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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

THURSDAY, THE 6TH DAY OF MARCH 2025 / 15TH PHALGUNA, 1946

CRL.A NO. 96 OF 2014

CRIME NO.174/2008 OF THALAPUZHA POLICE STATION, WAYANAD

AGAINST THE JUDGMENT DATED 22.01.2014 IN SC NO.206 OF 2010 ON THE FILE OF THE COURT OF SESSION, KALPETTA, WAYANAD.

APPELLANT/ACCUSED:

AJEESH @ AJEESHKUMAR,
AGED 25 YEARS,
S/O.RAJAPPAN, CHITTATHADATHIL HOUSE,
COMPANYKUNNU ALATTIL, PERYA AMSOM,
WAYANAD DISTRICT.

BY ADV SRI.P.VENUGOPAL (1086/92)

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM – 682 031.

BY ADV SMT.SHEEBA THOMAS, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12.02.2025, THE COURT ON 06.03.2025 DELIVERED THE FOLLOWING:

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**C.S.SUDHA, J.**

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**Criminal Appeal No.96 of 2014**

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**Dated this the 6th day of March 2025**

**J U D G M E N T**

In this appeal filed under Section 374(2) Cr.P.C., the appellant, the sole accused, in S.C.No.206 of 2010 on the file of the Court of Session, Kalpetta, Wayanad, challenges the conviction entered and sentence passed against him for the offences punishable under Sections 377 and 506 Part II IPC.

2. The prosecution case is that on 11/10/2008 at about 12:30 p.m. the accused had carnal intercourse against the order of nature with PW1 a minor boy aged 12 years and threatened to do away with his sister if he divulged the incident to others. Hence, as per the final report/charge sheet the accused is alleged to have committed the offences punishable under Sections 377 and 506 Part I IPC.

3. Crime no.174/2008, Thalapuzha police station, that is, Ext.P9 FIR was registered by PW8, the then Additional Sub Inspector of police, based on Ext.P1 FIS of PW1. The investigation was conducted by PW9, the then Additional Sub Inspector of Police, Thalapuzha, who on completion of investigation submitted the final report before the jurisdictional magistrate alleging the commission of the offences punishable under the aforementioned Sections by the accused.

4. On appearance of the accused, the jurisdictional magistrate after complying with all the necessary formalities contemplated under Section 209 Cr.P.C., committed the case to the Court of Session, Kalpetta, Wayanad. The case was taken on file as S.C. No.206 of 2010. On appearance of the accused, the trial court framed a charge for the offences punishable under Sections 377 and 506 Part I IPC, which was read over and explained to the accused to which he pleaded not guilty.

5. On behalf of the prosecution, PW1 to PW9 were examined and Exts.P1 to P10 were marked in support of the case.

After the close of the prosecution evidence, the accused was questioned under Section 313(1)(b) Cr.P.C. regarding the incriminating circumstances appearing against him in the evidence of the prosecution. The accused denied all those circumstances and maintained his innocence.

6. As the trial court did not find it a fit case to acquit the accused under Section 232 Cr.P.C., he was asked to enter on his defence and adduce evidence in support thereof. No oral or documentary evidence was adduced on behalf of the accused.

7. On consideration of the oral and documentary evidence and after hearing both sides, the trial court by the impugned judgment found the accused guilty of the offences punishable under Sections 377 and 506 Part II IPC. Hence, he has been sentenced to rigorous imprisonment for four years and to a fine of ₹10,000/- and in default to rigorous imprisonment for three months for the offence punishable under Section 377 IPC and rigorous imprisonment for one year for the offence punishable under Section 506 Part II IPC. The fine amount if realized has been directed to be paid to PW1, the

victim boy, as compensation under Section 357(1)(b) Cr.P.C. The sentences of imprisonment have been directed to run concurrently. Set off under Section 428 Cr.P.C. has also been allowed. Aggrieved, the accused has come up in appeal.

8. The only point that arises for consideration in this appeal is whether the conviction entered and sentence passed against the accused/appellant by the trial court are sustainable or not.

9. Heard both sides.

10. It was submitted by the learned counsel for the accused/appellant that there are material improvements in the case put forward by the prosecution. Even if the entire allegations in Ext.P1 FIS are taken to be true, the offence under Section 377 IPC would not be made out. At best the allegations would only make out an offence under Section 511 of Section 377 IPC. It was also pointed out that the accused at the time of the incident was only 19 years old and hence the provisions of Section 360 Cr.P.C. may be invoked.

10.1. *Per contra*, it was submitted by the learned Public Prosecutor that there are sufficient materials on record to prove the

offences alleged against the accused and therefore the impugned judgment calls for no interference by this Court.

11. I briefly refer to the evidence on record relied on by the prosecution in support of the case. Ext.P1 FIS is seen recorded on 12/10/2008 at 10:35 a.m. PW1 the victim boy aged 12 years states that on 11/10/2008 at 12:30 p.m. he had gone to the vacant property situated adjacent to the house of one Jobi for tethering his cow. The accused, his neighbour, came and took the rope from his hand and tethered the cow on a tree and thereafter forcibly took him behind a vacant building situated nearby. The accused threatened that if PW1 did not accompany the former, he would do away with PW1's sister. The accused then pushed him down and when he fell, the accused came near him, undressed him and made him lie on the ground. The accused lay on top of him and pulled his private part which caused pain. He cried out for help. Hearing his cries, PW2 his aunt, accompanied by CW3 and PW3 rushed to the scene. The accused then wore his dhoti and ran away into the forest. PW2 and PW3 dressed him and took him to the house of PW2.

11.1. PW1 when examined in addition to the matters stated in Ext.P1 deposed that the accused had also rubbed the genitals of the latter on his thighs.

11.2. PW2, aunt of PW1 deposed that she knows the accused, but she had not seen the incident. However, she admitted that the incident took place in the year 2008 and on the said day she had seen PW1 and the accused in the property of one Jobi. When she saw them, both were standing in the said property. She could not comprehend the purpose for which they were standing there and therefore she called CW3 and PW3. She denied having stated to the police that she had seen the incident. PW2 was declared hostile, and the Prosecutor was permitted to put questions as put in the cross-examination. On further examination she admitted that she had stated to the police that the accused had undressed PW1; that PW1 had told her that the accused had done some sexual act on him and that she had told the police that the accused had committed carnal intercourse against the order of nature on PW1. In the cross-examination PW2 deposed that on the said day she had seen PW1 tethering the cow at

which time he was alone. She had taken PW1 to her house, at which time there was nobody else present along with her.

11.3. PW3 also turned hostile and deposed that she had not stated to the police that she had seen the incident. On the said day she had seen PW1 and the accused standing in the property of one Jobi and that both of them had gone there for tethering the cow. The witness was declared hostile, and the Prosecutor was permitted to put questions as put in the cross-examination. On further examination PW3 admitted that she knows that the present case is one of sexual abuse and that she is aware that of the allegation that the accused had sexually abused PW1.

11.4. PW5, Casualty Medical Officer, District Hospital, Mananthavady deposed that on 11/10/2008 she had examined PW1 who had come to the hospital with a history of sexual abuse. She issued Ext.P6 wound certificate. On examination she found contusion on the neck as well as on the scrotum of PW1. There was no other injury seen.

11.5. PW6, father of PW1, has only hearsay knowledge about the incident. According to him the incident took place in the year 2008. On the said day in the morning, he and his wife had gone to Mananthavady, at which time PW1 was alone at home. By about 04:00 p.m. when they returned, PW1 was at the house of PW2. His son was crying and when he enquired about the matter, his son told him that he had been taken by the accused to the nearby property and sexually abused. His son had also told him that when he cried out for help the accused had threatened to do away with his sister. He, along with his wife took his son to the District Hospital, Mananthavady, where the latter was admitted for about 3 to 4 days.

12. The trial court based on the aforesaid evidence found the accused guilty of the offence punishable under Section 377 IPC. According to the trial court, PW1 had deposed that the accused had inserted/thrust his penis between the thighs of PW1 and rubbed it. Such an act is not spoken to by PW1. In Ext.P1 FIS his case is only that the accused pulled at his private part causing pain. There is no case of insertion/thrusting of the penis of the accused between the

thighs of PW1 or rubbing it. The medical evidence on record shows that PW1 had complained of pain, and he had contusion on his scrotum. In the box PW1 has also a case that the accused had rubbed his genitals on his thighs. The materials on record do not make out an offence under Section 377 IPC. At best the overt acts of the accused can only be termed as an attempt to commit the offence punishable under Section 377, that is, Section 511 of 377, and not an offence under Section 377 IPC.

13. Section 377 IPC is punishable with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and is also liable to fine. Section 511 IPC deals with punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment. The Section says that whoever attempts to commit an offence punishable under the Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, shall be

punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both. The longest term of imprisonment under Section 377 is imprisonment for life. As per Section 57 which deals with fractions of terms of punishment, in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. Here, the accused can only be held guilty of the offence of attempt to commit carnal intercourse against the order of nature, that is, Section 511 of Section 377 IPC and therefore one half of the longest term of imprisonment, which is imprisonment for life, would be 10 years.

14. The learned counsel for the appellant/accused submitted that the accused was just 19 years when the incident took place and therefore, he is entitled to be given the protection under Section 360 Cr.P.C. It was also pointed out that the trial court did not give the benefit of Section 360 Cr.P.C. only because the offence

under Section 377 IPC is punishable with imprisonment for more than 10 years and hence Sections 3 and 4 of the Probation of Offenders Act, 1958 (the PO Act) are not applicable. But as the materials on record only make out a case of attempt to commit the offence under Section 377 IPC, he urges this Court to invoke the benevolent provisions of Section 360 Cr.P.C.

15. Section 19 of the PO Act says that subject to the provisions of Section 18, Section 562 Cr.P.C. shall cease to apply to the States or parts thereof in which the Act is brought into force. Section 562 of the old Cr.P.C. is Section 360 of the Criminal Procedure Code, 1973 (See **State of Kerala v. Chellappan George, 1983 KHC 180**). In the light of Section 19, Section 360 Cr.P.C is not applicable in Kerala. Where provisions of the PO Act are applicable, it is those provisions which are to be applied, and not Section 360 CrPC. (**Gulzar v. State of M.P. 2007 (1) KHC 279: AIR 2008 SC 383; Chhanni v. State of U. P., 2006 KHC 794: AIR 2006 SC 3051; Daljit Singh v. State of Punjab through Secretary Home Affairs, 2006 KHC 965; Ramesh Dass v. Raghu Nath, 2008 KHC**

**4231 and Gulzar v. State of M. P., 2007 (1) KHC 279: AIR 2008 SC 383).**

16. According to the learned counsel for the appellant/accused, as the accused was only 19 years at the time of the commission of the offence, the provisions of Section 4 and Section 6 of the PO Act may be applied. Section 4 of the PO Act deals with the power of the Court to release certain offenders on probation of good conduct. Section 6 of the PO Act deals with the restrictions on imprisonment of offenders under 21 years of age, which says that when any person under 21 years of age is found guilty of having committed any offence punishable with imprisonment, but not with imprisonment for life, the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under Section 3 or Section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so. Sub section (2) says that for the

purpose of satisfying itself whether it would not be desirable to deal under section 3 or section 4 with an offender referred to in sub-section (1), the court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender. Now the question is the crucial date for deciding whether the benefit of Section 6 can be extended to the accused herein.

17. The injunction contained in Section 6 of the PO Act is not to impose a sentence of imprisonment is confined to those who are below the age of 21 years on the date of conviction. (**Ramji Missar v. State of Bihar, 1963 KHC 592 : AIR 1963 SC 1088; State of Kerala v. Parameswaran Nair Radhakrishnan Nair, 1993 KHC 231 and Motty Philipose v. State of Kerala, 2006 KHC 230**). The appellant/accused herein was 19 years in the year 2008, that is, when the incident occurred. However, on the date of his conviction by the trial court, that is, on 22/01/2014, he was apparently above 21 years. Therefore, the benefit of Section 6 of the PO Act cannot be given to him.

18. Now the question to be considered is should the benevolent provisions of Section 4 of the PO Act be invoked and the accused released on probation? As noticed earlier, the trial court did consider the question whether the accused can be released on probation, though under a wrong provision of law. It is true that one reason given by the trial court is that the accused is liable for imprisonment for more than 10 years and hence the benevolent provisions cannot be invoked, is not correct because the materials on record make out only an offence under Section 511 of Section 377 IPC. But in the light of the nature of the offences committed, I do not think that the benevolent provisions require to be invoked because not only was there an attempt to commit an offence under Section 377 IPC but also threatening the victim with dire consequences. Of late offences of this nature, that is, sexual offences against children and women are on the increase. Hence invoking the provisions of the PO Act may send a wrong message to society at large. However, considering the age of the accused at the time of the commission of the offence and the nature of the offence made out from the materials

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on record, a lenient view can be taken. The interest of justice can be met by adequately compensating the victim. Hence the substantive sentence of imprisonment is reduced to imprisonment for a day till the rising of the Court and to payment of compensation of ₹25,000/- to PW1 under Section 357(3) Cr.P.C. and in default of payment, the accused shall undergo simple imprisonment for three months.

The appeal is allowed to the aforesaid extent.

Interlocutory applications, if any, pending are closed.

**Sd/-**
**C.S.SUDHA**
**JUDGE**

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