



2024/KER/57377

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 30TH DAY OF JULY 2024 / 8TH SRAVANA, 1946

OP(CRL.) NO. 485 OF 2024

AGAINST SC NO.770 OF 2023 OF FAST TRACK SPECIAL COURT,
PUNALUR

PETITIONER/ACCUSED:

ANUJITH
AGED 23 YEARS, S/O AJITH,
VALETH PUTHEN VEEDU,
NEAR POLYTECHNIC, NELLIPALLY P.O,
VALACODE VILLAGE,
PUNALUR TALUK, PIN - 691305

BY ADV PRAKASH MATHEW

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031

SRI. NOUSHAD K.A., PUBLIC PROSECUTOR

THIS OP (CRIMINAL) HAVING COME UP FOR ADMISSION ON
22.07.2024, THE COURT ON 30.07.2024 DELIVERED THE
FOLLOWING:

**“C.R.”****BECHU KURIAN THOMAS, J****.....
O.P.(Crl.) No.485 of 2024
.....****Dated this the 30th day of July, 2024****JUDGMENT**

Can the mode of examination contemplated under section 33(2) of the Protection of Children from Sexual Offences Act, 2012 be extended to a victim who is no longer a child? The aforesaid question arises for consideration in this original petition under Article 227 of the Constitution of India.

2. Petitioner is the sole accused in a proceeding under the Protection of Children from Sexual Offences Act, 2012 [for short, 'the Act'] and also under the Indian Penal Code, 1860 for sexual offences including rape of a minor girl. The proceeding is pending as S.C. No.770/2023 on the files of the Fast Track Special Court, Punalur. The victim was examined as PW1 on 01.12.2023 and she was cross-examined on 03.06.2024. During the course of the cross-examination, the learned defence counsel requested permission to put questions directly to the



victim as it transpired that she had attained the age of majority on 04.12.2023. According to the petitioner, the protection under Section 33(2) of the Act, ought not to be extended to the witness as she had crossed the age of minority and is no longer a child. The Special Court refused to accept the plea of the defence counsel, and hence, this petition seeking directions to the Special Court to permit the defence counsel to cross-examine PW1 directly without putting questions to the court and not to provide the benefit of Section 33(2) of the Act to the victim.

3. Sri. Prakash Mathew Panjikaran, the learned counsel for the petitioner, persuasively submitted that the entire purpose of Section 33(2) of the Act, is to insulate a child from direct and vigorous cross-examination of the defence counsel. According to the learned counsel, the use of the term 'child' in the aforementioned provision is indicative of the legislative intention that such protection must be provided only if the person being subjected to examination is below the age of majority, in view of the definition in section 2(d) of the Act. Learned counsel further submitted that the principles of fair trial demand that the exception carved out under the Act while examining a child be



accorded only to a child and not to a person, who has crossed the age of eighteen. Learned counsel further relied upon the decisions in **Manu Dev v. xxxx** (2023 (2) KHC 41) and **Unnikrishnan R. v. Sub Inspector of Police, Kurathikadu Police Station and Another** (2018 (5) KHC 390) to drive home the contention that cross-examination will be deprived of its very purpose if the questions are not put directly to the witness, especially when the purpose of the provision is only to insulate the child against offensive or aggressive cross-examination.

4. Sri.K.A.Noushad, the learned Public Prosecutor, on the other hand, contended that one of the objectives of the Statute is to insulate the victim of sexual abuse who is a child at the time of the offence from further traumatic experiences. According to the learned Public Prosecutor, reference to Sections 35, 36 and 37 of the Act will clearly indicate the legislative intention and if the request of the petitioner is permitted, the same would offend the intention of the statute.

5. While considering the contentions advanced, it is necessary to bear in mind the objectives and the scheme of the statute under consideration. The Act is a comprehensive legislation, to protect children from sexual offences. A Special



Court is created incorporating child-friendly mechanisms, not only for reporting the crime, but also for recording evidence. Section 22 of the Act deals with the special provisions for recording the statement of a victim, section 23 imposes restrictions on asking explicit or embarrassing questions to the victim. The cross-examination of the child should be gentle and non-confrontational and explicit or graphic details should be avoided and be conducted in a child-friendly manner focusing on relevant facts.

6. The term child is defined in section 2(1)(d) of the Act as follows:

*“2. Definitions.—(1) In this Act, unless the context otherwise requires, -
(d) “child” means any person below the age of eighteen years.”*

7. The procedure provided in the Act for the examination of the child is mentioned in Section 33(2) of the Act, which states as follows :

“33. Procedure and powers of Special Court.—

(1) xxx xxx xxx xxx xxx xxx xxx

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.”

8. On an appreciation of the aforesaid provisions, it is



evident that the statute intends to protect a child who is already a victim of sexual abuse from further mental trauma and to provide remedies for such abuses. A departure from the normal mode of examination was brought in by a legislative mechanism to protect the victim. From a conservative point of view, examination, especially the cross-examination, through an intermediary may not achieve the purpose of an effective examination. Nevertheless, the legislative intention to insulate the victim of the offence against aggressive and offensive cross-examination and from embarrassing questions, cannot be overlooked. The insulation from mortifying questions is necessary since the offence relates to sexual abuse. The purpose of such a mechanism is to ensure that the victim is able to testify in a safe, confident and dignified manner. The intention is also to avoid cross-examination being another bout of trauma for the victim.

9. There is no doubt that cross-examination is an art that requires great skill, inventiveness and acumen. Questioning the witness directly has its own effectiveness. The efficacy of cross-examination can be marginally diminished by the restriction on direct cross-examination. A fair trial cannot also be sacrificed



under any circumstances whatsoever. True, as observed in **Unnikrishnan R's** case (supra) that cross-examination is a skill that requires the greatest ingenuity, logical thought, perception, ability to read men's minds intuitively, and to understand the witnesses by their face and the ability to cross-examine with force and precision. This Court had also observed in the above judgment that a lawyer has to deal with a prodigious variety of witnesses testifying under different circumstances and a skilled lawyer should know the precise moment at which a particular question is to be put and the questions which are not to be put and further that in a regular cross-examination, questions are often to be moulded and asked on the spur of moment, depending on the answers given by the witness. However, the above salient features of cross-examination cannot be a justification to ignore the statutory intention.

10. A perusal of the various provisions of the Act, especially sections 35, 36 and 37 indicates that the scope and extent of protection accorded by the statute is not just to the child, but it is accorded to the child who is a victim. The protection or the insulation provided to the victim of sexual abuse by the Act, cannot be defeated depending upon the date



of examination of the child. If the protective umbrella under the Act gets removed based on the age of the victim on the date of examination, ingenuous methods could be adopted by the accused to delay the examination of a victim and thereby overcome the rigour of the Statute.

11. Further, if the date of examination is the determinant for applying Section 33(2) of the Act, the law will remain fluid, fluctuating between different dates of examination. Such uncertainty in law cannot be permitted.

12. Thus, this Court is of the view that it is not the date of examination that determines whether the benefit of Section 33(2) of the Act should be accorded or not, but it is the date of commission of offence that determines the said question. The above interpretation is fortified by the prefatory words to the definition clause "*unless the context otherwise requires*" appearing in section 2(1) of the Act. Hence the word 'child' in section 33(2) of the Act has to be interpreted as 'the victim' and therefore the protection under the said provision will continue to remain for the victim, regardless of whether he or she attains the age of majority in the meanwhile. Thus the mode of examination contemplated under section 33(2) of the Act is to



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be applied notwithstanding the victim crossing the age of eighteen.

Hence this original petition is devoid of any merit and it is dismissed.

Sd/-

BECHU KURIAN THOMAS
JUDGE

vps



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APPENDIX

PETITIONER'S/S' EXHIBITS:

EXT.P1 TRUE COPY OF THE SSLC CERTIFICATE OF THE PW1 NO.687345

RESPONDENT'S/S' EXHIBITS:

NIL