



2024:KER:62763

Cr1.R.P.818/2022

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 14TH DAY OF AUGUST 2024 / 23RD SRAVANA, 1946

CRL.REV.PET NO. 818 OF 2022

ORDER DATED 01.11.2022 IN CRMP NO.4642 OF 2022 IN
S.C.NO.300/2021 OF ADDITIONAL SESSIONS JUDGE-I (SPECIAL COURT),
PATHANAMTHITTA (SPECIAL COURT UNDER POCSO ACT, PATHANAMTHITTA)

REVISION PETITIONER/PETITIONER/ACCUSED:

P.C. VARGHESE MUTHALALI
AGED 80 YEARS, ADVOCATE
S/O. CHACKO MUTHALAI,
PADINJATTUKARA PUTHEN VEEDU,
KANNANCODE, ADOOR, PIN - 691523.

BY ADV THOMAS GEORGE

RESPONDENT/RESPONDENT/COMPLAINANT:

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

SENIOR PUBLIC PROSECUTR SRI RENJIT GEORGE

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
01.08.2024, THE COURT ON 14.08.2024 PASSED THE FOLLOWING:



“C.R”

A. BADHARUDEEN, J.

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Crl.R.P.No.818 of 2022
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Dated the 14th day of August, 2024

O R D E R

This Revision petition has been filed under Section 397 r/w 401 of the Code of Criminal Procedure (for short ‘Cr.P.C.’ hereinafter) and the revision petitioner is the sole accused in SC.No.300/2021 pending before the Special Court for trial of cases under the Protection of Children from Sexual Offences Act (‘POCSO Act’ for short), Pathanamthitta. The revision petitioner impugns order dated 01.11.2022 in Crl.M.P.No.4642/2022 in S.C.No.300/2021, whereby the petition filed by the petitioner/accused to discharge him under Section 227 of the Code of Criminal Procedure (‘Cr.P.C’ for short) was dismissed.

2. Heard the learned counsel for the revision petitioner and the learned Public Prosecutor in detail. Perused the order impugned and the relevant documents, including final report and statement of the



witnesses.

3. In this matter, the prosecution alleges commission of offences punishable under Sections 7 and 8 of the POCSO Act on the allegation that when the victim boy, aged 12 years, reached the advocate office run by the accused on 10.11.2019 along with witnesses 2 and 3, the accused opened the zip of the pants worn by the victim and caught hold of his penis and made comment that the same is small as that of kids and thereby subjected the victim to sexual assault.

4. It is pointed out by the learned counsel for the revision petitioner that as per Annexure V this Court granted anticipatory bail to the petitioner and the specific case put up by the petitioner was that he was implicated in this crime. He also would submit that the trial court failed to consider the ingredients to attract the offences punishable under Sections 7 and 8 of the POCSO Act while dismissing the application filed by the petitioner seeking discharge and going by the allegations, *prima facie*, the prosecution case is not made out. Therefore, dismissal of the discharge petition by the Special Court is erroneous and the same would require interference, so as to grant discharge to the petitioner.

5. While opposing discharge, the learned Public Prosecutor



would submit that going by the allegations, materials to attract offences under Sections 7 and 8 of POCSO Act are made out, *prima facie*, warranting framing of charge and trial and therefore, the learned Special Judge rightly dismissed the discharge petition. As such, the said order doesn't require any interference.

6. In so far as the essentials to be considered while considering the petition under Section 227 of Cr.P.C and while framing charge under Section 228 of Cr.P.C, the law is well settled. In the decision 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.”



7. Coming to Section 7 of POCSO Act, where it has been provided that, whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault. Section 8 provides for punishment for the offence punishable under Section 7. So touching the penis of a child with sexual intent is an offence under Sections 7 of the POCSO Act and punishable under Section 8 of the Act.

8. Here the allegation exactly is that the accused opened the zip of the pants of the victim and caught hold on his penis and stated that the same is small as that of kids. The prosecution specifically alleges that the accused done the overt acts with sexual intent. It is argued by the learned counsel for the petitioner that the overt acts done by the accused, if admitted, the same could not be held as one done with sexual intent. In view of this specific contention, the questions pose for decision are: (i) What are the parameters that would govern 'culpable mental state' under the POCSO Act? and (ii) Is it permissible to consider the question of 'culpable mental state' at the time of discharge or quashment of the



proceedings, prohibiting the prosecution to lead evidence and negating the reverse burden of the accused under Section 30 of the POCSO Act?

9. In this connection, presumption of culpable mental state provided under Section 30 of the POCSO Act assumes significance.

Section 30 provides as under:

“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, but it shall be a defence for the accused to prove that he had no such mental state with respect to act/acts charged as an offence/offences in the prosecution. Thus in cases, where the overt acts dealt under the provisions are made out, the Court shall presume the culpable mental state



of the accused, before trial. After trial, when the prosecution discharges its initial burden to prove the commission of the offence/s, with essentials to constitute the same, then a reverse burden is cast upon the accused to prove that he has no 'culpable mental state' to commit the offence with sexual intent. Therefore, 'culpable mental state' is a matter which cannot be considered at the pre-trial stage, viz., (i) in a proceedings for quashment of the crime and (2) at the time of discharge. However, quashment or discharge can be considered at the pre-trial stage, if the prosecution materials do not constitute offences alleged by the prosecution.

10. Having gone through the prosecution materials at par with the arguments advanced by the learned counsel for the petitioner and the learned Public Prosecutor, this is not a case of discharge since the prosecution materials, *prima facie*, made out the offence alleged to be committed by the accused warranting framing of charge and trial. The question as to whether the accused had the required sexual intent is a matter of evidence and the same is available during trial and not at the pre-trial stage.

11. 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.

12. Accordingly, this Revision Petition stands dismissed.

13. Interim order, already granted, shall stand vacated. Since the matter is of the year 2021, the Special Judge is directed to expedite the trial and dispose of the case, as early as possible, within a period of four months, from the date of receipt of a copy of this order.

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

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/