

# VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

WEDNESDAY, THE 2<sup>ND</sup> DAY OF AUGUST 2023 / 11TH SRAVANA, 1945

BAIL APPL. NO. 2863 OF 2023

CRIME NO.203 OF 2023 OF HOSDURG POLICE STATION, KASARGOD

PETITIONER/ACCUSED:

SURESH K.M,  
AGED 45 YEARS  
SREYAS HOUSE, CHAYYOTH HOUSE, NEELESWARAM VIA,  
KASARAGOD, PIN - 671314  
BY ADVS.  
I.V.PRAMOD  
SAIRA SOURAJ P.  
K.S.SREEKUMAR

RESPONDENT/DEFACTO COMPLAINANT & STATE:

STATE OF KERALA,  
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF  
KERALA, PIN - 682031  
BY ADV SMT S REKHA SR PP,

OTHER PRESENT:

ADV S SREEKUMAR SR.

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON  
24.07.2023, THE COURT ON 2.08.2023 DELIVERED THE FOLLOWING:

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“C.R.”

**O R D E R**

Dated this the 2<sup>nd</sup> day of August, 2023

This is the second application for pre-arrest bail filed by the accused in Crime No.203/2023 of Hosdurg Police Station u/s 438 of the Code of Criminal Procedure.

2. The applicant is alleged to have committed the offences punishable under Sections 354 and 511 of 376C of the Indian Penal Code.

3. The prosecution case in short is that on 13/2/2023 at about 6.30 p.m, at the ACR Lab, the applicant sexually assaulted the victim by catching her breast and attempting to insert his finger in her vagina and thereby committed the aforesaid offences.

4. I have heard Sri.S.Sreekumar, the learned senior counsel instructed by Sri.I.V.Pramod for the applicant and Smt.S.Rekha, the learned Senior Public Prosecutor. Perused the case diary.

5. The learned senior counsel for the applicant submitted

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that the applicant is innocent and he has been falsely implicated in the case. The learned senior counsel further submitted that since principle of *res judicata* or estoppel does not apply to criminal jurisprudence, there is no bar for an accused person to make successive bail application on sufficient grounds. The learned senior counsel also submitted that certain vital documents which would show that the husband of the victim is in the habit of making frivolous complaints against others for silly reasons could not be produced at the time of consideration of the first bail application. The investigation is practically over, and hence the custodial interrogation is not necessary, added the counsel.

6. On the other hand, the learned Public Prosecutor submitted that the alleged incident occurred as a part of the intentional criminal act of the applicant, and if he is released on bail, it will affect the course of the investigation. The learned Public Prosecutor has pointed out that the applicant has not pleaded or established any change in circumstances of the case since the dismissal of the first bail application filed by him. The learned Public Prosecutor also submitted that, in the earlier

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proceedings, all the points available to the applicant have been urged and negated by this court. In the absence of any change in fact situation or in law after the dismissal of the first application, the second application is not maintainable, submitted the learned Public Prosecutor.

7. The law regarding the grant of pre-arrest bail is well settled. Pre-arrest bail cannot be granted as a matter of course. Grant of pre-arrest bail to some extent interferes in the sphere of investigation of an offence, and hence, the court must be circumspect while exercising such power for the grant of anticipatory bail. The extraordinary power of the High Court and the Court of Session to grant pre-arrest bail under Section 438 of Cr.P.C could be exercised with a significant amount of prudence, care, and caution and only when a special case is made out, that too, recording reasons thereof. While exercising powers under Section 438, the Court is duty-bound to strike a balance between the individual's right to personal freedom and the investigational right of the police.

8. The order granting or refusing to grant a pre-arrest bail application is a final order, and the entertainment of a second

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application essentially leads to a review of the earlier order. However, a second or subsequent application for pre-arrest bail is not completely barred. It cannot be entertained in routine as well. An accused must establish the change in the circumstances sufficient to persuade the court to invoke its extraordinary jurisdiction to maintain the application for pre-arrest bail for the second time. A material change in fact situation or law is *sine qua non* for a second application for pre-arrest bail. The three Judge Bench of the Apex Court in ***Kalyan Chandra Sarkar v. Pappu Yadav*** [(2005 (2) KLT SN 4 (C.No. 3) SC =AIR 2005 SC 921)] considered the legality and propriety of successive bail applications. It was held in paragraph 20 thus:

*"Even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application."*

Following the principles of law laid down by the Apex Court in ***Kalyan Chandra Sarkar*** (supra), this Court, in ***Vineeth v. State of Kerala*** (2015 (5) KHC 224), held that successive bail applications

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without showing any change in the fact situation or circumstance requiring the invocation of the extraordinary jurisdiction of the High Court or the Court of Session under S.438 of Cr.P.C. can only be regarded as an abuse of the process of the court. The Full Bench of the Calcutta High Court in *Sudip Sen v. State of W.B.* (2010 Cri. L.J. 4628), after reiterating the principle that there is no general bar or impediment in moving a second application for pre-arrest bail, held that a person will be entitled to move the High Court or the Court of Session for the second time only on the ground of substantial change in the facts and circumstances of the case due to subsequent events. It was clarified that the accused would not be entitled to move the second application on the ground that the Court, on earlier occasion, failed to consider any particular aspect or material on record or that any point then available to him was not agitated before the Court. The Full Bench of the Rajasthan High Court in *Ganesh Raj v. State of Rajasthan* [2006 (1) KLT SN 15 (C.No.25) Raj.(F.B.)] took the view that second or subsequent application under Section 438 of Cr.P.C. can be filed if there is a change in the fact situation or in law which require the earlier view being interfered with or where

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the earlier finding has become obsolete. A Single Bench of this Court in *Muhammed Ziyad v. State of Kerala & Another* (2015 (4) KLJ 22) deprecated filing successive bail applications without legal justification. Another Single Bench of this Court in *Pandi v. State of Kerala* (2018 (4) KLT 249) held that subsequent application for pre-arrest bail on the same grounds without any change in circumstances is liable to be rejected even summarily.

9. Thus, even though there is no absolute embargo in filing the subsequent application for pre-arrest bail, it can be entertained only if there is a substantial change in the facts and circumstances of the case, which requires the earlier view be interfered with or where, the earlier finding has become obsolete. Ordinarily, the grounds canvassed in the earlier application cannot be permitted to be reurged in the subsequent application. Nor could the accused in the subsequent application contend that the Court, while considering the earlier bail application, failed to advert to any fact or material on record. A fact which was not in existence at the time of considering the earlier bail application but came into existence subsequently alone could be considered a change in facts and circumstances.

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10. Coming to the facts of the case, the first bail application was rejected by this court taking into account the gravity of the offence, the complicity of the applicant in the crime, the stage of investigation and the requirement of the applicant for custodial interrogation. This court on perusal of the entire case diary and after hearing the submission of both sides, found that the accusation made against the applicant is very serious in nature and it *prima facie* shows a premeditated criminal act on his part. There is no change in any of these circumstances. A perusal of the FI statement of the victim would show that she has in detail narrated the sexual assault meted out by her at the hands of the applicant at the odd hours at the medical lab where he was working. This court also found that the custodial interrogation of the applicant was necessary for the investigation. The applicant has now raised mainly two grounds in his second application for pre-arrest bail. The first ground is that the husband of the victim is in the habit of filing frivolous complaints against so many persons. He produced copies of certain such complaints to substantiate the said allegation. The second ground urged is that now the investigation is almost over

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and hence custodial interrogation is not necessary. The applicant has no case that the documents now sought to be produced to prove that the husband of the victim is in the habit of filing complaints against others were not in existence at the time of consideration of the earlier bail application. The fact that the victim or her husband has filed certain complaints against others cannot be termed as a change in fact situation or change in circumstances so as to justify the filing of second application for pre-arrest bail. The second application for pre-arrest bail filed by the applicant does not spell out any change in the fact situation or circumstance of the case after the dismissal of the first bail application. So far as the argument with regard to the requirement of custodial interrogation is concerned, this court has already found that custodial interrogation is necessary for the purpose of investigation. The learned Public Prosecutor submitted that the applicant has been absconding all along and hence he could not be apprehended. That apart, it is trite that even if the custodial interrogation is not required or necessitated by itself, cannot be ground to grant anticipatory bail. Custodial interrogation can only be one of the grounds for declining

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anticipatory bail [*see Sumitha Pradeep v. Arun Kumar* 2022 (5) KLT OnLine 1239 (SC)].

The applicant has not made out a case to invoke the extraordinary jurisdiction vested with this court under section 438 of Cr.P.C for the second time. Accordingly, the bail application is dismissed.

Sd/-

**DR. KAUSER EDAPPAGATH**

**JUDGE**

Rp

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**APPENDIX OF BAIL APPL. 2863/2023**

PETITIONER ANNEXURES

Annexure-1 A TRUE COPY OF THE ORDER IN BA NO. 1545/2023 OF THIS HON'BLE COURT DATED 10/3/2023

Annexure-2 A TRUE COPY OF THE FIR IN CRIME NO.111/2023 OF VELLARIKUNDU POLICE STATION DATED 8/3/2023

ANNEXURE-A3 A TRUE COPY FIR AND FIS IN CRIME O.203/2023 OF HOSDURG POLICE STATION, KASARAGOD DISTRICT

Annexure A4 A TRUE COPY OF THE COMPLAINT PREFERRED BY PROF. LOIUS VICTOR D'ROSE BEFORE JFCM-II, HOSDURG DATED 22/2/2023

Annexure A5 A TRUE COPY OF THE FIR AND FIS IN CRIME NO. 175/2023 OF VELLARIKINDU POLICE STATION DATED 10/4/2023

Annexure A6 A TRUE COPY OF THE REPLY DATED 27/3/2023 GIVEN BY THE VELLARIKUNDU POLICE

Annexure A7 PHOTOGRAPH OF ACR LAB IN ONE ANGLES

Annexure A8 PHOTOGRAPH OF ACR LAB IN DIFFERENT ANGLES

Annexure A9 PHOTOGRAPH OF ACR LAB IN ANOTHER ANGLES

Annexure A10 PHOTOGRAPH OF ACR LAB IN YET ANOTHER ANGLES