



2024/KER/48707

“C.R.”

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

WEDNESDAY, THE 3RD DAY OF JULY 2024 / 12TH ASHADHA, 1946

CRL.REV.PET NO. 768 OF 2021

AGAINST THE ORDER DATED 14.12.2021 IN CRMP 184/2021 IN SC

NO.154 OF 2021 OF THE FAST TRACK SPECIAL COURT,

CHANGANASSERY

REVISION PETITIONER/2ND ACCUSED:

JEFFIN KURIAKOSE

AGED 28 YEARS

S/O.KURIAKOSE, PUTHANPURACKAL HOUSE,
EZHALLOOR BHAGOM, KUMARAMANGALAM VILLAGE,
IDUKKI - 685 605.

BY ADV NANDAGOPAL S.KURUP

RESPONDENT/COMPLAINANT:

THE STATE OF KERALA

REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH
COURT OF KERALA, ERNAKULAM - 682 031.

SMT.SHEEBA THOMAS, PUBLIC PROSECUTOR

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR
FINAL HEARING ON 19.06.2024, THE COURT ON 03.07.2024
DELIVERED THE FOLLOWING:

**P.G. AJITHKUMAR, J.****“C.R.”****Crl.Revision Petition No.768 of 2021****Dated this the 3rd day of July, 2024****ORDER**

The petitioner is the 2nd accused in S.C.No.154 of 2021 pending on the files of the Fast Track Special Court, Changanassery. He filed Crl.M.P.No.184 of 2021 seeking discharge. The learned Special Judge dismissed that petition as per the order dated 14.12.2021. Challenging that order, the petitioner has filed this petition under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (Code).

2. Heard the learned counsel for the petitioner and the learned Public Prosecutor.

3. The offences alleged in the final report are punishable under Sections 363, 368 and 376(2)(n) read with Section 34 of the Indian Penal Code, 1860 (IPC) and Sections 4 r/w 3 and 6 r/w 5(I) of the Protection of Children from Sexual Offences Act, 2012 (PoCSO Act). The Special Judge



held that the petitioner is not answerable even constructively for the charges of kidnapping and rape. However, it was held that the petitioner is liable to be tried for the offence of abetment punishable under Section 17 of the PoCSO Act. The learned counsel for the petitioner would submit that such an offence was not alleged in the final report and the materials produced by the prosecution would not make out such an offence as against the petitioner. The statement of the victim itself reveals that the petitioner, who is her friend, helped her on her request to find a flat. The further overtact is that he dropped the de facto complainant and the 1st accused near the flat and that he purchased a mobile phone and gave to her. In the view of the learned counsel for the petitioner by any stretch of imagination those acts would not attract an offence of abatement to commit kidnapping and penetrative sexual assault. Accordingly, the learned counsel submits that the impugned order is liable to be set aside and the petitioner discharged.



4. The learned Public Prosecutor, on the other hand, would submit that when the petitioner, knowing fully that the victim was a child, facilitated to avail a flat and stay there along with the 1st accused, that would amount to aiding him for the commission of the sexual offences. It is contended that the statement of the victim coupled with assertions by charge witness Nos.7 and 8 establishes the complicity of the petitioner in facilitating commission of such an offence and therefore he is answerable to a charge of abetment.

5. From the statement of the victim given to the investigating officer under Section 161 of the Code, Annexure A4, it is seen that the petitioner is her friend and on her request only the petitioner had helped her to avail the flat on rent where the alleged offences of sexual assault occurred. It is also stated that he took her along with the 1st accused near the flat. On her request only a mobile phone was made available to her by the petitioner. From the statements of charge witness Nos.7 and 8, it is evident that it was the victim who took initiative to avail the flat on rent. It is, however,



seen from the victim's statements that the petitioner was also along with them for availing the flat. When that is the evidence proposed by the prosecution to prove the complicity of the petitioner, his contention that the said acts would not amount to any offence has to be considered in the light of the provisions of Sections 16 and 29 of the PoCSO Act.

6. Section 16 of the PoCSO Act which defines abetment has three clauses. If an act of a person falls within the purview of any of those clauses it would amount to abetment. The third clause, at the best, applies to the present case. The third clause is hence reproduced here:

"A person abets the doing of a thing who intentionally aids, by any act or illegal omission, the doing of that thing".

The scope of the word "aids" has been clarified in Explanation-II, which reads:

"Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act".



The said Explanation does not say what would or would not amount to "intentionally aids". It only explains what is meant by aiding. But when the clause thirdly couched with 'intentionally' an act which merely amounts to aiding the commission of an offence is not abetment. The aiding must have been with the intention that such an offence would be facilitated. Then only the 'aiding' will snow-ball into "intentionally aiding". Thus, in order to constitute abetment, the abettor must be shown to have "intentionally aided" the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of Section 16 of the PoCSO Act. And, intention being a condition of mind locked in the bosom of the concerned, necessarily should be a matter for inference from the attending circumstances. The circumstance has to be assessed, discerned and understood with due regard to the usual human conduct.



7. The aforementioned principle which is germane in the context of Section 107 of the IPC may not be the yardstick in a case involving offences under the PoCSO Act, since Section 29 of that Act creates a legal fiction of presumption. Section 29 of the PoCSO Act states:

“29. Presumption as to certain offences.- Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

8. In a prosecution for sexual assault against a minor, the Special Court trying the case therefore will presume that the accused is guilty unless proven otherwise. This presumption also applies when the accused is prosecuted for abetting to commit offences under Sections 3, 5, 7, and 9 of the Act. When the materials placed on record by the prosecution show that the petitioner rendered assistance to the victim to avail the flat in question on rent and at that time the 1st accused was also present along with them, the



attribution of the offence punishable under Section 4 of the PoCSO Act attracts a presumption under Section 29 of the PoCSO Act. At the stage of framing of a charge/discharge, it is not possible to delve deep into the facts borne by records in order to decide whether such a presumption would be rebutted or not. That is a matter coming within the realm of trial and appreciation of evidence.

9. In the above circumstances, I am of the view that the trial court rightly had held that a charge for an offence under Section 17 of the PoCSO Act was liable to be framed against the petitioner. If the prosecution materials make out an offence, non-mentioning of it in the final report does not bar the trial court from framing a charge for that offence. The impugned order therefore is not liable to be interfered with. The Revision petition is therefore dismissed.

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr



APPENDIX OF CRL.REV.PET 768/2021

PETITIONER ANNEXURES

- ANNEXURE A1** CERTIFIED COPY OF THE FIR AND THE FIS IN CRIME NO.1198/2020 OF KARUKACHAL POLICE STATION.
- ANNEXURE A2** CERTIFIED COPY OF THE FINAL REPORT ALONG WITH THE 161 STATEMENTS IN S.C.NO.154/2021 ON THE FILES OF THE FIRST TRACK SPECIAL COURT, CHANGANACHERRY.
- ANNEXURE A3** TRUE COPY OF THE PETITION NUMBERED CRL. M.P NO. 226/2023IN S.C NO. 154/2021 ON THE FILES OF THE FAST TRACK SPECIAL COURT, CHANGANASSERY
- ANNEXURE A4** TRUE COPY OF THE 161 STATEMENT GIVEN BY THE VICTIM
- ANNEXURE A5** TRUE COPY OF THE 164 STATEMENT OF THE VICTIM.