that too as against quite a few persons. The approach cannot be that, merely because there is delay in lodging FIR, the version of victim is absolutely lacks credibility and believability. This Court would say so, without in any manner, making any findings regarding the merits of the issue, and the abovesaid observations are made by this Court from the

limited perspective about the nature of the decision making process involved in a case like this.

42. After hearing both sides and after noting the aforecited decisions, it is true that the Code of Criminal Procedure as it stands now or any of the enactments governing the field, has made any provision making an obligation on the part of the court dealing with anticipatory bail to afford opportunity of hearing to the victim as well in cases like the one on hand. If that be so, as already held by this Court, there is no statutory compulsion that prior notice should necessarily be served on the Prosecutor, or that both the Prosecutor and the counsel for the accused should be necessarily be heard. Those are all matters arising out of canons of fair procedure. Principles of natural justice has emerged initially from the context of adjudication by the judicial wings, and later it has been transposed to the realm of administrative law, initially in the context of conferment and exercise of quasi judicial powers, and later by extending the all pervasive concept of fairness in other realms of administrative decision making process as well. Therefore, the very origin of principles of natural justice and fairness is from the exercise of judicial powers. If that be so, this Court has no hesitation to hold that, though, it is not statutorily

obligation to hear the victim in all cases of anticipatory bail, or that even otherwise there is judicial duty emerging out of the principles of fairness, that the victims should be heard in all cases of anticipatory bail. But there cannot be any quarrel that, in the scenario of new judicial approaches in being sensitive to the victim in the criminal law due process, there is indeed a duty cast on the court dealing with anticipatory bail applications, atleast in serious and heinous cases involving offence as per Sec.302 of the IPC and cases of sexual violences as per Sec.376 of the IPC, and other provisions in the POCSO Act, etc that the Court has a duty to examine as to whether or not to exercise discretion to hear the victim before taking decision on the plea for anticipatory bail.

43. Therefore, in the light of the changed approach, there cannot be any two opinions that, the fact of the matter is that, there is gross under-representation of women in responsible positions of not only the prosecution machinery and the investigating agency but also in the judicial organs of the State. Therefore, in serious cases of sexual violence, both involving Sec.376 of the IPC and other offences affecting child victims under the POCSO Act, etc the Court has to be sensitive to the victims, and should exercise its discretion to consider seriously as to whether or not the

victim is to be heard in the facts and circumstances of the case, even though there is no statutory obligation.

44. In this context it may not be out of place to note the words of *'Susan Brownmiller'* in her book *'Against Our Will: Men, Women and Rape'* that,

> *"the body of a raped woman becomes a ceremonial battlefield, a parade ground for the victor's trooping of the colors".* She has also said as follows: *"A world without rape would be a world in which women moved freely without fear of men."*

*E*lsewhere, *'Brownmiller'* has observed as follows:

> *"Women as a class have never subjugated another group; we have never marched off to wars of conquest in the name of the fatherland. We have never been involved in a decision to annex the territory of a neighboring country, or to fight for foreign markets on distant shores. These are the games men play, not us. We want to be neither oppressors nor oppressed. The women's revolution is the final revolution of them all."*

45. One need not agree with all the views of feminists and women thinkers like "*Susan Brownmiller*". But certainly, the spirit and substance of the views should be taken into account atleast for appreciating their perspectives in the matter, so that authorities conferred with power, could also at times place

themselves in the shoe of woman concerned, and make an attempt to see things from their prisms. The necessity for the Courts to be sensitive to the victims in cases of sexual violence, need not be reiterated. Therefore, in serious and grave cases of sexual violence, it is indeed the obligation and duty of the criminal court concerned to apply its judicial mind to ascertain and decide whether or not to exercise discretion to afford opportunity of being heard to the lady victims in such cases, even if there is no statutory duty cast in that regard as per the provisions of the Cr.P.C. or the applicable laws governing the field.

46. It is true that, it is only in a very few enactments as in the Scheduled Castes/ Scheduled Tribes (Prevention of Atrocities) Act, 1989, as amended recently, that there is an obligation to hear the victim in these cases. So also, the Parliament has made recent amendments to the Muslim Women (Protection of Rights on Marriage) Act, 2019 (Central Act No.20 of 2019), dealing with offences arising out of acts done in prohibition of divorce by pronouncement of Thalaq by Muslim husbands, wherein a statutory provision has been made in Sec.7(c) thereof that, no person accused of an offence punishable under that Act shall be released on bail unless the Magistrate, on an application filed by the accused and after

hearing the married Muslim woman upon whom talaq is pronounced, is satisfied that there are reasonable grounds for granting bail to such person. Merely because, such provisions as in the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989, and the Muslim Women (Protection of Rights on Marriage) Act, 2019, are not introduced by way of amendment to Cr.P.C. or other relevant enactments, does not cast away obligation of the Courts, to consider whether discretion is to be exercised as to whether or not such hearing is to be granted in serious and grave offences as above mentioned. In the facts of the case it may be true that there is delay of 4½ years in lodging the FIS. But, serious and grave allegations are made by the lady victim about a series of incidents which now has led to the registration of not only the above mentioned 5 cases, but also additional 13 other cases. Atleast at the time when the impugned bail orders were granted on 18.9.2020, there were 5 cases on hand. After anxious consideration of the facts and circumstances of the case, and after taking into consideration the serious submissions made on rival sides, this Court is of the considered view that, in the facts and circumstances of the case, the Sessions Court ought to have considered as to whether or not discretion should have exercised to hear the victim and

that the refusal of Sessions Court in exercising discretion and in not hearing the lady victim in these cases, amounts to serious impropriety and unreasonableness. Therefore, the decision making process of the learned Sessions Court in having taken the decision as per the impugned orders without hearing the victim is vitiated in the facts and circumstances of this case, and therefore the impugned order are liable for interdiction on that score as well.

47. The Sessions Court has also not applied its judicial mind as to whether custodial interrogation of the accused is necessary in these cases. Further it is also to be noted that, the Sessions Court in the impugned order has not placed any effective conditions to deal with the contingency of the accused persons threatening and intimidating witnesses including the lady victim, and also to deal with the scenario that some of the accused having Passports and going abroad, etc. In such cases, the Courts should consider as to whether necessary directions should be issued to ensure that the accused persons does not enter into the territorial limits of the Police Station where the lady victim and her family members are residing or working, and also to ensure that the Passports of the accused persons are duly surrendered with the embargo that they shall not travel abroad until

the conclusion of trial without the permission of the competent criminal court concerned. So also, conditions could also be contemplated to ensure that the possibility of intimidation of lady victim is taken into account, and conditions could be placed to ensure that the investigating agency deputes Police Constable/Woman Police Constable on a monthly basis, etc to go to the residence of the lady victim and to ascertain from her and family members whether they have been subjected to any serious intimidation or threat, and also as to whether it anything such adverse is brought to the notice of investigating agency, then to direct them to take immediate steps to conduct appropriate enquiry and then to ascertain the truth of the matter, and then to immediately file requisite application for cancellation of bail which would then be considered by the competent criminal court concerned after hearing all the affected parties concerned and in accordance with law, etc. No such conditions are seen even remotely considered or imposed in the impugned orders. The impugned orders are thus vitiated for not having considered such crucial and relevant aspects.

48. As already stated herein above, this Court is not in a position to take the view that, the extra ordinary powers conferred under Sec.439 of

the Cr.P.C. is to be invoked in the facts and circumstances of the case. However, this Court is of the considered view that, the impugned decision making process on the part of the Sessions Court in having arriving at conclusions and in having passed the impugned orders on 18.9.2020 is vitiated by illegality, impropriety and perversity. So also, the impugned orders suffer from not taking into consideration various relevant aspects that are not mentioned hereinabove. Hence, for the above said reasons stated hereinabove, this Court is of the considered view that, the inherent extra ordinary powers conferred on this Court under Sec.482 of the Cr.P.C. could be invoked in these cases, as the impugned orders are only to be viewed as illegal, improper and perverse, as the very decision making process on the basis of which the said impugned orders have been rendered, are so vitiated.

49. Since the impugned decision making process has been so vitiated, it may not be right and proper for this Court to embark upon an enquiry and find out and determine the merits of the case, and then pass an order one way or the other, substituting the impugned orders of the Sessions Court. That, the considered judgment of this Court may not be called for in this case, and the reasonable, proper and proportionate way of

dealing the case would be to remit the matter to the court below concerned for consideration and decision afresh, after taking into consideration all relevant aspects of the case and after granting reasonable opportunity of being heard not only to the accused persons and prosecution agency, but also to the lady victim as well. Hence, for effectuating such a remit, the impugned orders are liable for interdiction by quashment, as the impugned orders are vitiated by illegality, perversity and impropriety for the reasons stated hereinabove.

50. In that view of the matter it is ordered in the interest of justice that, the impugned orders dated 18.9.2020 rendered by the Sessions Court, Kasargod, on Crl.M.P. Nos. 1217, 1218, 1220 & 1219 of 2020 will stand set aside and quashed. Consequently, it is ordered that the said Crl.M.P. Nos. 1217, 1218, 1220 & 1219 of 2020 will stand remitted to the court below concerned for consideration and decision afresh. Since the impugned orders dated 18.9.2020 granting bail has thus been quashed and set aside, needless to say, all consequential steps taken in pursuance thereof, like execution of bail bonds etc, will also stand cancelled and rescinded.

51. Since, it appears from the record that the impugned orders have been rendered by the Principal Sessions Court, Kasargod and since the

learned Principal Sessions Court has already taken a view in the matter, this Court is of the considered view that the interest of justice would warrant that, in order to ensure that the matter is examined afresh and independently, that the matter is remitted so as to be decided by the appropriate Sessions Court concerned other than the Principal Sessions Court concerned who has rendered the impugned orders.

52. It is brought to the notice of this Court that, the 1st Additional Sessions Court, Kasargod, is authorized and notified to deal with cases of sexual violence against women and children. In that view of the matter it is ordered in the interest of justice that, in order to ensure that the matter is examined afresh and independently, the abovesaid Crl.M.P. Nos. 1217, 1218, 1220 & 1219 of 2020 on the file of the Sessions Court, Kasargod, will stand remitted for consideration and decision afresh by the 1st Additional Sessions Court, Kasargod.

53. It is noted hereinabove that, this Court has already been apprised by this Court by the learned Prosecutor that, the State Police Chief has already passed an order entrusting the investigation of these cases apart from other cases to the Special Investigation Team (SIT), to be supervised and monitored by the Deputy Inspector General of Police,

Kannur, with the condition that the members of the SIT should be constituted from police personnel outside Kasargod district, in view of allegations raised against the present investigation agency at Kasargod.

54. It is not known as to when the investigation will be actually entrusted to the SIT, as it may take some time as the SIT is to be constituted by the Deputy Inspector General of Police, Kannur, from police personnel outside Kasargod district. In the interregnum, it is for the D.I.G. of Police, Kannur Range and the District Police Chief, Kasargod, to ensure that matters are properly monitored and supervised, so that the prosecution agency is properly instructed in these cases before making submission of the prosecution before the 1st Additional Sessions Court, Kasargod, on the matters that are remitted.

55. Accordingly it is ordered that, the Principal Sessions Court, Kasargod, will immediately make sure that the entire case papers in relation to the abovesaid anticipatory bail pleas are placed before the 1st Additional Sessions Court, Kasargod, without any further delay. The 1st Additional Sessions Court, Kasargod, will

thereafter issue notice of hearing to the applicant/accused persons concerned, the learned Public Prosecutor and the lady victim, and then may ensure that the submissions of all the parties concerned are duly heard and considered, and a well considered decision is taken on the abovesaid anticipatory bail applications in accordance with law, without much delay, and within a reasonable time limit that may be appropriately fixed by the 1st Additional Sessions Court, Kasargod, as it thinks it fair and proper taking note of the overall facts and circumstances of the case, preferably within a period of 4 weeks from the date of receipt of the case papers along with copy of this order.

56. Further it is also ordered that, since the State Police Chief has already ordered that the investigation in respect of all the 18 cases including the abovesaid 5 cases have already been entrusted to the SIT to be constituted by the Deputy Inspector General of Police, Kannur, from police personnel outside Kasaragod district, and as 4 such cases have now been remitted by this Court to the 1st Additional Sessions Court, Kasargod, it is ordered that anticipatory bail pleas in respect of all other cases should

also be placed by the Principal Sessions Court, Kasargod, before the 1st Additional Sessions Court, Kasargod, for consideration and decision thereon. In other words, in order to ensure consistency in the judicial process, all such other bail pleas in all the other cases may be heard and decided by the 1st Additional Sessions Court, Kasargod.

57. Before parting with this case, some incidental observations and directions may also be called for in the facts and circumstances of this case. The learned Prosecutor has already submitted on the basis of instructions that, the State Police Chief would also pass appropriate orders to ensure that the investigation in respect of all crimes including Crime No.467/2020 of Bakel Police Station, (in which the defacto complainant is 'Asharaf' and in which the accused persons are the husband of the lady victim and others), will also be entrusted to the SIT to be constituted by the Deputy Inspector General of Police, Kannur, from police personnel outside Kasargod district.

58. Taking note of these aspects, it is ordered that, the State Police Chief as well as the Deputy Inspector General of Police will ensure that necessary orders and proceedings are rendered to ensure that the investigation in respect of Crime No.467/2020 of Bakel Police Station, in

which Asharaf is the defacto complainant, is also entrusted with the abovesaid SIT to be constituted by the Deputy Inspector General of Police, Kannur.

59. If there is some delay in actually handing over the investigation to the SIT, and the 1st Additional Sessions Court, Kasargod, takes a view that the orders on the remitted anticipatory bail pleas are to be decided without much delay, then it should be ensured that necessary instructions to the Prosecutor are furnished under the direct monitoring and supervision of the D.I.G. of Police, Kannur Range, and the District Police Chief, Kasargod (so long as the actual process of taking over the investigation by the SIT is not by then completed) so that the Prosecutor is also able to examine all issues in proper perspective and then to make considered submissions before the 1st Additional Sessions Court, Kasargod.

60. Further, the counsel for the petitioner has fervently urged that, this Court should pass orders to ensure that the CC TV footages of the Bakel Police Station on the day in question (31.8.2020) is also decoded and retrieved by the officials concerned without any further delay, as otherwise, the lady victim will not be able to prove her presence in the Police Station on 31.8.2020 from 11 A.M. onwards, and that this would seriously affect

her case that the very FIR and FIS have been manipulated and doctored by the then I.O., in the manner indicated hereinabove, in order to deliberately help the accused persons to bring out with cases of alibi etc.

61. This Court has already noted the submissions of the learned Prosecutor in that regard. All what is required to be observed is that, taking note of abovesaid aspects, it is ordered that the Deputy Inspector General of Police, Kannur, and the team head of the SIT may take necessary steps to immediately get expert opinion as to whether the CC TV footages of the Bakel Police Station, Kasaragod, for the day in question (31.8.2020), could be decoded from the system, and if it is so feasible, then urgent steps will have to be taken to retrieve and reserve such footages. Further, this Court need not deal with other allegations raised by the lady victim regarding the alleged doctoring and manipulation by the then I.O., etc and all those aspects should also be given serious consideration at the hands of the Deputy Inspector General of Police, Kannur, as well as the team head of the SIT, to have an exhaustive investigation so as to ferret out the truth, so that maximum confidence is reposed in the public and all stakeholders concerned, about the fairness and efficiency of the investigation to be conducted by the SIT.

62. The petitioner has also made submissions that the SIT should seek the assistance of the Cyberdome Unit or Hi-Tech Cell of the State Police agency. The counsel for the petitioner has also made certain pleas regarding the transcripts of alleged audio mobile conversation between the lady victim and the then Investigating Officer 'Nisam', and that this Court need not get into those issues except to say that, it is for the lady victim concerned to raise all those aspects before the Deputy Inspector General of Police, Kannur, as well as the team head of the SIT, in an appropriate manner and it is for the said competent police officials concerned to examine all those issues and act in accordance with law, so that the basic task of the investigating agency so as to ferret out the truth of the matter is discharged by them in a fair and efficient manner, and in accordance with law.

63. Before parting with these cases, this Court would only again reiterate that, this Court has not examined the merits of the controversy in any manner, and has only examined the limited issue as to whether the decision making process embarked upon the learned Sessions Court in rendering the impugned orders dated 18.9.2020 is vitiated by illegality, impropriety and perversity, etc and the limited issue as to whether the

matter would interdiction at the hands of this Court by exercise of the powers under Sec.482 of the Cr.P.C. and none of the observations and findings made by this Court shall be construed as an opinion by this Court on the merits of the controversy, and the anticipatory bail pleas now remitted to the 1st Additional Sessions Court, Kasargod, is to be independently and fairly considered afresh by the said Court after hearing all the parties concerned including the lady victim, in accordance with law.

With these observations and directions, the above Criminal Miscellaneous Cases will stand disposed of.

Sd/-

ALEXANDER THOMAS,
JUDGE

vgd/MMG

APPENDIX OF Crl.MC 4603/2020

PETITIONER'S/S EXHIBITS:

ANNEXURE I	**TRUE COPY OF THE FIR ALONG WITH FIS IN CRIME NO.468/2020 OF BAKEL POLICE STATION**
ANNEXURE II	**TRUE COPY OF THE FIR IN CRIME NO.471/2020 OF Bakel POLICE STATION**
ANNEXURE III	**TRUE COPY OF THE FIR IN CRIME NO.467/2020 OF BAKEL POLICE STATION**
ANNEXURE IV	**CERTIFIED COPY OF THE ORDER DATED 18.09.2020 IN CR.M.P.NO.1217/2020 OF SESSIONS COURT, KASARGODE.**
ANNEXURE V	**TRUE COPY OF THE NEWS REPORT PUBLISHED IN DESHABHIMANI NEWSPAPER,DATED 24.09.2020**
ANNEXURE VI	**TRUE COPY OF THE REPRESENTATION DATED 05.10.2020 SUBMITTED TO THE 4TH RESPONDENT**
ANNEXURE VII	**TRUE COPY OF THE REPRESENTATION DATED 07.10.2020 SUBMITTED TO THE STATE POLICE CHIEF.**

ANNEXURE VIII	**THE TRUE COPY OF THE DELIVERY CONSIGNMENT REPORT FROM THE WEBSITE OF INDIA POST WITH REGARD TO THE SERVICE OF NOTICE TO THE 2ND RESPONDENT**
ANNEXURE IX	**THE TRUE COPY OF THE SCREENSHOT PICTURE TAKEN FROM YOU TUBE VIDEO SHOWING THE ACCUSED BY NAME MOHAMMED ASIF K SHOWING HIS PASSPORT**
ANNEXURE X	**THE TRUE COPY OF THE SCREENSHOT PICTURE TAKEN FROM YOUTUBE VIDEO SHOWING THE ACCUSED BY NAME MOHAMMED ASAIF K SHOWING HIS PASSPORT**
ANNEXURE XI	**THE TRUE COPIES OF THE RTI APPLICATIONS DATED 25.09.2020**
ANNEXURE XII	**THE TRUE COPY OF THE REPRESENTATION DATED 12.10.2020 BEFORE THE STATE POLICE CHIEF**
ANNEXURE XIII	**THE TRUE COPY OF THE REPLY DATED 04.11.2020 UNDER RTI ACT ISSUED BY THE OFFICE OF THE 3RD RESPONDENT**
ANNEXURE XIV	**THE PETITIONER HAD PREFERRED AN APPEAL UNDER RTI DATED 17.11.2020**
ANNEXURE XV	**THE TRUE COPY OF THE FIR & FIS IN CRIME NO.721/2020 DATED 17.10.2020 OF BAKEL POLICE.**
ANNEXURE XVI	**THE TRUE COPY OF THE RELEVANT PAGE OF THE GENERAL DIARY FOR THE DATE 31.08.2020 RECEIVED UNDER RTI**
ANNEXURE XVII	**THE TRUE COPY OF THE JUDGMENT DATED 27.10.2017 IN WPC NO.29332/2017**
ANNEXURE XVIII	**THE TRUE COPY OF THE CMP NO.2429/2020 DATED 16.11.2020 FILE DBEFORE THE JFCM-II, HOSDURG**

APPENDIX OF Crl.MC 4630/2020

PETITIONER'S/S EXHIBITS:

ANNEXURE I	**TRUE COPY OF THE FIR ALONG WITH FIS IN CRIME NO.468/2020 OF BAKEL POLICE STATION**
ANNEXURE II	**TRUE COPY OF THE FIR IN CRIME NO. 473/2020 OF BAKEL POLICE STATION,**
ANNEXURE III	**TRUE COPY OF THE FIR IN CRIME NO. 467/2020 OF BAKEL POLICE STATION,**
ANNEXURE IV	**CERTIFIED COPY OF THE ORDER DATED 18.09.2020 IN CR.M.P NO.1220/2020 OF SESSIONS COURT, KASARAGOD.**
ANNEXURE V	**THE TRUE COPY OF THE NEWS REPORT PUBLISHED IN DESHABHIMANI NEWSPAPER, DATED 24.09.2020.**
ANNEXURE VI	**TRUE COPY OF THE REPRESENTATION DATED 05.10.2020 SUBMITTED TO THE 4TH RESPONDENT.**
ANNEXURE VII	**TRUE COPY OF THE REPRESENTATION DATED 07.10.2020 SUBMITTED TO THE STATE POLICE CHIEF.**
ANNEXURE VIII	**THE TRUE COPY OF THE DELIVERY CONSIGNMENT REPORT FROM THE WEBSITE OF INDIA POST WITH REGARD TO THE SERVICE OF NOTICE TO THE 2ND RESPONDENT**

APPENDIX OF Crl.MC 4638/2020

PETITIONER'S/S EXHIBITS:

ANNEXURE 1	**TRUE COPY OF THE FIR ALONG WITH FIS IN CRIME NO. 468/2020 BAKEL POLICE STATION**
ANNEXURE II	**TRUE COPY OF THE FIR IN CRIME NO. 472/2020 OF BAKEL POLICE STATION**
ANNEXURE III	**TRUE COPY OF THE FIR IN CRIME NO. 467/2020 OF BAKEL POLICE STATION**
ANNEXURE IV	**CERTIFIED COPY OF THE ORDER DATED 18-09-2020 IN CR.M.P NO.1219/2020 OF SESSIONS COURT, KASARGODE**
ANNEXURE V	**THE TRUE COPY OF THE NEWS REPORT PUBLISHED IN DESHABHIMANI NEWSPAPER, DATED 24-09-2020**
ANNEXURE VI	**TRUE COPY OF THE REPRESENTATION DATED 05-10-2020 SUBMITTED TO THE 4TH RESPONDENT**
ANNEXURE VII	**TRUE COPY OF THE REPRESENTATION DATED 07-10-2020 SUBMITTED TO THE STATE POLICE CHIEF.**
ANNEXURE VIII	**THE TRUE COPY OF THE DELIVERY CONSIGNMENT REPORT FROM THE WEBSITE OF INDIA POST WITH REGARD TO THE SERVICE OF NOTICE TO THE 2ND RESPONDENT**

APPENDIX OF Crl.MC 4644/2020

PETITIONER'S/S EXHIBITS:

ANNEXURE I	**TRUE COPY OF THE FIR ALONG WITH FIS IN CRIME NO.468/2020 OF BAKEL POLICE STATION.**
ANNEXURE II	**TRUE COPY OF THE FIR IN CRIME NO. 474/2020 OF BAKEL POLICE STATION.**
ANNEXURE III	**TRUE COPY OF THE FIR IN CRIME NO. 467/2020 OF BAKEL POLICE STATION.**
ANNEXURE IV	**CERTIFIED COPY OF THE ORDER DATED 18/09/2020 IN CR. MP NO.1218/2020 OF SESSIONS COURT, KASARAGOD.**
ANNEXURE V	**THE TRUE COPY OF THE NEWS REPORT PUBLISHED IN DESHABHIMANI NEWSPAPER, DATED 24/09/2020.**
ANNEXURE VI	**TRUE COPY OF THE REPRESENTATION DATED 05/10/2020 SUBMITTED TO THE 4TH RESPONDENT.**
ANNEXURE VII	**TRUE COPY OF THE REPRESENTATION DATED 07/10/2020 SUBMITTED TO THE STATE POLICE CHIEF.**
ANNEXURE VIII	**THE TRUE COPY OF THE DELIVERY CONSIGNMENT REPORT FROM THE WEBSITE OF INDIA POST WITH REGARD TO THE SERVICE OF NOTICE TO THE 2ND RESPONDENT**