

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Present:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

Wednesday, the 19th day of August 2020/28th Sravana, 1942

CRL.A No.1087/2019

SESSIONS CASE NO.1092/2017 OF THE ADDITIONAL
DISTRICT AND SESSIONS COURT(FOR THE TRIAL OF
CASES RELATING TO ATROCITIES & SEXUAL VIOLENCE
AGAINST WOMEN AND CHILDREN), ERNAKULAM.

APPELLANT/ACCUSED

ABHISHEK.K.A @ BHANU, AGED 27,
S/O.ASOKAN, KEECHAMKERIL HOUSE,
NEAR THOTTARA CHEEPUKAL,
KULAYATTIKKARA.P.O.,
AMBALLOOR VILLAGE, PIN-682315.

RESPONDENT/COMPLAINANT

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

This Criminal Appeal coming on for orders upon perusing
the appeal and upon hearing the arguments of
SRI. C.P.UDAYABHANU, Advocate for the petitioner and the
PUBLIC PROSECUTOR for the respondent, the court passed the
following:

P.T.0

P.B.SURESH KUMAR, J.

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Dated this the 19th day of August, 2020.

ORDER

In the course of the hearing of this matter, a few disturbing facts concerning the investigation and trial of cases arising under the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act) have come to the notice of this court. The POCSO Act provides for protection of children from sexual assault, sexual harassment and child pornography by safeguarding their interests through a prompt and systematic multi-sectoral intervention involving the State Government, the Child Welfare Committee, the Police, the Special Court, Non-Government Organizations and Professionals and Experts assisting the children. It is the scheme of the POCSO Act that the children who have been sexually abused are not subjected to secondary victimisation at the hands of the justice delivery process. Unlike other penal statutes, the POCSO Act provides for the participation of the child also in the proceedings before

the Special Court to make the justice delivery effective and meaningful. Similarly, unlike other penal statutes, Section 39 of the POCSO Act makes it obligatory for the State Government to prepare guidelines for the use of the stakeholders to be associated with pre-trial and trial stages to assist the child. In exercise of the power conferred under Section 39 of the POCSO Act, the State Government has prepared elaborate guidelines (the Guidelines) and the same include provisions to be followed in the matter of investigating the cases, conducting medical examination of the victim, rendering legal aid and other services to the victim, providing child friendly environments, providing information to the child about the legal proceedings, etc. The Guidelines also prescribe in detail, the roles to be played by the Special Public Prosecutor and the lawyer of the child while conducting the cases before the Special Court, and their duties. Suffice it to say that the Guidelines are exhaustive, and if the same are given effect to in its letter and spirit, the POCSO Act would serve its purpose.

2. Although a provision in the nature of Section 39 has been made in the POCSO Act having regard to the fact that the justice delivery would not be effective and meaningful without exhaustive guidelines in relation to various matters, the Guidelines formulated and published by the State Government as early as on 20.4.2015 are not available in public domain even now. This court has not come across any reference even about the Guidelines in any of the matters arising under the POCSO Act which have been dealt with during the last almost 8 months. On enquiry, it is revealed that the State Legal Services Authority which is to play a pivotal role in the implementation of the Guidelines has not even taken note of the Guidelines in the matter of discharging its functions. Needless to say, lack of awareness regarding the Guidelines among the stakeholders is adversely affecting the investigation and the trial of the cases arising under the POCSO Act.

3. In this regard, it is relevant to mention that it has come to the notice of this court that cases arising under

the POCSO Act are being investigated by police personnel who are not informed of the rights of the children or trained to deal with the children and members of their family in a child sensitive manner. Lack of professionalism is writ large in the investigations. Fundamental flaws such as, not collecting legal evidence to prove the age of the victim for want of awareness as to the relevance of such evidence, have come to the notice of this court not in one, but in several cases. Similarly, despite elaborate provisions in the Guidelines, evidence are not collected to establish the sexual abuse through behavioural indicators, or to explain the trauma induced "counterintuitive behaviour" of the victim as in the case on hand, thereby making the child a witness without credibility. Though most of the cases are framed based on the sole evidence of the victim, no mechanism, whatsoever, is adopted by the investigating agency to cross check the veracity of the statements including subjecting the children to psychological/psychiatric consultations. Coming to the trial, the Guidelines provide that

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the Special Public Prosecutor would be responsible for the trial; that there shall be a lawyer for the child; that the lawyer shall ensure that all concerns of the child are raised in the proceedings by building up a rapport with the Special Public Prosecutor etc. Even while the Guidelines provide that it is for the lawyer of the child to identify the issues which need to be determined in regard to the welfare and best interests of the child, a lawyer is not seen engaged by the child in any proceedings under the POCSO Act or the service of a lawyer has been provided to the child by the Legal Services Authority. As it is found that compliance of the guidelines under Section 39 is necessary for the purpose of achieving the object of the POCSO Act, even while the competent authority for monitoring the application of the Guidelines is the State Commission for the Protection of Child Rights in terms of the Protection of Children from Sexual Offences Rules, 2020, in order to protect the children involved in cases arising under the POCSO Act from the risk of secondary victimisation and to make justice

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delivery effective and meaningful, I deem it appropriate to issue a few general guidelines in relation to the investigation of the cases arising under the POCSO Act, as also the trial of such cases before the Special Court, as this court is concerned about the quality of the justice delivery in this field. However, before issuing the Guidelines, it is necessary to hear the State Public Prosecutor as also the Kerala State Legal Services Authority in the matter.

Post on 25.08.2020. Registry shall issue a copy of this order to the State Public Prosecutor as also to the Kerala State Legal Services Authority, today itself.

Sd/-

P. B. SURESH KUMAR, JUDGE

/true copy/

Suresh

ASSISTANT REGISTRAR

19/8/2020

tgs

19/8/2020