



2024:KER:52950

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 17TH DAY OF JULY 2024 / 26TH ASHADHA,

1946

CRL.REV.PET NO. 1084 OF 2023

SC NO.76 OF 2023 OF FAST TRACK SPECIAL COURT,

PERUMBAVOOR

REVISION PETITIONER/ACCUSED:

XXXXXXXXXX
XXXXXXXXXX XXXXXXXXXXXX

BY ADVS.
ELDHO PAUL
TESSY JOSE

RESPONDENTS/COMPLAINANT:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT
OF KERALA, ERNAKULAM, KOCHI, PIN - 682031
- 2 THE STATION HOUSE OFFICE
KALADY POLICE STATION KALADY ERNAKULAM, PIN -
683111.
- 3 YYYY
(*ADDL.R3 IMPEADED AS PER ORDER DATED
23.11.2023 IN CRL. M.A.2/2023 IN CRL.R.P.
1084/2023)

BY ADV No Advocate

SENIOR PUBLIC PROSECUTOR SRI RENJIT GEORGE

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ON 27.06.2024, THE COURT ON 17.07.2024 PASSED
THE FOLLOWING:



“C.R”

A. BADHARUDEEN, J.

=====
Crl.R.P.No.1084 of 2023
=====

Dated the 17th day of July, 2024

ORDER

This Revision petition under Section 397 r/w 401 of the Code of Criminal Procedure (for short ‘Cr.P.C.’ hereinafter), has been filed by the petitioner/sole accused in SC.No.76/2023 pending before the Special Court for Trial of Cases Relating to Atrocities and Sexual Violence Against Women and Children Act under the Protection of Children from (‘PoCSO Act’ for short), Perumbavoor, seeking the following reliefs:

“a) *To set aside Annexure A6 order and allow A5 discharge petition filed by the petitioner.*

b) *To stay all further*



proceedings in SC 76/2023 on the file of Fast Track Court (POCSO) Perumbavoor.

c) To grant such other reliefs which are deem fit in the facts and circumstances of the case.”

2. Annexure A6 order is passed in Annexure A5 discharge petition, whereby the learned Special Judge dismissed the plea of discharge raised by the petitioner.

3. Heard the learned counsel for the revision petitioner and the learned Public Prosecutor in detail.

4. The learned counsel for the revision petitioner argued at length to convince that, in this matter dismissal of the discharge petition by the Special Court as per Annexure A6 order is illegal, since the plea of discharge sought for under Section 227 of Cr.P.C would have been allowed by the Special Court.

5. Whereas the learned Public Prosecutor strongly opposed the prayer to set aside Annexure A6



order on the specific submission that, in the instant case, the accused herein after making a sound 'shu shu', lifted his dhoti. Thereafter he asked the victim to measure his penis. Therefore, the offences under Section 509 of Indian Penal Code as well as under Sections 11(1) r/w 12 of Protection of Children from Sexual Offences Act ('PoCSO Act') would squarely attract. Hence, the discharge plea raised by the petitioner definitely would fail.

6. In view of the rival submissions made, I have gone through FIS given by the victim. In the FIS, the victim stated that at about 2.30 p.m on 05.10.2022, while the defacto complainant along with another victim was looking at their phone, the accused made the noise 'shu shu' and both of them looked at him. Then the accused lifted his dhoti. At that time, he had worn a kavi dhoti and check shirt and he had worn trouser also. They got afraid and the defacto



complainant called her mother. When her mother, mother's sister and grandmother reached there, the accused ran away towards the road. According to the defacto complainant, the accused had done this act by standing on the property on the opposite side of the kitchen of the house of the defacto complainant. In the 164 statement given by the victim, the victim repeated the instances narrated in the F.I.S and that the accused asked her to measure penis. Here the prosecution alleges offence punishable under Section 509 of IPC and the ingredients to constitute the said offence are; utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, whoever, intending to insult the modesty of any woman.

7. Coming to Section 11 of PoCSO Act:

"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; or

(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii) shows any object to a child in any form or media for pornographic purposes; or

(iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or

(v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or (vi) entices a child for pornographic purposes or gives gratification therefor.

Explanation.—Any question which involves “sexual intent” shall be a question of fact.

8. According to the learned counsel for



the petitioner, going by the overt acts spoken by the victim in her FIS along with the 164 statement and statements of the other witnesses, no offence under Section 11(1) of POCSO Act is made out and no materials, *prima facie*, could be found to hold that the accused with sexual intent committed any of the overt acts mentioned in the Section. So also nothing substantiated to find commission of offence punishable under Section 509 of IPC by the accused, *prima facie*.

9. In this case, as I have already pointed out, lifting of dhoti to show his private part, and then asking the victim to measure his penis, are the allegations. The same would squarely attract Section 11(1) of the PoCSO Act as well as under Section 509 of IPC, *prima facie*. Explanation to Section 11 makes it clear that any question which involves sexual intent, shall be a question of fact. That apart, Section 30 of the POCSO Act provides that:

30. Presumption of culpable mental state.—(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a



defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. (2) For

the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.—In this section, “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.”

So culpable mental state on the part of the accused shall be presumed by the Court and it is for the accused to prove that he had no such mental state with respect to the charge for the offence in the prosecution.

10. Coming to the essentials to be considered while considering discharge sought under Section 227 of Cr.P.C and framing charge under Section 228 of Cr.P.C, in the decisions reported in [2024 KHC OnLine 586], ***Sandeep G. v. State of Kerala***, this Court set out the principle as under, following the Apex Court decisions in this regard.

“(i) *Matters to be considered at the time of considering discharge and while framing*



charge are not aimless etiquette. Concomitantly the same are not scrupulous exertion. Keeping an equilibrium in between aimless etiquette and scrupulous exertion, the trial judge need to merely examine the materials placed by the prosecution in order to determine whether or not the grounds are sufficient to proceed against the accused on the basis of police charge/final report. The trial Judge shall look into the materials collected by the investigating agency produced before the Court, to see, prima facie, whether those materials would induce suspicious circumstances against the accused, so as to frame a charge and such material would be taken into account for the purposes of framing the charge. If there is no sufficient ground for proceeding against the accused necessarily, the accused would be discharged. But if the court is of the opinion, after such consideration of the materials there are grounds for presuming that accused has committed the offence/s which is/are triable, then necessarily charge shall be framed.

(ii) The trial Judge has to apply his judicial mind to the facts of the case, with reference to the materials produced by the prosecution, as may be necessary, to determine whether a case has been made out by the prosecution for trial on the basis of charge/final report.

(iii) Once the accused is able to demonstrate



from the materials form part of the charge/final report at the stage of framing the charge which might drastically affect the very sustainability of the case, it is unfair to suggest that such material should not be considered or ignored by the court at this stage. The main intention of granting a chance to the accused of making submissions as envisaged under Section 227 of the Cr.P.C. is to assist the court to determine whether it is required to proceed to conduct the trial.

(iv) At the stage of considering an application for discharge the court must proceed on an assumption that the materials which have been brought on record by the prosecution are true and evaluate said materials, in order to determine whether the facts emerging from the materials taken on its face value, disclose the existence of the ingredients necessary of the offence/s alleged.

(v) The defence of the accused not to be looked into at the stage when the accused seeks discharge. The expression "the record of the case" used in Section 227 Cr. P.C. is to be understood as the documents and objects, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. The submission of the accused is to be confined to the material produced by the prosecution.



(vi) *The primary consideration at the stage of framing of charge is the test of existence of a prima-facie case, and at this stage, the probative value of materials on record shall not be evaluated.*

(vii) *At the stage of framing of charge, the court has to form a presumptive opinion to the existence of factual ingredients constituting the offence alleged and it is not expected to go deep into probative value of the material on record and to check whether the material on record would certainly lead to conviction at the conclusion of trial.*

(viii) *In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which are really the function of the trial Judge, after the trial. At the stage of Section 227, the Judge has merely to sift the prosecution materials in order to find out whether or not there are sufficient grounds to proceed with trial of the accused.*

(ix) *Strong suspicion in favour of the accused, cannot take the place of proof of his guilt at the conclusion of the trial. But at the time of framing charge, if there is suspicion which leads the Court to think that there is ground for presuming that the accused has committed an*



offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. In such case also charge needs to be framed to permit the prosecution to adduce evidence.

(x) If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.”

11. Summarising the discussion, it is held that, *prima facie*, the ingredients to attract offences punishable under Section 509 of IPC as well as under Section 11(1) r/w 12 of PoCSO Act have been made out by the prosecution. The question as to whether the accused had the required sexual intent is a matter of evidence and the same is available during trial alone.

12. Having considered the facts of the case, the dismissal of discharge petition filed by the petitioner before the trial court, is only to be justified



and, therefore, the impugned order doesn't require any interference. Consequently, this revision petition must fail.

Accordingly, this Revision Petition stands dismissed.

Registry shall forward a copy of this order to the jurisdictional court for information and for further steps.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/