



2024:KER:75202

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

MONDAY, THE 14TH DAY OF OCTOBER 2024 / 22ND ASWINA, 1946

CRL.MC NO. 3553 OF 2022

CRIME NO.1267/2021 OF FORT POLICE STATION, THIRUVANANTHAPURAM

S.C.NO.593/2022 ON THE FILES OF THE ADDITIONAL SESSIONS COURT (POCSO-II),

THIRUVANANTHAPURAM

PETITIONER/2ND ACCUSED:

FISAL KHAN
AGED 42 YEARS
S/O SAINUDEEN, TC NO.49/540(6), SNRA 195(2),
KUTHUKALLUMOODU, MANACADU PO, THIRUVANANTHAPURAM,
PIN - 695009

BY ADV LIJU. M.P

RESPONDENTS/STATE AND VICTIM:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, PIN - 682031
- 2 XXXXXXXXXXXX

BY ADV AUGUSTUS BINU
PP - M P PRASANTH

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 30.09.2024,
THE COURT ON 14.10.2024 PASSED THE FOLLOWING:

**“C.R”****ORDER****Dated this the 14th day of October, 2024**

This Criminal Miscellaneous Case has been filed under Section 482 of the Code of Criminal Procedure, 1973, to quash all further proceedings in furtherance to Annexure-1 Final Report in Crime No.1267/2021 of Fort Police Station, Thiruvananthapuram, now pending as S.C. No.593/2022 on the files of the Special Court for the trial of cases under the Protection of Children from Sexual Offences Act (hereinafter referred as ‘POCSO Act’ for short) cases, Thiruvananthapuram. The petitioner herein is the 2nd accused in the above case as per the Final Report.

2. Heard the learned counsel for the petitioner, the learned Public Prosecutor and the learned counsel appearing for the defacto complainant, in detail. Perused the relevant materials available.

3. In this matter, though the petitioner is arrayed as the 2nd accused, while arraying the mother of the victim as the 1st accused, the narration in the charge runs on the



premise that the petitioner herein is the 1st accused. The allegation of the prosecution is that, on 08.02.2021 in Room No.151 of RP Days Inn Lodge in Kizhakkekotta, the mother of the victim and the petitioner herein, after sharing common intention, engaged in sexual intercourse, in the presence of the victim. The allegation is that, after reaching the lodge along with the victim, minor boy aged 16 years, the minor was sent to purchase some articles. When the minor returned along with the articles, at 20.30 hours and opened the door, he happened to see that, both of them were engaged in sexual intercourse, after being naked. When, the victim questioned the same, the petitioner herein abused the minor, caught hold on his neck, beat on his cheek and kicked him down. The other accused, who is the mother of the victim also shared common intention by not restraining the petitioner from doing the said overt acts against the minor. It is on this premise, the prosecution alleges commission of offences punishable under Sections 294(b), 341, 323 and 34 of IPC, Section 12 read with 11(i) of the POCSO Act and Section 75 of the Juvenile Justice (Care and Protection) of Children



Act [hereinafter referred as 'JJ Act' for short], by accused Nos.1 and 2.

4. The learned counsel for the petitioner read out the FIS and submitted that, no ingredients to attract offences punishable under Sections 294(b) and 341 of IPC as well as under Section 11(i) read with 12 of the POCSO Act, made out, as against the petitioner and the other accused. He also would submit that, Section 75 of the JJ Act also would not attract as against the petitioner, since he has no actual control or custody of the victim, in any manner. Therefore, the proceedings as against the petitioner is liable to be quashed.

5. Opposing quashment, the learned Public Prosecutor specifically pointed out that offence punishable under Section 11(i) read with 12 of the POCSO Act would attract since, sexual intercourse in naked state in between the 1st and 2nd accused was seen by the minor. He also would submit that offence under Section 323 read with 34 of IPC also is made out from the statement as well as the additional statement of the victim.

6. On perusal of the statements and additional



statement of the victim, it could be seen that there is allegation that the petitioner abused the minor, caught hold on his neck, beat on his cheek and kicked him down and the specific allegation is that, the victim saw the sexual intercourse between the accused persons after being naked. Even though there is allegation of using abusive words, the words are not stated in the statements and also there is nothing stated regarding wrongful confinement.

7. Coming to Section 11(i) read with 12 of the POCSO Act, the same is as under:

11. Sexual harassment.—A person is said to commit sexual harassment upon a child when such person with sexual intent,—

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child;

8. Reading the statutory provision, a person is said to commit sexual harassment upon a child, when such person with sexual intent, utters any word or makes any



sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child. The same is an offence punishable under Section 12 of the POCSO Act. To be more explicit, when a person exhibits naked body to a child, the same is an act intending to commit sexual harassment upon a child and therefore, the offence punishable under Section 11(i) read with 12 of the POCSO Act would attract. In this case, the allegation is that the accused persons engaged in sexual intercourse after being naked, even without locking the room and allowed the entry of the minor in the room, so that the minor could see the same. Thus, *prima facie*, the allegation as to commission of offence punishable under Section 11(i) read with 12 of the POCSO Act, as against the petitioner in this case is made out.

9. Coming to the allegation as to commission of offences punishable under Sections 294(b) of IPC, as per Section 294(b) of IPC, whoever, to the annoyance of others, sings, recites or utters any obscene song, ballad or words, in or near any public place, is an offender. In this



case, the prosecution materials do not suggest that the minor was abused in or near any public place or what is the word used to abused him. Similarly, wrongful confinement dealt under Section 341 of IPC also could not be read out from the prosecution records. Therefore, offences punishable under Sections 294(b) and 341 of IPC are not made out, *prima facie*.

10. However, there is allegation that the petitioner herein beat on the cheek of the minor victim and kicked him down and the same made sufferings to the child. It is also alleged that, the mother of the victim shared common intention with the petitioner herein in doing the said overt acts, *prima facie*. Therefore, it has to be held that the offence punishable under Section 323 read with 34 of IPC, would attract in this case.

11. As far as the offence punishable under Section 75 of the JJ Act is concerned, as per Section 75 of the JJ Act, whoever, having the actual charge of, or control over, a child, assaults, abandons, abuses, exposes or wilfully neglects the child or causes or procures the child to be assaulted, abandoned, abused, exposed or neglected in a



manner likely to cause such child unnecessary mental or physical suffering, is an offender.

12. In the instant case, the petitioner herein does not have actual charge or control over the child. Therefore, offence punishable under Section 75 of the JJ Act would not attract as against the petitioner, though the same would attract against the other accused, who being the mother of the victim, has actual charge or control over the child.

13. In view of the above discussion, this petition stands allowed in part. Criminal proceedings pertaining to offences punishable under Sections 294(b), 341 read with 34 of IPC as well as under Section 75 of the JJ Act, as against the petitioner herein stand quashed, while dismissing the quashment sought for, for the offences punishable under Sections 323 read with 34 of IPC as well as under Section 11(i) read with 12 of the POCSO Act. The petitioner is directed to go for trial for the offences punishable under Sections 323 read with 34 of IPC as well as under Section 11(i) read with 12 of the POCSO Act.

Registry is directed to forward a copy of this order to



the Special Court, within three days, for information and further steps.

**Sd/-
A. BADHARUDEEN
JUDGE**

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