

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

THURSDAY, THE 22ND DAY OF DECEMBER 2022 / 1ST POUSHA, 1944

CRL.MC NO. 4577 OF 2022

**AGAINST SC 707/2019 OF ADDL. SESSIONS AND SPECIAL (POCSO ACT)
CPIRT, THIRUVANANTHAPURAM**

PETITIONER:

XXX

XXX,
BY ADVS.
MAJIDA.S
AJIKHAN.M

RESPONDENTS:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM, PIN - 682031
- 2 STATION HOUSE OFFICER
KAZHAKUTTOM POLICE STATION,
THIRUVANANTHAPURAM, PIN - 695582
- 3 XXXXXXXXXXXX
XXXXXXXXXXXX XXXXXXXXXXXX

R1 & R2 BY SRI SANAL P RAJ-PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
22.12.2022, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

O R D E R

This Crl.M.C has been preferred to quash all further proceedings in S.C.No.707/2019 on the file of the Additional Sessions and Special (POCSO) Court, Thiruvananthapuram (for short ‘the court below’) under Section 482 of Cr.P.C.

2. The petitioner is the sole accused. The 3rd respondent is the de facto complainant.

3. The offences alleged against the petitioner are punishable under Section 204 of IPC, Sections 11(ii), 11(v), 9(p), 10 and 12 of the Protection of Children from Sexual Offences Act, 2002 (for short ‘the POCSO Act’), Sections 67A and 67B(b) of the Information Technology Act , 2002 (for short ‘the IT Act’) and Section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short ‘the JJ Act’).

4. The 3rd respondent’s son was a student of 8th standard at Sainik School, Kazhakuttom. He was staying in the hostel of the

school. The petitioner is stated to be a housemaster of the hostel. The prosecution allegation is that the petitioner who is bound to give care and protection to the victim, took him to his quarters in the upstairs of the hostel, de-robed him, took photographs of his semi naked body and also made him to sit on his lap and touched on his body with sexual intent and further caused disappearance of the electronic evidence by removing the memory card from the camera and thereby committed the offence.

5. I have heard Smt.S.Majida, the learned counsel for the petitioner and Sri.Sanal.P.Raj, the learned Public Prosecutor. Even though notice has been served to the 3rd respondent, there is no appearance.

6. The learned counsel for the petitioner submitted that even if the entire allegations in the first information statement together with the materials collected during investigation are believed in toto, the offences alleged against the petitioner are not attracted. On the other hand, the learned Public Prosecutor submitted that the

allegations in the first information statement are prima facie sufficient to attract the offences and when prima facie case is made out, the jurisdiction vested with this Court under Section 482 of Cr.P.C cannot be invoked.

7. The offences under the POCSO Act alleged against the petitioner are under Sections 11(ii), 11(v), 9(p), 10 and 12.

8. Section 9 of the POCSO Act deals with aggravated sexual assault. Section 10 of the POCSO Act deals with punishment for aggravated sexual assault. Section 7 of the POCSO Act defines sexual assault. When a person in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else, the offence under Section 9(p) of the POCSO Act is attracted. As stated already, the petitioner is stated to be the housemaster of the hostel. In the statement of the 3rd respondent, the victim as well as the Vice Principal of the school, they stated that the duty of the housemaster/petitioner is to look after the affairs of the inmates in the hostel. In short, the duty

assigned to the petitioner is to take care of the inmates as well as to look after the inmates of the hostel and also to look after their affairs. That does not mean that he is in a position of trust or authority of the inmates of the hostel. There are no material on record to suggest that the petitioner is in a position of trust or authority of the inmates of the hostel. That apart, as rightly argued by the learned counsel for the petitioner, no material has been collected by the investigating agency showing the duty assigned to the petitioner. Hence, Section 9(p) as well as Section 10 of the POCSO Act are not prima facie attracted.

9. Section 11 of the POCSO Act deals with sexual harassment. Section 11(ii) gets attracted if a person makes a child exhibit his body or any part of his body with sexual intent so as it is seen by such person or any other person. The statement of the victim would clearly show that the petitioner made the child to exhibit his body. The circumstances clearly show that it was with sexual intent. Therefore, Section 11(ii) is prima facie attracted. In

order to attract Section 11(v) of the POCSO Act, a person should, with sexual intent, threaten 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. The prosecution has no case at all that the petitioner has exercised any threat to the victim. Hence, Section 11(v) is not attracted.

10. Section 67A of the IT Act deals with publishing or transmitting of material containing explicit sexual act of children in any electronic form. The only case of the prosecution is that the petitioner captured the image of the semi naked body of the victim in his camera. There is absolutely no case that he has published or transmitted it. Hence Section 67A of IT Act is not attracted. However, Section 67B(b) of IT Act is attracted when a person creates text or digital image depicting children in obscene or indecent or sexually explicit manner. The statement given by the victim would show that the petitioner captured the semi naked body of the victim.

Hence, the offence under Section 67B(b) of the IT Act is clearly attracted.

11. In order to attract Section 75 of the JJ Act, the accused should be the person who is in actual control or charge over the child. As stated already, there is no case for the prosecution that the petitioner was in actual charge or control over the victim.

12. Section 204 of IPC deals with destruction of a document or electronic record to prevent its production as evidence. It reads as follows:

“204. Destruction of [document or electronic record] to prevent its production as evidence.—Whoever secretes or destroys any [document or electronic record] which he may be lawfully compelled to produce as evidence in a Court of Justice, or in any proceeding lawfully held before a public servant, as such, or obliterates or renders illegible the whole or any part of such 1[document or electronic record] with the intention of preventing the same from being produced or used as evidence before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

13. According to the prosecution, the petitioner has removed

the memory card from his camera in order to destroy the evidence. The learned counsel for the petitioner submitted that the camera used by the petitioner is DSLR camera and it does not have any memory card at all. The mahazar would show that the pen drive seized by the police contained the entire image of the photograph and video graph captured by the petitioner. Hence there is no question of destruction of any evidence. That apart, there is nothing on record to show that the memory card in DSLR camera has been removed by the petitioner. Hence, Section 204 of IPC is also not attracted.

14. In the light of the above findings, the offence under section 11(ii) r/w 12 of the POCSO Act and Section 67B(b) of the IT Act alone are attracted against the petitioner. Even if the entire allegations in the FI statement together with the materials collected during investigation are believed in toto, the offence under Sections 11(v), 9(p) of the POCSO Act, Section 67A of the IT Act, Section 75 of the JJ Act and Section 204 of IPC are not attracted. Hence, all

further proceedings against the petitioner under Sections 11(v), 9(p) of the POCSO Act, Section 67A of the IT Act, Section 75 of the JJ Act and Section 204 of IPC are hereby quashed.

Crl.M.C is allowed in part as above.

Sd/-

DR. KAUSER EDAPPAGATH

JUDGE

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APPENDIX

PETITIONER' ANNEXURES:

ANNEXURE A1: COPY OF THE FINAL REPORT IN S.C.No.707/2019

RESPONDENTS ANNEXURES: NIL