



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

WEDNESDAY, THE 20<sup>TH</sup> DAY OF SEPTEMBER 2023 / 29TH BHADRA, 1945

BAIL APPL. NO. 144 OF 2023

CRIME NO.59/2023 OF VADAKKANCHERY POLICE STATION

PETITIONER/ACCUSED:

XXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXX

BY ADVS.

K.K.DHEERENDRAKRISHNAN

N.P.ASHA

R.HARISHANKAR

S.RAJEEV

B.RAMAN PILLAI (SR.)

RESPONDENT/STATE:

- 1 STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. (CRIME NO. UNKNOWN OF VADAKKANCHERY POLICE STATION, PALAKKAD DISTRICT), PIN - 682031
- 2 STATION HOUSE OFFICER, VADKANCHERRY POLICE STATION, PALAKKAD-, PIN - 678683
- 3 XXXX IS IMPEADED AS PER ORDER DATED 23-08-23 BY ADVS.SR.PUBLIC PROSECUTOR SRI.HRITHWIK NIKITA J. MENDEZ, P.M.RAFIQ M.REVIKRISHNAN, AJEESH K.SASI SRUTHY N. BHAT, RAHUL SUNIL SRUTHY K.K, P.VIJAYA BHANU (SR.)

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 23.08.2023, ALONG WITH Bail Appl..2157/2023, THE COURT ON 20.09.2023 DELIVERED THE FOLLOWING:





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"C.R."

**O R D E R**

Dated this the 20<sup>th</sup> day of September, 2023

Does sub-section (4) of Section 438 of the Code of Criminal Procedure create an absolute bar in granting pre-arrest bail to an accused involved in the offence of rape of a minor girl? – This is the important question that arises for consideration in these bail applications.

2. The applicants in both cases who allegedly committed the offence, among other things, punishable under Section 376-AB of the Indian Penal Code (for short, IPC) invoked the jurisdiction of this Court under Section 438 of the Code of Criminal Procedure (for short, Cr.P.C) seeking pre-arrest bail.

3. The facts in both cases are almost identical. The applicants are alleged to have committed penetrative sexual assault on their own minor daughters. The crimes were registered pursuant to the complaint of the mother of the victims. The applicants totally deny the allegations. They contend that a false case has been foisted against them at the behest of their wives



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to deny the custody of the minor victim, which they are fighting at the Family Court.

4. I have heard the learned counsel for the applicant in BA No.144/2023 -Sri.B. Raman Pillai and Sri.S.Rajeev, the learned counsel for the applicant in BA No.2157/2023 – Sri. Shibin K.F., the learned Senior Counsel for the defacto complainant in BA No.144/2023 - Sri. P.Vijayabhanu and the learned Senior Public Prosecutor - Sri. C.S.Hrithwik

5. The learned counsel for the applicants Sri.B. Raman Pillai, Sri.S.Rajeev and Sri.Shibin K.F submitted that the applicants are innocent of the offences alleged against them and they have been falsely implicated in the case. The counsel further submitted that no materials are on record to connect the applicants with the alleged crime; hence, they are entitled to get pre-arrest bail. The learned Senior Public Prosecutor Sri. C.S.Hrithwik as well as the learned Senior Counsel for the defacto complainant Sri. Vijayabhanu, on the other hand, submitted that the case diary in BA No.144/2023 reveals that the accusation made against the applicant therein is very serious in nature, it *prima facie* shows a premeditated criminal act on his part and his



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custodial interrogation is necessary for the investigation.

6. The learned Senior Public Prosecutor Sri.C.S.Hrithwik further submitted that sub-section (4) of Section 438 of Cr.P.C, explicitly excludes the application of the provision relating to pre-arrest bail in relation to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of IPC and inasmuch as the offences alleged in both cases include Section 376-AB of IPC as well, the applications for pre-arrest bail is not maintainable. In reply to the said argument, the learned counsel for the applicant in BA No.144/2023 Sri.S.Rajeev submitted that the exclusion of pre-arrest bail provisions by sub-section (4) of Section 438 of Cr.P.C would not constitute an absolute bar for the grant of bail if a *prima facie* case of commission of the offences mentioned therein is not made out or if the allegations are patently false or malafide. Reliance was placed on the three-Judge Bench decision of the Apex Court in ***Prathvi Raj Chauhan v. Union of India and Others*** [(2020) 4 SCC 727]. Referring to Sections 60A and 41 of Cr.P.C. and Section 26 of IPC, the learned counsel for the



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applicant in BA No.2157/2023 Sri.Shibin K.F submitted that the bar under sub-section (4) of Section 438 would attract only in a case where the information received by the police regarding the commission of the offence by the accused is credible and based on that credible information, there are reasons to believe that the accused has committed the offence.

7. Before dealing with the merits of the cases, I will advert to the plea of maintainability raised by the learned Senior Public Prosecutor based on Section 438(4) of Cr.P.C.

8. Section 438 of the Cr.P.C. provides for issuing directions for granting bail to a person apprehending arrest. The amendment [Code of Criminal Procedure Amendment Act, 2018] introduced to Section 438 (4)] reads as follows:

*“438(4). Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code.”*

9. A plain reading of the above provision indicates that it does not impose an absolute fetter to the grant of pre-arrest bail



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concerning the offences stated therein. The only restriction provided is that the provision regarding pre-arrest bail (Section 438) shall not apply to any case “involving the arrest” of any person on accusation of having committed an offence under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of IPC. The word “involving arrest” in sub-section (4) is significant. It must be read in conjunction with Sections 60A and 41 of Cr.P.C. and Section 26 of IPC.

Section 60A of Cr.P.C. reads as follows:

*“No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest.”*

Section 41(1) (ba) of Cr.P.C., which deals with the arrest of a person, reads as follows:

*“(1) Any police officer may, without an order from a Magistrate and without a warrant, arrest any person—*

*xxxxxx xxxxxxxx xxxxxxxxx*

*(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years, whether with or without fine or with death sentence, and the police officer has reason to*



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*believe on the basis of that information that such person has committed the said offence."*

10. Thus, the arrest could be effected only if there was 'credible information' and the police officer had 'reason to believe' that the offence had been committed and that such arrest was necessary. In *Lalita Kumari v. Government of U.P.* (AIR 2014 SC 187), the Apex Court distinguished the kind of 'information' under Sections 154 and 41 of Cr.P.C. as follows:

*"64. The legislature has consciously used the expression "information" in S.154(1) of the Code as against the expression used in S.41(1)(a) and (g) where the expression used for arresting a person without warrant is "reasonable complaint" or "credible information". The expression under S.154(1) of the Code is not qualified by the prefix "reasonable" or "credible".*

11. The word 'reason to believe' in Section 41 has not been defined in Cr.P.C. Section 2(y) of Cr.P.C. says that words and expressions used in the Code and not defined but defined in IPC have the meanings respectively assigned to them in that Code. Section 26 of IPC explains the meaning of the word "reason to believe". It reads thus:

*"26. A person is said to have "reason to believe" a*



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*thing, if he has sufficient cause to believe that thing but not otherwise."*

12. The expression 'reason to believe' in Section 41 Cr.P.C. had to be read in the light of Section 26 I.P.C. and the judgments interpreting the said expression. Explaining the expression 'reason to believe', the Apex Court in ***A.S.Krishnan v. State of Kerala*** [(2004) 11 SCC 576] held thus:

*"Under the IPC, guilt in respect of almost all the offences is fastened either on the ground of "intention" or "knowledge" or "reason to believe". We are now concerned with the expressions "knowledge" and "reason to believe". "Knowledge" is an awareness on the part of the person concerned indicating his state of mind. "Reason to believe" is another facet of the state of mind. "Reason to believe" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing. "Reason to believe" is a higher level of state of mind. Likewise "knowledge" will be slightly on higher plane than "reason to believe". A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same."*

13. The Apex Court has consistently held that the exercise



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of the power of arrest requires reasonable belief about a person's complicity and also about the need to effect arrest. In *Joginder Kumar v. State of U.P. and Others* [(1994) 4 SCC 260], it was held that no arrest can be made merely because it is lawful to do so, and the exercise of power must be for a valid purpose. In *Siddharam Satlingappa Mhetre v. State of Maharashtra* [(2011) 1 SCC 694], it was held that arrest should be the last option, and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. It was observed that the court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused, and these allegations are corroborated by other material and circumstances on record. While granting general guidelines on arrest, detention and bail, the Apex Court in *Satender Kumar Antil v. CBI and Another* (AIR 2022 SC 3386) emphasised that the Courts would have to satisfy themselves on the compliance of Sections 41 and 41A of Cr.P.C. It was held that any noncompliance would entitle the accused to grant bail. In *Arnesh Kumar v. State of Bihar and Another* [(2014) 8 SCC 273], the Apex Court, referring to the amendment of law



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in Section 41 Cr.P.C., in the light of recommendations of the Law Commissions, directed that arrest may be justified only if there is 'credible information' or 'reasonable suspicion' and if the arrest was necessary to prevent further offence or for proper investigation or to check interference with the evidence. It was observed thus:

*"8. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of S.41 of Cr. P.C."*

14. The Law Commission in July 2002 severely criticised the police of our country for the arbitrary use of the power of arrest, which, the Commission said, is the result of the vast discretionary powers conferred upon them by Cr.P.C. The



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Commission expressed concern that there is no internal mechanism within the Police Department to prevent misuse of law in this manner and the stark reality that the complaint lodged in this regard does not bring any result. In *Joginder Kumar* (supra), the three-judge Bench of the Apex Court has referred to the 3<sup>rd</sup> Report of the National Police Commission, in which it is mentioned that, by and large, nearly 60% of the arrests by the police in India were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails.

15. A police officer is authorised to detain a person for a maximum of 24 hours as per Section 167 of Cr.P.C. Thereafter, such person is to be produced before the Magistrate. Again, Section 167(1) imposes a condition that a police officer can forward a person to a Magistrate only “if there are grounds for believing that the accusation or information is well-founded”. The rigour of the condition to forward a person to the Magistrate is more stringent than the condition required to effect an arrest. Section 41 says that to effect an arrest, information need only be credible, but to forward a person, the information or accusation



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must be well-founded. According to Section 167(2) of Cr.P.C., the Magistrate is authorised to order the detention of the accused. Automatic detention is not the scheme of the Act. Before a Magistrate authorises detention under Section 167(2) Cr.P.C., he must be first satisfied that the arrest made is legal and in accordance with the law and that all the constitutional rights of the person arrested are satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, the Magistrate is duty bound not to authorise his further detention and release him [*See Arnesh Kumar* (supra)].

16. A conjoint reading of Sections 438(4), 60A and 41 of Cr.P.C. and Section 26 of IPC would reveal that the bar under sub-section (4) of Section 438 of Cr.P.C. would attract only in a case where the information received by the police regarding the commission of the offence by the accused is credible and based on that credible information, there are reasons to believe that the accused has committed the offence. In other words, in cases where no *prima facie* materials exist warranting the arrest of the accused, the bar under sub-section (4) of Section 438 would not



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attract, and the court has the power to direct a pre-arrest bail. There cannot be any mandate under the law to arrest an innocent.

17. Certain special statutes have excluded the operation of Section 438 of the Cr.P.C for the accusation of offences punishable under those special statutes, for example, Section 18 of the Scheduled Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 (for short, SC/ST Act), Section 43D(4) of the Unlawful Atrocities Prevention Act, 1967 (for short, UAP Act) and Section 20(7) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA). The wording in the above provisions is identical to that of sub-section (4) of Section 438 of Cr.P.C. Interpreting those provisions, the Apex Court, as well as this Court, has held that the bar created by those provisions for the operation of Section 438 would not apply when no *prima facie* case is made out for applicability of the penal provisions of those statutes.

18. Section 18 of the SC/ST Act explicitly excludes the application of Section 438 of the Cr.P.C in relation to any case involving the arrest of any person on an accusation of having



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committed an offence under the Act. Interpreting this provision, in *Dr.Subhash Kashinath Mahajan v. State of Maharashtra & Another* [(2018) 6 SCC 454], a two-judge Bench of the Apex Court held that the exclusion of anticipatory bail provisions of Cr. P.C (by Section 18 of the Act) did not constitute an absolute bar for the grant of bail if a *prima facie* case of commission of an offence under the Act is not made out or if it can be shown that the allegations about atrocities or violation of the provisions of the Act were false. The Court also issued some other directions. Later, by the judgment in *Union of India v. State of Maharashtra & Others* [(2020) 4 SCC 761], a few of the directions issued in *Dr. Subhash Kashinath's* judgment (supra) were reviewed. In the meantime, Section 18A of the SC/ST Act was introduced to overcome the rigour of the abovementioned judgments. Sub-section (2) of Section 18-A specifically excluded the application of the provisions of Section 438 of the Cr. P.C, notwithstanding any judgment, order or direction of a court. The validity of the said amendment was considered by the three-judge Bench of the Apex Court in *Prathvi Raj Chauhan* (supra). While affirming and reiterating the right of an applicant to seek pre-arrest bail,



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despite the bar under Sections 18 and 18A of the SC/ST Act, it was held that the exclusion of the right of anticipatory bail is applicable only if the case is shown to be bona fide and that *prima facie* it falls under the SC/ST Act and not otherwise. Thus, after the decisions in *Dr.Subhash Kashinath Mahajan* (supra) and *Prathvi Raj Chauhan* (supra), there is no absolute bar against the grant of pre-arrest bail in cases under the SC/ST Act if no *prima facie* case is made out or where on judicial scrutiny the complaint is found to be *prima facie* mala fide. In view of the latter decision, the position of law regarding the power of the court to grant pre-arrest bail remains almost the same as that laid down in the former judgment despite the review judgment and the enactment of Section 18A of the Act.

19. The UAP Act also contains similar provisions, which exclude the application of Section 438 of Cr.P.C. It reads as follows:

*“43D (4): Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.”*

20. Interpreting the above provision, the Division Bench of



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this Court in ***Jayarajan v. State*** (2016 (2) KLT 859) held that simply because an offence under the UAP Act is alleged, it cannot be said that the bar under Section 43D (4) would apply. There must be materials *prima facie* to find the allegation against the accused that he committed the offence under the UAP Act. In ***Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others*** [(1994) 4 SCC 602], while dealing with the cases under the TADA, the Apex Court held thus:

*“13. We would, therefore, at this stage like to administer a word of caution to the Designated Courts regarding invoking the provisions of TADA merely because the investigating officer at some stage of the investigation chooses to add an offence under same (sic some) provisions of TADA against an accused person, more often than not while opposing grant of bail, anticipatory or otherwise. The Designated Courts should always consider carefully the material available on the record and apply their mind to see whether the provisions of TADA are even prima facie attracted.”*

21. The provision of pre-arrest bail enshrined in Section 438 of Cr.P.C. is conceptualised under Article 21 of the Constitution of India, which relates to personal liberty. The law presumes an accused to be innocent till his guilt is proven. As a



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presumably innocent person, he is entitled to all the fundamental rights, including the right to liberty guaranteed under Article 21 of the Constitution of India. In *Sushila Aggarwal v. State (NCT of Delhi) and Another* (AIR 2020 SC 831), the Apex Court held that the provision for pre-arrest bail was specifically enacted as a measure of protection against arbitrary arrests and humiliation by the police, which Parliament itself recognised as a widespread malaise on the part of the police and inasmuch as the denial of bail would amount to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438. In *Bhadresh Bipinbhai Sheth v. State of Gujarat* (AIR 2015 SC 3090), the Apex Court held that the provision of pre-arrest bail enshrined in Section 438 of Cr. P.C calls for liberal interpretation in the light of Article 21 of the Constitution of India. In *Hema Mishra v. State of Uttar Pradesh and Others* [(2014) 4 SCC 453], the Apex Court emphasised the mandate of a constitutional court to protect the liberty of a person from being put in jeopardy on account of baseless charges. It was held that a writ court is even empowered to grant pre-arrest bail despite a statutory bar imposed against the grant



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of such relief.

22. No doubt, rape is not only an offence against the person of a woman, rather a crime against the entire society. It degrades and humiliates the victim; it is more so if the victim is a minor. It can have lasting effects on a victim's development and sense of safety to varying degrees throughout life. The offences fall within sub-section (4) of Section 438 (Sections 376(3), 376-AB, 376-DA or 376-DB of the IPC) are related to the offence of rape or gang rape with a minor woman under the age of twelve or sixteen years. Considering the grievous nature of those offences, excluding the provision of pre-arrest bail in genuine cases is absolutely justified. However, there can be no dispute that there are cases where patently false or motivated allegations are made misusing the provisions relating to rape and sexual abuse, and innocent persons are termed as accused. A Division Bench of this Court in *Suhara v. Muhammed Jaleel* (2019 (2) KLT 960) observed that there is a growing tendency in recent years to foist false crimes against the biological father alleging sexual abuse of his own child misusing the provisions of the POCSO Act when serious fight for custody of ward is pending resolution



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before the Family Courts. If the exclusion of the provision for pre-arrest bail embodied in Section 438(4) of Cr.P.C. is treated as absolute, there will be no protection available to innocent persons against whom false and motivated accusations are made. Protecting the innocent is equally important, like convicting the guilty. The criminal justice system needs to strike a balance between punishing the guilty and protecting the innocent. Thus, the exclusion clause cannot, by any reasonable interpretation, be treated as applicable when no case is made out or allegations are patently false or motivated. Limiting the exclusion to genuine cases is essential to protect the fundamental right of life and liberty guaranteed under Article 21 of the Constitution of India.

23. In the wake of the above findings, the question posed at the beginning of this order is answered negatively. I hold that the exclusion of pre-arrest bail provision by Section 438(4) of Cr.P.C. in respect of the offences mentioned therein is not to be read as absolute, where it was discernible to the court that the allegations are patently false or motivated and no *prima facie* materials exist warranting the arrest of the accused. The exclusion clause applies only when a *prima facie* case of



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commission of offences is made out. This may have to be determined by the Court concerned in the facts and circumstances of each case.

24. Now, let me consider each case on its merits.

25. **B.A.No.144/2023:** This bail application is with respect to Crime No.59/2023 of Vadakkanchery Police Station. The offences alleged are under Sections 376(2)(f), 376-AB of IPC and Sections 4(2), 3(d), 6(l), 5(m), 5(n) of the POCSO Act. The prosecution allegation is that on a day before 18.1.2023, the applicant committed penetrative sexual assault on the victim aged 4 years, who is none other than his daughter, at his house in Vadakkanchery.

26. I have perused the FI Statement and the victim's statement recorded under Section 164 of Cr.P.C. It shows that the accusation made against the applicant is very serious in nature. The police also recorded the statement of the Psychologist, Mrs. Reshma P.V. (O.R.C), District Child Protection Unit, Thrissur, who interacted with the victim. She stated that during counselling of the victim, the allegation that the father sexually assaulted the victim was found to be true. The learned Special Public



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Prosecutor has made available to me the treatment record of the victim at the New Medical College Hospital, Thrissur, who was admitted therein from 13.12.2022 to 17.12.2022 due to a change in her behaviour. The discharge card would show that the victim revealed to the doctor 'bad touch' by her father on her private parts. Due to this, the victim had sleep disturbance. In the medical prescription dated 6.1.2023, the doctor at the Psychiatry Department had recorded that though the victim was reluctant to reveal the incident initially, later, during the session, the victim said that her father had licked her face and private parts.

27. As per the order dated 2.8.2023, this Court directed the Victim Rights Centre, High Court of Kerala, to have an independent physiological evaluation of the victim. Accordingly, Adv. Parvathi Menon, the Project Coordinator of the Victim Rights Centre, High Court of Kerala, visited the victim, her mother as well as the applicant and interacted with them in detail. She sought the assistance of an expert team consisting of Ms. Resma P.V, Psychologist ORC, District Child Protection Unit, Thrissur, Ms. Maria Babu C, the Clinical Psychologist and Ms. Jewel, Counsellor, DCPU Centre. Adv. Parvathi Menon, along with these experts,



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met the child, did an independent physiological evaluation of the victim, and filed a detailed report in a sealed cover. The report also shows that the allegation made by the victim against the father is true. In the report, it is specifically stated that the mother did not indoctrinate the victim about the alleged incident. These materials are sufficient to hold that a *prima facie* case of commission of the offence is made against the applicant to attract the exclusion clause of Section 438(4) of Cr.P.C. That apart, according to the learned Senior Public Prosecutor, custodial interrogation of the applicant is necessary to unearth more details about the incident. Considering the gravity of the offence, the stage of the investigation and the bar provided under Section 438(4) of Cr. P.C., I am of the view this is not a fit case where extraordinary jurisdiction vested with this Court under Section 438 Cr.P.C. could be invoked.

28. **BA No. 2157/2023:** This bail application is with respect to Crime No.160/2023 of Vadakkekara Police Station. The offences alleged are punishable under Sections 376 (2)(f)(3), 376-AB, 354-A(i) of the IPC and Sections 4(2), 3(b), 6 r/w 5 (m)(n), 8 r/w 7, 10, r/w 9(m), 9(n) of the POCSO Act. The prosecution



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allegation is that four and a half years ago, while the applicant and the victim were residing together at his house in North Paravur, the applicant committed penetrative sexual assault on the victim by inserting his finger into her vagina and caressing her between her buttocks.

29. On 2.7.2023, the investigating officer submitted a report stating that, in the investigation conducted, it was revealed that there is no evidence to justify the allegation levelled against the applicant. It is further stated that the factual report was already submitted to higher authorities for sanction to file the case as a mistake of fact. The learned Senior Public Prosecutor, on instruction, submits that the applicant will not be arrested. The submission is recorded. In view of the report and submission of the learned Senior Public Prosecutor, no order is necessary in this Bail Application.

Accordingly, BA No.144/2023 is dismissed, and BA No.2157/2023 is closed, recording the above submission.

Sd/-

**DR. KAUSER EDAPPAGATH**

**JUDGE**

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