



2026:KER:57121

Crl.Appeal No.2302/2024

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

TUESDAY, THE 28TH DAY OF JULY 2026 / 6TH SRAVANA, 1948CRL.A NO. 2302 OF 2024

CRIME NO.292/2021 OF CBCID, ERNAKULAM, Ernakulam

AGAINST THE JUDGMENT DATED 30.09.2024 IN SC NO.1 OF 2022 OF
FAST TRACK SPECIAL COURT, PERUMBAVOORAPPELLANT/ACCUSED NO.1:JOSHY. K.J,
AGED 39 YEARS,
S/O. JOSE, KUNNEL HOUSE, THIRUVILWAMALA P.O.,
THIRUVILWAMALA VILLAGE, BEHIND GVHSSC
KJATTUKULAM, THRISSUR DISTRICT, PIN - 680588.BY ADVS.
SRI.M.G.SREEJITH
SMT.VIDYAJITH M.
SMT.BINCY JOSE
SHRI.ROJIN DEVASSY
SMT.GOPIKA K.V.
ADV.GAJENDRA SINGH RAJPUROHIT(STATE BRIEF)RESPONDENT/COMPLAINANT:STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031.

PUBLIC PROSECUTOR SRI SAJEEV.P.K

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17.06.2026,
THE COURT ON 28.07.2026 DELIVERED THE FOLLOWING:



'CR'

A. BADHARUDEEN, J.***Crl.Appeal No.2302 of 2024******Dated this the 28th day of July, 2026******J U D G M E N T***

This appeal is at the instance of accused No.1 in S.C.No.1/2022 on the files of the Special Court under the Protection of Children from Sexual Offences Act [‘POCSO Act’ for short hereinafter] and he assails judgment dated 30.09.2024 in the said case.

2. As on 25.05.2026, this Court appointed Advocate Gajendra Singh Rajpurohit as the State Brief to argue the appeal on merits since there was no representation for the learned counsel for the appellant on 21.05.2026 and 25.05.2026. When the case was posted for disposal on hearing the State Brief, on today, Advocate M.G.Sreejith, the learned counsel for the appellant appeared and submitted that he would argue the appeal. Accordingly, Advocate M.G.Sreejith and the learned Public Prosecutor were heard in detail. Additional points urged by Advocate



Gajendra Singh Rajpurohit also have been considered. Perused the verdict under challenge and the evidence available.

3. The prosecution case is that at 11 a.m on 20.07.2019, the 1st accused, by misusing his authority as Manager of the 2nd accused, had brought the victim, a minor into the room on the south-eastern portion of the first floor of the building by name 'Pranavam' at Kaloor-Vattapparambu-lane, which was taken on lease by the 2nd accused for running treatment centre. Thereafter, he laid the victim forcefully on the treatment bed and thereafter inserted an oval shaped penis like orange instrument on a vibrating machine. Thereafter on lowering her pants and undergarments, the 1st accused forcefully placed the vibrating machine on her vagina in the vibrating condition. The further allegation is that the 1st accused also threatened the victim that she would not divulge the same to anybody, if so, she would be depicted as a bad girl in the Society and thereby the 1st accused committed the offences punishable under Sections 376, 354B as well as 506(i) of the Indian Penal Code ('IPC' for short) and under Sections 3(b), 4, 7 and 8 of the POCSO Act. The 2nd accused is



also incorporated in this crime on the allegation that he failed to inform the occurrence to the authorities though he was informed of the same by the victim. Thus the 2nd accused alleged to have committed the offence punishable under Section 19(1) r/w 21 of the POCSO Act.

4. The learned Special Judge, on completing the pre-trial formalities, recorded the evidence. PW1 to PW14 were examined, Exts.P1 to P18 and M.O1 to M.O5 were marked on the side of the prosecution. On the side of defence DW1 to DW5 were examined and during cross examination of PW6, Exts.D1 to D4 contradictions and during cross examination of PW12, Exts.D5 to D7 contradictions and Ext.D8 were marked. Thereafter, the learned Special Judge appreciated the evidence and found that the 1st accused committed the offences punishable under Sections 376(1) r/w 375(b), 354B and 506(i) of the IPC as well as under Section 4(1) r/w 3(b) of POCSO Act and accordingly he was sentenced as under:

“(1) The 1st accused is sentenced to undergo rigorous imprisonment for Ten (10) years and to pay a fine of Rs. 20,000/- (Rupees Twenty thousand only) for the offence punishable u/S.4(1) r/w



S.3(b) of the PoCSO Act. In default in -paying the fine, he shall undergo rigorous Imprisonment for a further period of four (4) months.

(2) No separate punishment is awarded for the offence u/S. 376(1) r/w S. 375(b) IPC for the bar u/S 42 of the PoCSO Act.

(3) For the offence u/S. 354B IPC, the 1st accused is sentenced to undergo rigorous imprisonment for Three (3) years and to pay a fine of Rs. 10,000/- (Rupees Ten thousand only). In default in paying the fine, he shall undergo rigorous Imprisonment for a further period of two (2) months.

(4) The 1st accused is sentenced to undergo rigorous imprisonment for six (6) months and to pay a fine of Rs. 5,000/- (Rupees Five thousand only) for the offence punishable u/S. 506(I) IPC. In default in paying the fine, he shall undergo rigorous Imprisonment for a further period of One (1) month.

(5) Substantive sentences shall run concurrently.

(6) The 1st accused is allowed set off u/S.428 of Cr.PC for the period of detention already undergone by him as an under-trial prisoner from 24.10.2021 to 08.06.2022 against the substantive sentence of imprisonment;

(7) If the fine amount is paid or realised, as ordered above, it shall be released to the victim as compensation u/S.357(1)(b) Cr.PC;



(8) *MO1 & MO2 admittedly belong to the 2nd accused and the same after removing the penis-like attachment on MO1 shall be returned to the 2nd accused after the period of appeal or after the disposal of the appeal, if preferred;*

(9) *MOs.3 to 5 have become useless and the same along with the penis-like attachment of MO1 shall be destroyed after the period of appeal or after the disposal of the appeal, if preferred.”*

5. The learned Special Judge found that the 2nd accused did not commit the offence punishable under Section 21 r/w 19(1) of the POCSO Act and accordingly he was acquitted.

6. The learned counsel for the appellant argued that there is inordinate delay in lodging the FIR and according to him, the occurrence as per the prosecution case was on 20.07.2019 and FIR was lodged on 23.10.2021 after a long period. Therefore, the long delay is fatal to the prosecution. The second point argued by the learned counsel for the appellant is that at the time of occurrence, the victim had completed 17 years and 5 months and she would have attained majority after six months. According to him, this case emerged when the 2nd accused was arrested in connection with a cheating case on 25.09.2021. He submitted further that



even though the victim, who was examined as PW1, was questioned by the police in the said crime, she did not make any allegation of sexual assault or sexual overtures against the 1st accused. Therefore, the prosecution case is in the midst of doubt. It is argued further that, since there is no medical or scientific evidence to corroborate the prosecution allegations, the Special Court went wrong in relying on the evidence of PW1 to enter into conviction.

7. It is submitted further that the Special Court committed a glaring aberration from the established rules of appreciation of evidence, while analysing the evidence of PW1. The court below lost sight of the fact that the victim, PW1 being intrinsically pliable, her evidence had to be subjected to thorough scrutiny in order to check whether her version would be affected by extrinsic influence. In the instant case, the Special Court failed to conduct any such exercise and in the absence of any valid corroboration to support the evidence of PW1, the Special Court had given implicit reliance on the evidence of PW1, who had tendered fabricated versions that were impressed upon her by the prosecution, according to the learned counsel for the appellant.



8. It is submitted that the version of PW1 victim regarding the place of occurrence is contrary as per the evidence.

9. It is submitted further without prejudice to the above contentions, that the sentence imposed on the accused for offences found to be committed, is grossly excessive. There is nothing on record to reliably indicate that the accused repeated the sexual assault apart from a vague statement in the testimony of the victim. Thus reduction in sentence also canvassed.

10. Advocate Gajendra Singh Rajpurohit submitted that, relying on the evidence of PW1, insertion of the penis like structure on the vagina of PW1 could not be found since such a version was not given by her before the police though it was stated by her before the court. Therefore, the entire prosecution case regarding the commission of the offences failed to be proved.

11. Opposing this contention, the learned Public Prosecutor submitted that this crime was registered based on a complaint lodged on 23.10.2021 by PW1. It is submitted that even though there is delay of about 2 years in lodging the FIR, the facts and circumstances would justify



the reasons for the delay. Further, in cases of sexual molestation and sexual assault, the tendency of the victim and her relatives to suppress or delay the disclosure of the incident, which would have a detrimental effect on the future of the victim, is natural and, therefore, the delay is of no significance to disbelieve the prosecution case as the victim was able to disclose the occurrence only when the 2nd accused was arrested as she was afraid of the 2nd accused and the 1st accused in the matter of its disclosure. It is submitted further that since the occurrence was on 20.07.2019 and the crime was registered only on 23.10.2021, it was impossible to have the victim medically examined so as to corroborate the prosecution allegations. Therefore, for the said reason, the verdict doesn't warrant interference. He also submitted that the evidence of PW1, the victim, who was subjected to penetrative sexual assault by the 1st accused/appellant herein. That apart the 2nd accused also sexually molested PW1, for which a separate crime was registered and the 2nd accused was prosecuted, convicted and sentenced in the said crime on finding commission of aggravated sexual assault by the 2nd accused on her.



Therefore, the verdict would not require any interference.

12. Having appraised the points raised by both sides, the points arise for consideration are :

(i) Whether the Special Court is right in holding that the accused committed the offence punishable under Section 376(1) r/w 375(b) of IPC?

(ii) Whether the Special Court went wrong in holding that the accused committed the offence punishable under Section 354B of IPC?

(iii) Whether the Special Court is justified in holding that the accused committed the offence punishable under Section 506(i) of IPC?

(iv) Whether the Special Court went wrong in holding that the accused committed the offence punishable under Section 4(1) r/w 3(b) of the POCSO Act?

(v) Is it necessary to interfere with the impugned judgment in any manner?

(vi) The order to be passed?

Point Nos.(i) to (vi)

13. In this case, Ext.P2 is the attested copy of the SSLC book proved through PW1 and Ext.P6 is the extract of the birth certificate of



PW1 proved through PW9, the Registrar of Birth and Death, Maradu Municipality, and as per which the date of birth of the victim is 11.01.2002. Be it so, as admitted by the learned counsel for the appellant/accused and as found by the learned Special Judge, the victim was a minor, aged below 18 years, viz., a 'child' as defined under Section 2(1)(d) of the POCSO Act. In such a case, where the victim completed 17 years and on completion of further period of six months she would attain majority and thus the status of the victim as a 'child' could not be found, would not sustain. Therefore, the contention raised by the learned counsel for the appellant/accused highlighting the age of the victim as 17 years 5 months and 6 days is of no significance.

14. In this case, the prime witness is PW1. The learned Special Judge conducted *voir dire* examination before recording her evidence and the learned Special Judge had put 9 questions to ensure her capability to give evidence and rational answers during her examination. Thereafter, the learned Special Judge satisfied that the witness (victim) was capable of understanding the questions put to her and also capable of giving rational answers to the questions and accordingly she was



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examined. The evidence of PW1 is that, while she was staying at her house after having failed for some subjects in Plus Two course, the 2nd accused brought her to his house offering to teach her cosmetology and accordingly she was appointed as a staff therein. While so, she was taken to the Cosmetology room by the 1st accused and he treated her badly. At about 11 a.m on 20.07.2019, Joshy(A1) took her to the treatment room in the upstairs. According to her, in the upstairs the room of the 2nd accused was on the right side and on the left side was the treatment room. Later Joshy(A1) told about a vibrator and closed the door. Then he removed the attachment in the vibrator and fitted a penis like structure therein. Then she was pushed down to the treatment bed. Then he removed her kurthi capable of opening from front side and lowered her undergarment down. When she attempted to object, Joshy(A1) caught her strongly by using one of his hands and then Joshy(A1) placed the vibrator on her vagina and pressed for sometime and when the same pierced she felt horrible pain. She pushed away Joshy(A1) and put her dress. When she went out, Joshy threatened her that if she would disclose the incident to anybody, she



would be portrayed as a bad lady. Her further version is that because of the threat, she did not disclose it to anybody, but she had informed the same to the 2nd accused and, in turn, the 2nd accused stated that it was only a joke and that was because of her failure to co-operate with the 1st accused (Joshy). When the 2nd accused was arrested for a cheating case, she disclosed the same to the wife of her brother. When she was asked a question why this occurrence was not disclosed till that moment, she answered that she was under threat and fear as Monson, the 2nd accused had goondas and gunmen. She identified Ext.P1 FIS given by her and identified her signature therein. She had given her statement before the Magistrate also, but she failed to disclose all the details before the Magistrate. She also deposed that nobody was present at the time of the overt act. According to her, when the vibrator was placed in her vagina, the same was in working condition. During cross examination, she was asked about the colours of the dress worn by the accused and she answered in the affirmative. But she deposed that she did not mention the colour before the police. Though she failed to specify the time of recording her



statement by the police, she remained consistent with the statement she had given to the police. She also deposed that she had given complaint against Monson (A2) on 09.12.2021. During cross examination, she conceded that she did not remember that the vibrator was placed on her vagina for some time. When it was suggested that such a statement was not given to the police, she asserted that because of the particular mental stage, she could not give statement in detail. She conceded that she did not give statement as to pressing of the vibrator for some time and when it was pierced she felt discomfort. During her further cross examination, she had given rational answers as to the occurrence. Further, when a question was asked why she failed to inform about the sexual overtures by the 1st accused, to her mother and she opted to tell the same to the 2nd accused, she replied that, if had she informed the same to her mother, the mother would not be able to tolerate the same. Therefore, she disclosed the same to Monson (the 2nd accused) anticipating some relief from him.

15. PW2 examined in this case is the business coordinator in the institution of the 2nd accused till 2016. She deposed that the 1st accused



was working there as the make-up man and PW1, who was a student at that time, had occasionally come to the institution with her father, to bring back her mother who was working there, as a maid.

16. PW7 examined in this case is the HR Manager in Cosmos conducted by the 2nd accused during 2018-19. She deposed that the 1st accused was the make-up man, there. PW7 further deposed that PW1 had joined her job in the said institution in 2019.

17. PW3 is the brother of PW1, and was working as the driver-cum-dog-watcher in the institution of the 2nd accused from 2012 to 2018. He deposed that while working in Dubai in 2021, he got information that the 2nd accused had been caught by the Police. Thereafter, his wife told him over telephone that PW1 had disclosed to her that the 1st accused had assaulted her sexually by using vibrating-machine and that the 2nd accused told PW1 that there was no problem and need not be afraid. PW3 deposed further that PW1, who failed in 5 subjects in 12th standard, was employed by the 2nd accused by offering to teach cosmetology and he had no interest in the said employment of his sister as he knew the antecedents



of the 2nd accused and PW3 quit the institution of the 2nd accused, by quarrelling on the same.

18. The Senior Consultant in Gynaecology, General Hospital, Ernakulam was examined as PW4. She deposed that on 02.11.2021, she had examined PW1 and issued Ext.P3 certificate for the same. PW5 was the Scientific Officer, Kochi City Police and on 03.11.2021, she inspected and operated MO1 vibrating unit in the treatment-room of the building named 'Pranavam' at Kaloor and issued Ext.P4 report on her findings, to the Dy.S.P. PW6 deposed that she visited the residence of the 2nd accused at Kaloor to see the antique and also for treatment and the 1st accused was the Make-up man, working there. PW6 testified further that during 2020, she found PW1 in the said institution as the helper for treatment.

19. The Village Officer, Elamkulam, was examined as PW8 and he deposed about preparation of Ext.P5 site- plan of the place of occurrence. PW10, the Revenue Officer, Kochi Municipal Corporation, testified that he had issued Ext.P7 ownership certificate of the building, where the alleged offence occurred.



20. It was PW11, the ASI at the Ernakulam unit of Crime Branch, on 23.10.2021, recorded Ext.P1 F.I Statement of PW1 which would bear the signature of PW1, her sister-in-law (CW2) and her signature. PW11 given evidence supporting attestation of Ext.P8 mahazar prepared on the rent-deed relating to the building involved in the case to prove that the building(place of occurrence) was taken by the 2nd accused on rent. PW12, the Dy.S.P at the Crime Branch Police Station (HQ), deposed that based on Ext.P1 F.I.statement of PW1, sent to the Crime Branch ADGP by the Dy.S.P, Ernakulam Crime Branch, he registered Ext.P9 FIR, as per Ext.P10 order of the Crime Branch ADGP.

21. The owner of the building in which the 2nd accused was conducting his business, where the alleged incident occurred got examined as PW13. She deposed that she had leased out the said building to the 2nd accused for residential purpose, which was later used by the 2nd accused as a Museum.

22. PW14 examined is the Dy.S.P, Crime Branch, Ernakulam who took over the investigation in the case on 23.10.2021, as per the order of the ADGP, Crime Branch and laid the charge-sheet in the



case on 22.12.2021.

23. PW14 had arrested the 1st accused on 24.10.2021 and Ext.P11, P12, P13 and P14 are the arrest-memo, inspection-memo, custody-memo and report, showing the address of the accused. He had formally arrested the 2nd accused in the case. PW14 had prepared Ext.P15 scene mahazar and seized the vibrating machine used for the crime, under Ext.P16 mahazar. Ext.P17 is the report for adding the 2nd accused in the case and Ext.P18 is the report for adding S. 19 r/w S.21 of the PoCSO Act, against the 2nd accused.

24. Here plea of alibi was raised by the 1st and 2nd accused contending that the 1st and 2nd accused along with Jaison, Jishnu, 4-5 security guards, DW2 and Anitha Pullayil had gone to MCP International Convention Centre, Irinjalakkuda, for attending a marriage function and they reached the residence of the 2nd accused only at 4.30 p.m. In order to substantiate this contention, the 1st accused examined himself as DW4. Apart from that, DW1 to DW3 were also examined.

25. DW1 is a videographer and the 1st accused had shown



him a photograph with the image of the witness therein and DW1 who admitted that the same was taken at a marriage function, but he could not remember whether it was on 20.07.2019. DW2 is a retired DIG and he identified a photograph with his image standing with one Anitha Pullayil, the 2nd accused herein and also the bride & groom, in a marriage function. But DW2 could not remember whether it was a marriage conducted at MCP International Conventional Center, Irinjalakuda. So also, the witness denied that he had gone for the marriage on 20.07.2019 along with the 1st & 2nd accused herein and returned with them.

26. DW3 is the bridegroom in the marriage held on 27.07.2019 at MCP International Conventional Center, Irinjalakuda and he identified Ext.D8 as the certificate of the said marriage. Though the witness had identified the images of himself and his bride in a photograph shown to him by the accused, he could not identify the other persons in the photograph. All the above photographs were not marked or admitted in evidence for the absence of further proof on the authenticity of the same.

27. The evidence of DW5 is pertaining to the 2nd accused



and the same has no relevance now as the 2nd accused was acquitted by the learned Special Judge.

28. It is relevant to note that the 1st accused also produced his mobile phone along with a CD, which according to him, would contain the time- line of his google map as on 20.07.2019 to substantiate the plea of alibi. But the learned Special Judge did not consider the same and the same was not tendered in evidence in the manner known to law. Thus the mobile phone though produced before the court, the same has no relevance since it was not tendered in evidence to act upon the same. Therefore the Special Judge is right in not considering the said mobile phone or its content. After discussing the evidence of DW1 to DW4, in para.101 of the judgment impugned, the learned Special Judge found that the interested testimony of the 1st accused as DW4, not supported by any corroborative material would not be sufficient to prove the plea of alibi and accordingly the plea of alibi was found in the negative. In this connection, it is held that plea of alibi would require proof by reliable, convincing and cogent evidence, without any iota of doubt



and improbabilities, to hold that the accused was at the place, he would assert, totally to rule out his presence at the place of occurrence with all probabilities. Bearing this principle in mind, the evidence discussed to prove the plea of alibi raised by the appellant is evaluated, the same found to be insufficient to prove the plea of alibi. Thus the finding of the Special Judge in this regard is only to be justified. Similarly the learned Special Judge negated the contention raised by the 1st accused that the prosecution had failed to examine material witnesses, viz., the mother and sister in law of PW1, finding that the mother of PW1 was not having any direct knowledge regarding the occurrence and the same had never been disclosed to the mother at any point of time. Similarly, as regards to the sister-in-law also the learned Special Judge found that the evidence of the sister-in-law also is of no much significance. Thus on evaluation of the evidence, the learned Special Judge found that the 1st accused committed offences punishable under Sections 376(1) r/w 375(b), 354B and 506(i) of IPC as well as Section 4(1) r/w 3(b) of the POCSO Act.

29. Appraising the contentions raised by the learned counsel



for the accused that there was inordinate delay in lodging the FIR, the learned Special Judge considered the same in paragraphs 62 to 69 relying on the decisions of the Apex Court reported in [1996 SCC (2) 384], ***State of Punjab v. Gurbit Singh and Ors.*** and also [1990 KHC 737], ***Maharashtra v. Chandraprakash Kewal Chand Jain***, and found that PW1 had given sufficient explanation that she was threatened by the 1st accused that she would be defamed in case of disclosure of the accident to anybody and she was afraid of the henchmen of the 2nd accused, who was accompanied by gunmen and goondas. In fact, the finding of the learned Special Judge holding the view that the delay was explained properly by the evidence of PW1 need not be interfered as it is perceptible that, a minor victim of sexual molestation, working under the domain of the accused persons might not be possible to disclose the same when threat was given by the 1st accused, who, in fact, was so powerful under the 2nd accused to do any damage to PW1.

30. The second contention raised by the learned counsel for the 1st accused/appellant is that the learned Special Judge deviated from the



established principles governing appreciation of evidence while treating PW1 as an intrinsically pliable witness relying on the decision of the Apex Court reported in ***Rai Sandeep v. State (NCT of Delhi)*** [(2012) 8 SCC 21], wherein the Apex Court held that, *“For branding a witness as sterling, the Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. What is relevant is the truthfulness of the statement made by such a witness and its consistency right from the starting point till the end and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved as well as the sequence of it. The said version should consistently match with the version of every other witnesses. The version of the witness on the core spectrum of the crime should remain intact while all other attendant materials, namely oral, documentary and material object should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting material for holding the offender guilty of the charge alleged. Some minor omissions and discrepancies in the evidence of PW1 were found by the learned Special Judge also while holding that the evidence of PW1 as*



regards to the sexual overtures happened at 4.30 p.m at the treatment room of the 1st accused found to be unshaken, the learned Special Judge believed the same. It is relevant to note that PW1 identified the vibrating machine applied on her private part fitted with an instrument looking like a penis and also identified M.O2, the crescent shaped portion which had been altered. The accused did not dispute recovery of M.O1 and M.O2 by PW14 by preparing seizure mahazar, Ext.P16. Thus no deviation in appreciation of evidence as argued by the learned counsel for the appellant could be found by this Court. Hence this contention also must fail. Even though the learned counsel for the appellant/accused argued that the place of occurrence is contrary as per the evidence, in fact, there is no material contradiction to be found as regards to the place of occurrence as it was deposed by PW1 that it was on the treatment room of the 1st accused where PW1 was given employment by the 2nd accused. Therefore, this contention also must fail.

31. Now it is necessary to consider an argument advanced by Sri Gajendra Singh Rajpurohit relying on the evidence of PW1 that



pressing of the penis like structure on the vagina of PW1 could not be believed since such a version was not given by her before the police, though it was stated by her before the court during her evidence. In this connection, it is relevant to refer the ingredients necessary to find commission of offence under Section 3(b) of the POCSO Act as well as under Section 375 of IPC. Section 375 of IPC defines 'rape' as under:

“375. Rape.—

A man is said to commit "rape" if he -

(a)penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b)inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

(First.)— Against her will.

(Secondly.) — Without her consent.

(Thirdly.) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt,



(Fourthly.) — With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly.) — With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. (Sixthly.) — With or without her consent, when she is under eighteen years of age.

(Seventhly.) — When she is unable to communicate consent.

Explanation 1.— For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.— Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.— A medical procedure or intervention shall not constitute rape.

Exception 2.— Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

32. Section 3 of POCSO Act provides that a person is said to commit "penetrative sexual assault" if— (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with



him or any other person; or (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

33. Thus under Section 3(b), insertion to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person, would be sufficient to find that the accused committed penetrative sexual assault. Here M.O2 vibrator fixed with M.O1 penis like structure was placed on the vagina of the victim in vibrating mode. While so, PW1 felt the same as horrible and she resisted the same. Be it so, penetration of the vibrating machine on the vagina would happen, as the same was on the vibrating mode with the requisite power to penetrate. It is true that the words 'pressing of M.O1 on the vagina' not stated by the victim before the police though she stated so before the court. Here comes the significance of the statutory wording that "insert to any extent". That means, placing a vibrating machine on the orifice of the vagina viz., labia majora, or vulva,



by itself would be sufficient to find insertion of M.O1 on the vagina and the same is sufficient to hold that a person committed penetrative sexual assault as defined under Section 3(b) punishable under Section 4 of the POCSO Act. Similar is the position with regard to the offence of rape defined under Section 375(b) of the IPC. Therefore, this omission pointed out by the learned State Brief also would not yield.

34. Another contention raised by the learned counsel for the appellant is that PW1 did not disclose this occurrence to the police when she had given statement to the police regarding commission of sexual assault by the 2nd accused for which initially a crime was registered. In this regard the evidence of PW14 assumes significance. He deposed that the occurrence involved in the crime was revealed from the 161 statement of PW1 recorded in another case, viz., Crime No.280/CB/EKM/R/2021. He also deposed that the said statement was forwarded by PW13 to the Head Quarters of the Crime Branch, consequent to which this crime was registered, on recording the separate statement of PW1 in this crime, which had been forwarded by PW14 to the Head Quarters of the Crime Branch. Therefore, the finding of the learned Special Judge that the



accused committed the offence punishable under Section 3(b) r/w 4(1) as well as under Section 375(b) punishable under Section 376(1) of IPC need not require any interference.

35. Coming to the other offences, it is found that the ingredients for the offences punishable under Sections 354B and 506(i) of the IPC have also been established by the evidence on record. Therefore, the conviction for the said offences also does not warrant any interference.

36. Coming to sentence, though the learned counsel for the appellant/1st accused sought leniency, the sentence imposed by the learned Special Judge is confined to the statutory minimum of 10 years' rigorous imprisonment for the offence punishable under Section 3(b) read with Section 4(1) of the POCSO Act. Section 3(b) read with Section 4(1) prescribes a punishment of not less than ten years, which may extend to imprisonment for life, and shall also be liable to fine. Therefore, the learned Special Judge has imposed only the statutory minimum sentence, and no further reduction in the sentence is legally permissible.

37. In the result, this Appeal fails and is accordingly dismissed. The conviction and sentence imposed by the Special Court are



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confirmed.

Registry is directed to forward a copy of this judgment to the Special Court for information and further steps.

Sd/-

A. BADHARUDEEN, JUDGE

rtr/