



NON-USE OF SOCIAL MEDIA AS A CONDITION FOR BAIL : SOME REFLECTIONS ON MUHAMMED SHIFAS V. STATE OF KERALA

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Abstract

The Hon'ble High Court of Kerala at Ernakulam on September 17, 2020 granted bail to the accused in a case where he allegedly raped a minor and clicked her nude pictures. He allegedly continued to sexually abuse her for almost a year, under the threat of circulating her nude pictures that were in his possession, on social media. Then, he created a fake Facebook profile and uploaded the complainant's pictures on it and tried to extort money from her for deleting the pictures. That is when the case was reported to the police. The Hon'ble High Court while granting bail to the accused, imposed a condition that the accused will not use social media till the completion of the investigation or till the completion of the trial, in case the court took cognizance of the chargesheet. The Court also put the onus of informing the investigating officer about the violation of this condition on the victim. This article examines the reasonableness and the practicality of imposing such a condition for bail in light of the existing bail jurisprudence and the technical aspects of social media.

I. INTRODUCTION

The Code of Criminal Procedure, 1973 (hereinafter 'CrPC') classifies offences into bailable and non-bailable, depending on their seriousness. For bailable offences, bail is a matter of right. But for non-bailable offences, the court has the discretion to grant or deny bail pending investigation or trial. A person arrested for a non-bailable offence may apply for bail to a Magistrate's court under section 437 of the CrPC. Suitable conditions may be imposed by the court while granting bail, in order to ensure that the bail is not misused to derail a fair investigation or trial. As per section 437(3) of the CrPC, while granting bail for offences punishable with imprisonment up to seven years or more, or offences against the State, human body or property under the Indian Penal Code, 1860 (hereinafter 'IPC') or for abetment of, or conspiracy or attempt to commit such offences, the Magistrate should impose conditions directing the accused to attend in accordance with the conditions of the bail bond, not commit similar offences and not influence witnesses or tamper with evidence.¹ Apart

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¹CrPC, s. 437(3).

from these mandatory conditions, the Magistrate may impose any other conditions that he considers necessary “in the interest of justice”.²

A person arrested for a non-bailable offence may also apply for bail to a Court of Session or High Court under section 439, CrPC. These superior courts have wider powers to grant bail and if the offence is of the nature specified in section 437(3), then, they can impose any conditions that they consider necessary for the purposes mentioned in section 437(3). They can also set aside or modify a condition imposed by a Magistrate while granting bail under section 437. If the conditions of bail are violated after release, the bail of the accused may be cancelled by the court.³

II. CONSIDERATIONS FOR GRANT OF BAIL

The judicial discretion to grant or deny bail in case of non-bailable offences has to be exercised based on well-settled principles and not in an arbitrary manner. Factors like the nature of accusations, nature of the evidence, punishment provided for the offence, character, behaviour, means and standing of the accused, possibility of absconding of the accused or his tampering with evidence or influencing witnesses and the larger interests of the public or State are some of the factors that are to be considered by the courts.⁴

In view of this legal position relating to bail in non-bailable offences, the conditions imposed by a single judge Bench of the Kerala High Court in a bail order in *Muhammed Shifas v. State of Kerala*⁵ have been examined in this article.

III. MUHAMMED SHIFASV. STATE OF KERALA

Facts

In *Muhammed Shifasv. State of Kerala*, the applicant was accused of the offences of rape, insulting the modesty of a woman and criminal intimidation under the IPC; the offences of aggravated penetrative sexual assault, use of a child for pornographic purposes and storage of pornographic material involving a child under the Protection of Children from Sexual

²*Ibid.*

³*Id.*, ss. 437(5), 439(2).

⁴See *State v. Jagjit Singh*, (1962) 3 SCR 622; *Gurcharan Singh v. State (UT of Delhi)*, (1978) 1 SCC 118; *Prahlad Singh Bhati v. National Capital Territory of Delhi*, (2001) 4 SCC 280; *State of U.P. v. Amarmani Tripathi*, (2005) 8 SCC 21.

⁵(2020) SCC OnLine Ker 4148.

Offences Act, 2012(hereinafter ‘POCSO Act’) and for violation of privacy under section 66E of the Information Technology Act, 2000.

According to the prosecution’s case, the accused and the victim girl were in love. The victim accepted this fact. On December 22, 2018, the accused allegedly took the girl to a resort under some pretext, forcibly raped her there and took her nude photographs. Thereafter, he allegedly threatened the victim that if she disclosed the incident to anyone, he will circulate her nude pictures on social media. Using the same threat, the accused allegedly raped the victim on about six occasions until November 2019. According to the dates mentioned in the order, the victim must have been a minor under 18 years of age during most of this period. So, her consent to any kind of sexual act would have been irrelevant.⁶ It was also alleged that on July 31, 2020, the petitioner created a fake Facebook profile and posted the victim’s nude photographs and demanded Rs.1 lakh from the victim for deleting them. The FIR was registered by the victim on August 14, 2020 and the accused was arrested on August 23, 2020. The accused approached the Court of Session for bail, which was denied to him on September 9, 2020. Thereafter, the accused moved the Kerala High Court which admitted his application for bail on September 17, 2020 and granted him bail the same day.

Bail order

While granting bail to the accused, the Hon’ble High Court reiterated the principle that “bail is the rule and the jail is the exception”.⁷ It also considered the fact that the accused was “aged only 23 years” and the victim was also a “major” by now and “admits her love affair with the petitioner”⁸who was under detention (for less than a month going by the dates mentioned in the order). Another consideration for the Court was the directions issued by the Hon’ble Supreme Court in *In Re: Contagion of COVID-19 Virus in Prisons case*⁹ and by a three judge Bench of the Kerala High Court in *The Court on its own motion: Suo-moto proceedings-COVID-19-Pandemic case*¹⁰ for minimising the number of inmates inside prisons in order to follow social distancing norms so as to avert the spread of the novel Corona virus pandemic.¹¹

⁶See IPC, s.375, cl. sixthly; POCSO Act, s. 2(1) (d).

⁷*Supra* note 5, para 15.

⁸*Id.*, para 8.

⁹Suo-moto Writ (Civil) No. 000001 of 2020.

¹⁰ Writ Petition (Civil) No. 9400 of 2020 (S).

¹¹*Supra* note 5, para 14.

Hon'ble Mr. Justice P.V. Kunhikrishnan, while granting bail to the accused, notes that the victim's main grievance was that the accused was circulating her nude photographs on social media. Therefore, the learned judge imposed a condition that the accused shall not use social media like Facebook, WhatsApp, Twitter, Instagram etc., till the completion of the investigation, and if the court took cognizance of the chargesheet, then, the accused should not use social media till the completion of the trial. This condition was imposed to protect the girl's privacy. According to the learned judge:

“Heavens will not fall down if a condition is imposed in a bail order restraining the accused in a rape case in using social media, especially when it is to protect the victim girl's privacy.”¹²

The investigating officer was directed to inform the victim about this condition and ‘to do the needful in accordance with the law’ in case the victim ‘reported any violation of this condition’.¹³ The High Court traced its power to impose such a condition while granting bail under section 439(1)(a), CrPC to the fact that the alleged offences were covered under section 437(3) CrPC, and therefore, it had the power to impose in the interest of justice such other conditions as it considered necessary.¹⁴

Analysis

The condition imposed by the Hon'ble Court sought to avoid circulation of the nude photographs of the victim on social media. However, instead of protecting the victim against the further circulation of her nude pictures by the accused, the condition focusses more on curbing the use of social media by the accused, since he had allegedly misused it.

The bail order by the Hon'ble High Court seems to ignore the fact that social media is not the only means through which the pictures can be circulated. They can be circulated through emails, storage devices and offline modes like printouts etc. too. The bail order makes no reference to the seizure of the pictures and the capturing or storage media by the police, which leaves open the possibility of their further circulation and use for intimidation of the

¹²*Id.*, para 13.

¹³*Id.*, para 16, direction number 6.

¹⁴*Id.*, para 12.

victim, given the history of the case. There is no reference to the possibility that the pictures that were already put up on the Internet by the accused through the fake profile could have been accessed, stored or circulated by other users on the platform, not just in India but in any part of the world. The order does not ask the accused to disclose all his existing social media profiles, email ids etc. as a condition for bail. It is even more perplexing that the onus to report the violation of the condition regarding the accused's non-use of social media has been placed on the victim. It is difficult to fathom how will it be possible for the victim to monitor the use of social media by the accused. Is the victim expected to be on a constant vigil to check whether the accused is using social media platforms?

Apart from being inherently unfair, this requirement also reflects a lack of understanding of the nature and functioning of social media. Social media is not a monolith. Various platforms are included in 'social media'. Not all social media platforms are used by everyone. What if the victim is not using or does not want to use any or all of the social media platforms? Moreover, not all social media platforms are public by default. For example, if the accused uses WhatsApp to circulate the pictures, how will the victim know about it, unless someone knowing about such use or receiving those pictures brings it to her knowledge? Other social media platforms also allow for privacy settings where profiles may be made accessible to selected persons. Moreover, given the possibility of easily creating any number of fake profiles on social media, use of social media proxies and techniques like Virtual Private Network (VPN),¹⁵ masking of Internet Protocol (IP) address¹⁶ etc., it is almost impossible for anyone, including the victim, to constantly monitor the use of social media by the accused. So, this condition leaves the victim vulnerable to further circulation of her photographs. Furthermore, even if the victim gets to know about posting or sharing of her photographs by the accused, due to the very nature of the Internet, the damage may already be done, as other users may have accessed and stored and circulated the photographs by then.

¹⁵A VPN is a service that creates a safe, encrypted online connection and can be used for online privacy and anonymity. VPNs can be used to hide a user's browser history, Internet Protocol (IP) address and geographical location, web activity or devices being used. *See* "What is VPN? How It Works, Types of VPN" *available at*: <https://www.kaspersky.com/resource-center/definitions/what-is-a-vpn>(last visited on December, 10, 2020).

¹⁶An IP address is a unique address that identifies a device on the Internet or a local network. An IP address is assigned to a device by the Internet Service Provider. *See* "What is an IP Address – Definition and Explanation" *available at*: <https://www.kaspersky.com/resource-center/definitions/what-is-an-ip-address>(last visited on December, 10, 2020).

While granting him bail, the Court generously considered the young age of the accused who was “only aged 23 years” and was under detention, but failed to consider the impact that the lurking threat of her nude pictures being circulated may have over the mind of the 19-year-old girl, who according to the Hon’ble Court had “also turned major”.¹⁷ It is difficult to comprehend how the compliance of the condition regarding non-use of social media can be monitored even by the State agencies, leave aside the victim.

Even looking at things from the perspective of the accused, restraining the accused from using social media altogether, till the conclusion of the investigation or the trial, which can take many years in India, maybe very harsh. In today’s digital world, online forums, including social media, are being used for education, information, work, shopping and staying connected with loved ones. Online platforms including social media have become the means of survival for many people in a pandemic afflicted world. So, this kind of embargo on the accused is harsh and does not even fulfil the basic purpose for which it was ostensibly imposed by the learned Judge, which is to protect the privacy of the victim. The bail order also does not consider the future possibility of the victim asking for cancellation of bail on the ground that the accused has been sharing her photographs from someone else’s social media account(s) or some fictitious account(s). Since this would amount to violation of the condition for bail, will the court conduct a roving inquiry in such a case, to decide the truthfulness or otherwise of such an allegation, in order to decide the application for cancellation?

The condition does not fulfil the basic requirement of being a condition in the ‘interest of justice’ nor does it relate to any of the other considerations mentioned in section 437(3). In fact, the condition that the accused will not share the victim’s nude pictures on social media is implicit in the general condition imposed by the Court in terms of section 437(3). So, apart from the futility of this condition in ensuring the privacy of the victim, the complete embargo on the use of social media by the accused seems disproportionate and unnecessary from the point of view of the accused too. It also becomes punitive in nature and violates the principle of presumption of innocence in favour of the accused. It also significantly curbs his fundamental right to freedom of speech and expression, guaranteed by article 19(1) (a) of the Constitution of India, 1950. Incidentally, in a separate matter relating to charges of sedition,

¹⁷*Supra* note 5, para 8.

the Supreme Court did not interfere with the Allahabad High Court's order granting bail to the accused on the condition that he will not use social media, but on July 10, 2020, agreed to examine "whether prohibition on use of social media can be prescribed as a pre-condition for granting bail".¹⁸ The order in *Muhammed Shifaz's* case has been granted on September 17, 2020, that is, during the pendency of the matter before the Supreme Court.

Another condition imposed in *Muhammed Shifaz's* case is that the accused will "strictly abide by the various guidelines issued by the State Governments and Central Government to the keeping of social distancing in the wake of the COVID 19 pandemic".¹⁹ This condition is in accordance with the general directions issued by a three-judge bench of the Kerala High Court in *The Court on its own motion: Suo-moto proceedings-COVID-19-Pandemic case*.²⁰ Again, it is difficult to understand how this condition is related to a fair investigation or trial. How will the compliance of this condition be ensured? It also raises the question whether it is alright for the courts to impose conditions whose compliance cannot be ensured and violations cannot be tracked. It is not clear what purpose will be served by such conditions in ensuring the presence of the accused or a fair investigation and a fair trial.

IV. INTERPRETATION OF CONDITIONS "IN THE INTERESTS OF JUSTICE"

Sections 437(3) and 439 (1) (a) of the CrPC which empower the concerned court to impose "in the interests of justice, such other conditions as it considers necessary" have been interpreted by the Supreme Court in several decisions.

In *Sumit Mehta v. State (NCT of Delhi)*,²¹ the Supreme Court observed that the words "any condition" in the above-mentioned provisions "should not be regarded as conferring absolute power on a Court of law to impose any condition that it chooses to impose".²² According to the Hon'ble Court:

¹⁸*Sachin Choudhary v. The State of Uttar Pradesh*, Special Leave Petition (Criminal) No. 002720-002721 of 2020.

¹⁹*Supra* note 5, para 16, direction number 5.

²⁰*Supra* note 10.

²¹(2013) 15 SCC 570.

²²*Id.*, at 576, para 15.

“any condition has to be interpreted as a reasonable condition acceptable in the facts permissible in the circumstance and effective in the pragmatic sense and should not defeat the order of grant of bail”.²³

In *Kunal Kumar Tiwari v. The State of Bihar*,²⁴ a Division Bench of the Supreme Court recognised that the wordings of sub-clause (c) of section 437(3) “are capable of accepting broader meaning”, but cautioned that:

“such conditions cannot be arbitrary, fanciful or extend beyond the ends of the provision. The phrase ‘interest of justice’ as used under the sub-clause (c) of section 437(3) means “good administration of justice” or “advancing the trial process” and inclusion of broader meaning should be shunned because of purposive interpretation.”²⁵

In *Parvez Noordin Lokhandwalla v. State of Maharashtra*,²⁶ a division bench of the Apex Court, speaking through Hon’ble Dr. Justice D.Y. Chandrachud observed that though the competent courts are empowered under these provisions to impose ‘any condition’ for the grant of bail, the judicial discretion “has to be guided by the need to facilitate the administration of justice, secure the presence of the accused and ensure that the liberty of the accused is not misused to impede the investigation, overawe the witnesses or obstruct the course of justice”.²⁷

V. CONCLUSION

Examining the bail order in *Muhammed Shifas v. State of Kerala* in light of the above-mentioned observations by the Hon’ble Supreme Court in various cases, the condition regarding non-use of social media by the accused does not seem to be in consonance with these observations.²⁸ Moreover, the unusual conditions for bail in *Muhammed Shifas v. State of Kerala* belie Hon’ble Mr. Justice P.V. Kunhikrishnan’s own statement in the order that conditions imposed in a bail order should be “reasonable and effective in the pragmatic sense”.²⁹ The conditions, though well intentioned, may not serve the purpose for which they are imposed. They still leave the victim vulnerable and just seem to suggest that social media

²³*Ibid.*

²⁴(2018) 16 SCC 74.

²⁵*Id.*, at 78, para 9.

²⁶(2020) SCC OnLine 807.

²⁷*Id.*, para 14.

²⁸See *supra* Part IV.

²⁹*Supra* note 5, para 9.

is a tool which was misused by the accused and merely asking him not to use that tool will be sufficient safeguard against possible further abuse and intimidation of the victim, who will also be a crucial witness in the case.

With increased reporting of cases of alleged sexual exploitation or harassment of women under threat of publication/circulation of intimate pictures or videos on social media by male accused, many such regular and anticipatory bail applications are coming up before the courts. In such cases, the courts are either denying bail³⁰ or directing that the anticipatory bail granted by the court may be cancelled till the end of the trial, in case the accused circulates any intimate pictures on social media.³¹ In some cases, the courts have granted bail and imposed the usual conditions that the accused will not tamper with evidence and he will not contact or attempt to influence the complainant or other prosecution witnesses,³² or that he will furnish his cell phone number to the investigating officer,³³ or hand over his cell phone to the police for forensic examination.³⁴ In this context, the bail order in *Muhammed Shifav. State of Kerala* stands out for going a step further in trying to address the concern of the victim regarding further circulation of objectionable pictures. However, the well-intentioned order in *Muhammed Shifav. State of Kerala* falls short of meeting that requirement for the reasons discussed above.

The increased reporting of cases with facts similar to *Muhammed Shifav. State of Kerala* calls for laying down of standard protocols in such cases, to deal with the possible misuse of technology to evade the courts' directions and to ensure that the victims do not live under the perpetual fear of their pictures or videos being leaked through some other medium, link or platform. The evolution of such a protocol requires the engagement of the legislature, the executive, technical experts and stakeholders from the social media platforms. The situation also requires proactive monitoring and use of artificial intelligence based tools for quick and

³⁰See *Hetalkumar Hasmukhlal Modi v. State of Maharashtra*, (2019) SCC OnLineBom 11267.

³¹See *Virendra Vilas Ramteke v. State of Maharashtra*, (2018) SCC OnLineBom 12863.

³²See *Sanjeevan Ramchandran Nair v. The State of Maharashtra*, (2016) SCC OnLineBom 6414; *Harsh Kumar Trivedi v. The State of Maharashtra*, (2018) SCC OnLineBom 5406; *Rajkumar Ramdular Varma v. State of Maharashtra*, (2019) SCC OnLineBom 13027.

³³See *Ajay Ramnaresh Tripathi v. State of Maharashtra*, (2018) SCC OnLineBom 9562; *Rajkumar Ramdular Varma v. State of Maharashtra*, (2019) SCC OnLineBom 13027.

³⁴See *Sanjeevan Ramchandran Nair v. The State of Maharashtra*, (2016) SCC OnLineBom 6414; *Anil Govind Rathod v. State of Maharashtra*, (2019) SCC OnLineBom 13021.

effective removal of the objectionable content. In this regard, The Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 which *inter alia* impose liability on the intermediaries to ensure time bound removal of offensive content and The Personal Data Protection Bill, 2019 which seeks to provide for protection of personal data of individuals and proposes a regulatory mechanism for the same, are steps in the right direction for dealing with non-consensual sharing of intimate images, which generally woman and children are subjected to in the digital space. The action taken under these provisions will hopefully be considered in bail orders in future, so as to ensure that the victim is not harassed further due to grant of bail to the accused on certain conditions that contribute towards keeping the victim in a vulnerable position. There is also an urgent need for training and sensitisation of investigating officers for prompt action regarding the seizure of the offensive material and ensuring that immediate steps are taken for blocking and removal of offensive content already uploaded or shared. Such steps need to compliment the conditions imposed by the courts in cases like *Muhammed Shifasv. State of Kerala* in order to ensure fair treatment to the victim and the accused in the criminal justice system.