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**(2025) 02 KL CK 0046**

**High Court Of Kerala**

**Case No:** Criminal Miscellaneous Petition No. 1861 Of 2023

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APPELLANT

Vs

State Of Kerala

RESPONDENT

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**Date of Decision:** Feb. 11, 2025

**Acts Referred:**

- Code of Criminal Procedure, 1973 - Section 482
- Protection of Children from Sexual Offences Act, 2012 - Section 7, 8, 9(1)(m), 9(1)(n), 10, 30
- Assisted Reproductive Technology (Regulation) Act, 2021 - Section 31(1), 31(2)

**Hon'ble Judges:** A. Badharudeen, J

**Bench:** Single Bench

**Advocate:** Nithya R. S, Hajin S. Hameed, Jibu T.S, Shaijan C George C George, Vinai John

**Final Decision:** Allowed

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**Judgement**

A. Badharudeen, J

1. Sole accused in S.C.No.998/2020 on the files of the Additional Sessions Court (PoCSO), Thiruvananthapuram, seeks quashment of the said case

arising out of Crime No.960/2018 of Vanchiyoore Police Station, Thiruvananthapuram, where the accused is alleged to have committed offences

punishable under Section 7 r/w Section 8, Section 9(l)(m)(n) and Section 10 of the Protection of Children from Sexual Offences Act, 2012 (for short,

'the PoCSO Act' hereinafter).

2. Heard the learned counsel for the petitioner and the learned counsel appearing for the 2nd respondent/de facto complainant. Also heard the learned

Public Prosecutor, in detail.

3. In this matter, the allegations against the accused is that, at about 12.15 hrs. on 12.5.2018, when the accused was given temporary custody of the minor boy aged 7 years, as per the interim order of the Family Court, Thiruvananthapuram, the accused touched on the penis of the minor victim with sexual intent and made comments about the size of the penis and thereby, he committed the above offences.

4. While seeking quashment, the learned counsel for the petitioner argued that the entire allegations in Annexure A FIR and Annexure C Final Report in this crime are false and the said allegations are falsely raised by the 2nd respondent/de facto complainant, who got divorce from the petitioner, in order to defeat him in O.P.No.35/2015 filed by him to get custody of the minor. It is pointed out that, in fact, the allegation of sexual assault was alleged while the victim was given interim custody on the date of the alleged occurrence also, by the Family Court. According to the learned counsel for the petitioner, Section 7 of the PoCSO Act defines sexual assault and the offences under the PoCSO Act are inter-related to Section 7. Therefore, merely touching the penis of the child would not make out an offence if the same is not with sexual intent. Accordingly, the learned counsel for the petitioner submitted that the petitioner got custody of his minor son because of his affection towards him and he had no sexual intent. Therefore, the allegations are false. Apart from the same, the learned counsel pointed out grounds (ii) to (iv) in the Crl.M.C. also to justify quashment as prayed for.

Grounds (ii) to (iv) in the Crl.M.C. are as under:

ii. The 2nd respondent has selected the most unpleasant way to win the case in favor of her and thereby made her minor son a scapegoat. The 2nd respondent fearing that the family court may grant custody of the minor son to the petitioner has foisted the present crime, in order to defeat the ends of justice. The 2nd respondent in order to pressurize the petitioner and settle her end has foisted the present case. The provisions of Protection of Children from Sexual Offences Act, 2012 is misused in the present case. In one instance, this Honorable Court has expressed its dissatisfaction in the manner in which the act is being misutilized to settle personal scores or vendetta and how the life of persons is being played with at ease. This Honorable Court in Baby v. State of Kerala and another 2013 (4)

KLT 15 observed,

This case reflects the potential danger to all. No one seems to be safe. It seems that anybody can be implicated easily"".

iii. The 2nd respondent in order to cover up her mistakes and to wreak vengeance upon the petitioner has falsely implicated the petitioner in the case. The

allegation put forward by the 2nd respondent is that on 12/05/2015, when she produced the child before the Family Court at 11:00 am in compliance with the

interim order of the Family Court, the accused, who is the father of the child at about 12.15 pm, touched the body of minor son including his private part. It has

come out in the complaint of the 2nd respondent and statement of the child that the alleged victim was sitting near 2nd respondent and there were other persons

sitting near to them in Court. If the said incident had happened as alleged, the 2nd respondent or other parties present there would have been shown their

resistance immediately. Further, there was no complaint by the 2nd respondent to the staff of court who was present there, which would show that her allegation

is false.

iv. The 2nd respondent in order to wreak personal vengeance against the petitioner is making false allegations. In Vesa Holdings (P) Ltd and another v. State of

Kerala & others 2015 (1) KLD 823, it was held by the Supreme Court that ""Criminal Proceedings should not be encouraged when it is found to be mala-fide."" In

Parminder Kaur v. State of U.P & another, AIR 2010 SC 840, it was held that ""When a criminal proceeding is manifestly attended with mala-fide and/or where the

proceedings is maliciously instituted with an ulterior motive for wreaking vengeance on the accused with a view to spite him due to private and personal grudge,

the same may be quashed in exercise of its powers under section 482 of Cr.P.C."" In R. Kalyani v. Janak C. Mehta and others 2009 (1) SCC 516, it was held that,

One of the paramount duties of the superior courts is to see that a person who is apparently innocent is not subjected to persecution and humiliation on the basis

of a false and wholly untenable complaint.

5. Zealously opposing quashment, the learned counsel for the 2nd respondent/the de facto complainant, who is the mother of the victim child would

submit that the de facto complainant filed counter statement and additional counter statement with documents and the contention of the 2nd

respondent/de facto complainant is that the allegations against the petitioner raised by the minor child are the sexual assault suffered by the minor,

which led to commission of the offences alleged, and the de facto complainant never persuaded him to do anything so as to implicate the petitioner in the case. It is pointed out by the learned counsel for the 2nd respondent further that marriage between the petitioner and the 2nd respondent was solemnized on 11.7.2009 and while they had been living as husband and wife, during the initial days itself, the petitioner's mother always blamed the 2nd respondent as a barren woman. Thereafter, the 2nd respondent persistently demanded medical consultation for the petitioner as well as the 2nd respondent and ultimately, there was medical consultation at SAT Hospital, Thiruvananthapuram. During medical examination at SAT Hospital, Thiruvananthapuram, it was revealed that the petitioner is impotent and he is aware of the same even prior to marriage. Thereafter, as advised by the Doctor at SAT Hospital, Thiruvananthapuram, the petitioner and the 2nd respondent continued treatment at KJK Hospital, Nalanchira, Thiruvananthapuram and the impotency of the petitioner was confirmed and on the same day, the Doctor informed that the 2nd respondent had no issues and she could deliver a child after conceiving from a donor. According to the 2nd respondent, the minor victim was born by method of Intrauterine Insemination (IUI) by using donor's sperm, as evident from Annexure R2(a), true copy of Infertility Case Record issued from KJK Hospital, Nalanchira, Thiruvananthapuram, as consented by the petitioner. In fact, the petitioner gave consent to the 2nd respondent to undergo IUI procedure to suppress his impotency from the outside world. Meanwhile, the 2nd respondent also noticed illicit relationship between the petitioner and another lady. According to the learned counsel for the 2nd respondent, after birth of the minor victim, the petitioner was too cruel to the victim and he used to call the minor victim as a bastard and he uttered that he would kill him. Further, he ashamed the 2nd respondent by calling her as a bitch. It is also pointed out by the learned counsel for the 2nd respondent that since the relationship between the petitioner and the 2nd respondent found to be difficult to continue due to the attitude of the petitioner, the marriage was dissolved on 27.6.2014, as evident from Annexure B. The learned counsel placed decision of the Apex Court in Attorney General & Ors. v. Satish & Ors. reported in (2022) 5 Supreme Court Cases 545 with reference to

paragraph Nos.23 to 35, 40, 45, 63 and 74 to 82, while asserting that the overt acts at the instance of the petitioner herein are to be held as done with

sexual intent. In the decision, the Apex Court held in paragraph No.82 as under:

“82. The circumstance in which touch or physical contact occurs would be determinative of whether it is motivated by “sexual intent”. There could be a good explanation for such physical contact which include the nature of the relationship between the child and the offender, the length of the contact, its purposefulness; also, if there was a legitimate non-sexual purpose for the contact. Also relevant is where it takes place and the conduct of the offender keep in mind that “sexual intent” is not defined, but fact-dependant-as the Explanation to Section 11 specifies.”

6. In this connection, it is submitted by the learned counsel for the petitioner that, before divorce there was a compromise so as to give custody of the minor child to the 2nd respondent and also to provide maintenance to the minor child at the rate of Rs.1,000/- per month by the petitioner.

7. As rightly pointed out by the learned counsel for the 2nd respondent even though the marriage between the petitioner and the 2nd respondent was dissolved as per Annexure B order in a joint petition filed by them, the relief insofar as maintenance was not granted by the court. In this connection, it

is submitted by the learned counsel for the petitioner that as far as paternity of a child born in IUI mode is concerned, at present, the Assisted

Reproductive Technology (Regulation) Act, 2021 (for short, “the Act, 2021” hereinafter) came into force w.e.f. 25.1.2022 would apply, though

the same has no direct application in the instant case, since the said Act has no retrospective effect.

8. As per Section 31(1) and 31(2) of the Act, 2021, it has been provided as under:

31. Rights of child born through assisted reproductive technology.-

(1) The child born through assisted reproductive technology shall be deemed to be a biological child of the commissioning couple and the said child shall be entitled to all the rights and privileges available to a natural child only from the commissioning couple under any law for the time being in force.

(2) A donor shall relinquish all parental rights over the child or children which may be born from his or her gamete.

9. Thus, as per Section 31(1), if a child is born to a legally-wedded wife through IUI method, then also, the child shall be deemed to be the biological child of the commissioning couple and the said child shall be entitled to all the rights and privileges available to a natural child only from the commissioning couple under any law for the time being in force. As per Section 31(2), a donor shall relinquish all parental rights over the child or children who may be born from his or her gamete. Since the Act, 2021 came into force w.e.f. 25.1.2022, the same has no application in the present case as no retrospective effect seen given to the Act.

10. Having gone through the rival contentions, it is evident from the medical records produced by the 2nd respondent that the victim child was born in IUI method and the records also would show that the petitioner was found to be incapable of producing sperms as part of treatment and thereafter, the 2nd respondent conceived from a donor and gave birth to the minor child. At the same time, as per the final report in this case, witness No.13, Dr.Manoj R, Casualty Chief Medical Officer, General Hospital, Thiruvananthapuram, is cited by the prosecution to prove the potency of the petitioner as per the certificate issued by CW13. Thus, the potency of the petitioner itself is subject to different types of medical opinion, as discussed. Even though these are the factual aspects involved in this case, for which, this Court need not enter into a finality, the question that arises for consideration is, whether the prosecution records would show prima facie commission of offences punishable under Section 7 r/w Section 8, Section 9(l)(m)(n) and Section 10 of the PoCSO Act, by the petitioner herein?

11. As pointed out by the learned counsel for the 2nd respondent and the learned Public Prosecutor, the initial statement recorded as that of the victim and the 164 statement recorded as that of the victim assume significance and therefore, reference to the same is necessary.

12. In this matter, FIR was registered on 18.5.2018 on the strength of a complaint filed by the 2nd respondent before the City Police Commissioner, Thiruvananthapuram, disclosing an occurrence on 12.5.2018 occurred at court premises, when the same was forwarded to the S.H.O., Vanchiyoore Police Station, Thiruvananthapuram city. In the complaint, the 2nd respondent narrated her marriage with the petitioner, its collapse, also birth of the

victim child and filing of O.P.No.35/2015 by the petitioner. In the said complaint, the allegation of sexual assault against the minor was disclosed. It is true that the occurrence was on 12.5.2018 and the complaint was lodged by the 2nd respondent on 17.5.2018. The de facto complainant is a senior clerk working in Government Medical College, Thiruvananthapuram. On 18.5.2018, the Police Inspector, Vanitha Cell, Thiruvananthapuram, recorded the statement of the minor victim by putting questions and getting answers thereof. In the statement, the victim disclosed that he had love towards his father since he used to provide sweets, juice etc., when he came to the court. When a question was asked, why he felt disaffection to his father, he stated that, the disaffection started when he went to the court and the father touched on his head, legs and on the organ used for urination. Regarding the allegation in the statement of the victim, when the same was asked by the learned Magistrate while recording the 164 statement that, whether Arunkumar touched on him, he stated that he touched on the organ used in the toilet. According to him, he did not know who is Arunkumar. His case further is that, when he was in the custody of Arunkumar at the court premises, he used to touch on his hair, fondle on his cheek and thigh. His further statement is that, Arunkumar used to catch hold of his head and cheek, pat on his thigh and catch hold of the organ used in the toilet and no other assault. He further stated that Arunkumar had done the same on so many occasions. In fact, this is the statement given by the victim before the learned Magistrate.

13. On perusal of the complaint lodged by the de facto complainant, the allegation is that, Arunkumar used to catch hold of the minor victim's hand, legs and also on the organ used for urination by commenting whether the same was growing. When the statement of the victim was recorded by the Police Inspector, Vanitha Cell, his version was that he disliked his father by name Arunkumar stating that he used to catch hold of his head, legs and on the organ used for urination. But when he had given statement before the learned Magistrate, instead of using the word "the organ used for urination", he stated that the "organ used in the toilet".

14. In the context of the statement given by the victim as extracted above, it is relevant to refer Section 7 of the PoCSO Act. Section 7 of the PoCSO

Act reads as under:

7. Sexual assault.â€"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.

So, touching on the vagina, penis, anus or breast of the child or making the child touch the vagina, penis, anus or breast of such person or any other

person, or doing any other act with sexual intent which involves physical contact without penetration is an act of sexual assault. Further, Section 30 of

the PoCSO Act deals with presumption of culpable mental state. In Section 30, it has been provided as under:

30. Presumption of culpable mental state.â€"(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 to Section 30 provides that â€œculpable mental stateâ€ includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

15. According to the de facto complainant, she conceived from donorâ€™s sperm and gave birth to the victim. That apart, the petitioner herein used

to blame her as a bitch and also called the child as a bastard. But the petitioner filed O.P.No.35/2015 to get custody of the child where the medical

records produced by the 2nd respondent would show that the victim was born from a donor. In the Act, 2021, Section 31(1) specifically provides to

treat the commissioning couple as parents of the child born through Assisted Reproductive Technology. As submitted by the learned counsel for the

petitioner, because of the registration of this PoCSO case, the original petition filed by the petitioner for getting custody of the minor child was not

proceeded.

16. It is true that stringent provisions are incorporated in the PoCSO Act to punish the culprits who are involved in sexual assault, molestation and sexual harassment against children below 18 years. The intent behind the legislation is to protect the interest of the children from sexual exploitation.

But in practical application, apart from registering so many genuine cases, misuse of the provisions of this Act to settle score is not unusual. In cases

when the husband and wife are in loggerheads and one among them sues for custody of a minor child, there are instances whereby the other spouse

who is not ready to part with the custody of the minor used to fabricate facts to implicate the other spouse in PoCSO offences by using the child

whose custody is sought for. The intention behind implicating the spouse who demands custody of the child is to avoid the claim for custody.

17. In the instant case, O.P.No.35/2015 has been filed by the petitioner for custody of the victim child and the occurrence was on 12.5.2018, when

custody for a short time at the court premises was given to the petitioner. It is discernible that prior to the occurrence also, on many occasions, the

petitioner had custody of the victim as an interim arrangement at the court premises till 12.5.2018.

18. In this matter, the crime itself was registered on the basis of a complaint lodged by the 2nd respondent, who effected divorce from the petitioner

and is now having custody of the minor victim. It is discernible from her complaint and the 161 as well as 164 statements recorded as that of the

victim that the petitioner used to touch on the hair of the minor victim and fondle on his cheek and thigh. The further allegation is that, the petitioner

also touched on his organ used for urination. The same is the basis on which the entire case runs, on the premise that the petitioner committed

offences as alleged. In fact, no complaint lodged as on 12.5.2018 even though such an occurrence had happened and the complaint was registered by

the 2nd respondent only on 18.5.2018, after 6 days. The sexual assault alleged is at the court premises while the petitioner was holding interim custody

as per the order of the Family Court, for limited hours. In fact, the allegation levelled against the petitioner to the effect that he had committed sexual

assault on the minor victim when he got custody for limited hours on 12.5.2018 seems to be not digestible to prudence. To put it otherwise, this is a

case where the 2nd respondent was already divorced from the petitioner and according to her, she conceived with the aid of donor's sperm and

the victim was born through IUI method. With regard to those aspects, this Court could not say a final word. But the case stems from filing of

O.P.No.35/2015 by the petitioner for getting custody of the minor child and the allegation in particular is during the interim custody. In fact, what

emerges is that the allegations are an afterthought at the instance of the 2nd respondent to defeat the case of the petitioner, prima facie.

19. In such view of the matter, it is difficult to hold prima facie that the prosecution case is believable in the context of the facts discussed. Therefore,

I am of the view that the matter would require quashment.

In the result, this petition is allowed. All further proceedings in S.C.No.998/2020 on the files of the Additional Sessions Court

(PoCSO),Thiruvananthapuram, arising out of Crime No.960/2018 of Vanchiyoore Police Station, Thiruvananthapuram, against the petitioner herein,

stand quashed.