IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

TUESDAY, THE 13TH DAY OF OCTOBER 2026 / 21ST ASWINA, 1948

CRL.A NO. 1265 OF 2023

CRIME NO.879/2021 OF Vadakkekara Police Station, Ernakulam

AGAINST THE JUDGMENT DATED 27.07.2023 IN SC NO.1250 OF 2021 OF FAST TRACK SPECIAL COURT, NORTH PARAVUR

APPELLANT/ACCUSED:

SHAJI, AGED 69 YEARS
S/O BHASKARAN, KATTIPARAMBIL HOUSE, CHITTATTUKARA, VADAKKEKARA VILLAGE, ERNAKULAM DISTRICT., PIN - 683522

BY ADVS.
SMT.SAFNA P.S.
SHRI.SAURAV B.

RESPONDENT/STATE:

STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF KERALA, PIN - 682031

BY PUBLIC PROSECUTOR : ADV. M.A.SHIHAB

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28.09.2026, THE COURT ON 13.10.2026 DELIVERED THE FOLLOWING:

A. BADHARUDEEN, J.

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Crl.Appeal No.1265 of 2023

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Dated this the 13th day of October, 2026

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JUDGMENT

The sole accused in S.C.No.1250/2023 on the files of the Fast Track Special Court, North Paravur, for the trial of offences under the Protection of Children from Sexual Offences Act, 2012. (hereinafter referred to as 'the POCSO Act') has filed this appeal under Section 374(2) of the Code of Criminal Procedure challenging the conviction and sentence imposed against him in the above case as per judgment dated 27.07.2023. Respondent herein is the State of Kerala.

2. Heard Adv. Safna P.S., learned counsel for the appellant/accused as well as Adv. M.A.Shihab, learned Public Prosecutor. Perused the judgment under challenge along with the records of the Special Court.

3. The prosecution, after investigation of the crime had filed final report alleging commission of offences punishable under Sections 370 and 376AB of the Indian Penal Code

(hereinafter referred to as ‘ IPC’) and Sections 3(a) read with 4(2) and 5(m) read with 6 of the POCSO Act, by the appellant/accused. The specific allegation of the prosecution is that at about 14 hours on 02.09.2021, the accused, who is a nearby resident of the victim girl aged 3 years, committed penetrative sexual assault on her.

4. The learned Special Judge framed charge for the said offences, on completing pre-trial formalities and, thereafter, recorded the evidence. During trial, PWs.1 to 13 were examined and Exts.P1 to P20 were marked on the side of the prosecution. On the side of the defence, DW1 was examined and Exts.D1 and D2 were tendered in evidence.

5. The learned Special Judge analysed the evidence, after hearing both sides, and came to the conclusion that the appellant/accused committed offences punishable under Section 376AB of IPC and under Section 3(a) r/w 4(2) and 5(m) r/w 6 of the POCSO Act and accordingly, the appellant/accused was convicted for the said offences and sentenced as under:-

> “1. Convict is sentenced to undergo Rigorous Imprisonment for 20 (twenty) years and to pay fine of Rs. 50,000 (Fifty thousand) u/s 4(2) of POCSO Act.
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> 2. In default of payment of fine he is liable to undergo simple

imprisonment for six months.

3. Convict is further sentenced to undergo Rigorous Imprisonment for 20 (twenty) years and to pay fine of Rs. 50,000 (Fifty thousand) u/s 6 of POCSO Act.

4. In default of payment of fine he has to undergo Simple Imprisonment for six months.

5. Convict is further sentenced to undergo Rigorous Imprisonment for 20 (twenty) years and to pay fine of Rs. 50,000 (Fifty thousand) u/s 376 AB of Indian Penal Code.

6. In default of payment of fine he has to undergo Simple Imprisonment for six months.

7. Sentence shall run concurrently.

8. If paid or realized pay the full fine amount as compensation u/s 357 (1) (b) of Cr. P.C to PW1.

9. Convict is entitled to get set off from 05.09.2021 to 18.11.2021 the period that he had already undergone u/s 428 Cr.P.C.

10. Bail of convict is cancelled and he is committed to Central Prison, Viyoor to undergo sentence.

11. The District Legal Services Authority, Ernakulam is recommended for providing compensation to the victim under the Kerala State Victim Compensation Scheme. Communicate a copy of the judgment to DLSA, Ernakulam forthwith.

12. MO1 and MO2 shall be destroyed being valueless after the period of appeal."

6. The learned counsel for the appellant pointed out that as regards the penetrative sexual assault alleged by the prosecution and found by the learned Special Judge, the direct evidence available is that of PW1, the victim. According to the learned counsel, the specific overt act led to the finding of penetrative sexual assault at the instance of the appellant/accused is based on the version of PW1 stating that he had placed his penis into her vagina. It is contended by the

learned counsel for the appellant/accused that mere placement of the penis into the vagina would not amount to penetration and is akin to touching the vagina and therefore, ingredients of penetrative sexual assault or rape could not be found. In such view of the matter, the learned Special Judge went wrong in finding commission of penetrative sexual assault by the accused/appellant. According to the learned counsel, the evidence available is insufficient to find commission of the offences alleged by the prosecution and found by the learned Special Judge in toto, and thus the appellant would deserve acquittal. At the utmost, if reliance is given to PW1's evidence, supported by the evidence of PW4, the doctor, the only inference is that the appellant touched on the vagina of the victim aged 3 years with his penis and in such contingency, the offence of sexual assault as defined under Section 7 punishable under Section 8 of the POCSO Act, only to be found. Be it so, the maximum sentence to be imposed is only 5 years.

7. In support of the aforesaid contention, the learned counsel for the appellant/acused placed reliance on the decision of the Apex Court reported in **Laxman Jangde v. State of**

Chhattisgarh (2025 KHC OnLine 7514). In the said decision, the Apex Court considered whether the acts alleged against the accused therein would constitute an offence punishable under Section 376AB of IPC and Section 6 r/w 9(m) and 10 of the POCSO Act. The Apex Court held that;

> "8. The presumption by the Trial Court as upheld by the High Court that there was penetrative sexual assault, cannot be sustained for simple reason that the same is neither supported by the medical report nor by the statement of the victim herself on three different occasions as also, that of the mother of the victim. From the said reading of all the three statements which have common thread, the direct allegation is of touching the private parts of the victim and also at the same time, the appellant touching his private organs. In such view of the matter, we find that the conviction recorded under S.376 AB of the IPC and under S.6 of the POCSO Act, cannot be sustained."

8. The argument advanced in the said case based on the evidence, could be found in paragraph 4 of the above judgment, which is extracted hereunder:

> "4. Learned senior counsel for the appellant submitted that from the FIR, subsequent statement of the victim recorded under S.164 of the Code of Criminal Procedure, 1973 (for short, the "CrPC") and the deposition of the victim - girl before the Court during trial, it is clear that the offence under S.376 AB as well as under S.6 of the POCSO Act, is not proved. It was submitted that the allegation was that the appellant had

> touched the private parts of the victim and put his hand in his sexual organs. Thus, it was submitted that the said allegation, which has been reiterated, both before the Court in a statement recorded under S.164 of the CrPC as also during trial, would clearly not bring the behaviour under the purview of S.376 AB of the IPC and also, under S.6 of the POCSO Act since there has not been actual rape committed on the victim as there was no penetration. For the same reason, submission is that S.6 of the POCSO Act would also not be attracted because there was no penetrative sexual assault. It was contended that at worst, it can be a case under S.354 of the IPC and under S.9(m) of the POCSO Act. Accordingly, learned senior counsel submitted that the Court may consider this vital aspect especially, in the background that the appellant has already spent five and a half years in prison."

9. Apart from the above judgment, the learned counsel has also placed reliance on the Division Bench judgment of this Court in **Kuttappan @ Babukuttan v. State of Kerala (2022 KHC OnLIne 690)** where this Court in paragraphs 37 and 38 held as under:

> "37. Having taken note of the requirements of the offences canvassed, we refer to the facts once again in the present context. The specific version of PW1 in chief examination as regards penetration is that the accused / father attempted to insert his genitals on her vagina, but it did not enter / penetrate. The version of PW5 in this regard is of a much lesser degree that the accused / father used to touch her vagina.

> In view of this apparent inconsistency, we also perused PW1's version in Ext.P1 F.I.S, where PW1 would state that her father / accused kept his genitals on her vagina, whereupon she woke up and cried. We, therefore, discount the version of PW5 that the overt act is only to the extent of the accused touching the vagina of the victim. In doing so, we reckon the history as recorded in Ext.P5 medical certificate as well.
>
> 38. However, the fact remains that there was no penetration as such, although there was an attempt. The medical evidence adduced vide Ext.P5 also supports our conclusion, since the victim's vulva was normal, hymen intact and the vagina admits only the tip of a finger. In the circumstances, we find that the offence as defined under S.375 is not attracted; instead an attempt to commit the offence under S.375 cognizable under S.511 is attracted. As it is well settled, a crime contemplates four phases intention, preparation, attempt and commission /accomplishment. In the instant facts, the commission, insofar as the offence under S.375 is concerned, is unsuccessful. However, an attempt is quite clear. The medical evidence is also in support thereof. Here, we also notice that absence of a separate charge under S.511 of S.375 is of no consequence in view of the provision in sub-section (3) of S.222 of the Code."

In this judgment, this Court considered the evidence of PW1, the victim in the said case to the effect that the accused therein attempted to insert his genitals into her vagina, where PW4, the mother of the victim, had given evidence that the accused/father used to touch her vagina, while holding that the

offence punishable under Section 511 or 376 of IPC only would attract, on the basis of the said evidence.

10. In the present case, according to the learned counsel for the appellant, the doctor did not notice any external injuries. However, the doctor had noted that "the vaginal region appears to be patulous". Thus, the medical evidence also did not suggest penetrative sexual assault.

11. Repelling the above contentions, the learned Public Prosecutor argued that a mere reading of the evidence of PW1, the victim, would show that the accused placed his penis into her vagina, whereby PW1 stated to have felt pain and she cried out of pain. It is pointed out by the learned Public Prosecutor that in such a case, penetration could be found since the said overt act is akin to slightest degree of penetration on the labia major or vulva, which would suffice the requirement of penetration.

12. In this connection, the learned counsel has placed reliance on the decision of another Division Bench of this Court in **Raveendran V.S. v. Deputy Superintendent of Police (2025 KLT OnLine 1341)** wherein this Court considered the allegation

referred to in paragraph 20 and held as follows:

> "20. We are unable to accept the aforesaid contention of the learned counsel. What PW1, the minor child deposed is that "മാമൻ ചുണ്ണി (penis) കൊണ്ട് എൻറെ മൂത്രമൊഴിക്കുന്നിടത്തു കുത്തി." It is obvious that penile vaginal entry namely the actual penile access towards the vagina, passing of the penis into the vagina, is not essential to constitute rape, and even penile access towards the vagina, without there being any entry of the penis into vagina would constitute rape, if the penis gets physical contact in that process of access with any of the external portions of the female genital organ such as vulva, labia majora, etc. In the above regard, we are fortified by the decision in **Chenthamara v. State of Kerala** (2008 (4) KLT 290). Later in **Kunjumon v. State of Kerala** (2011 (4) KHC 72) it was clarified that an attempt at penetration into the vagina would amount to accessing the vagina and even a slightest penetration into vulva or labia majora would constitute "rape", although there would be no vaginal penetration in such cases. Similar view has been expressed by the Apex Court earlier in **Tarkeshwar Sahu v. State of Bihar (Now Jharkhand)**, (2006 (8) SCC 560), wherein also, it was explained that penetration of the male genital organ within the labia majora or the vulva, with or without any emission of semen or even an attempted penetration into the private part of the victim completely, partially or slightly would make out the offence under S.376 IPC. The aforesaid are decisions rendered prior to Act 13 of 2013, in terms of which S.375 of the IPC was amended to its present form. As per the unamended provision, sexual intercourse by a man with a woman under any of the circumstances described in the section would have constituted rape, and the question whether there is sexual intercourse or not had to be determined in the light of

> the clarification contained in the Explanation to the provision that penetration is sufficient to constitute sexual intercourse. All the decisions referred to above are therefore decisions dealing with the scope of the word 'penetration' contained in the Explanation to the definition of 'rape' as it stood prior to Act 13 of 2013."

13. This Court, while finding that there was penetrative sexual assault and penile vaginal entry, held that the slightest penetration into the labia majora would constitute rape and penile vaginal entry, namely the actual passing of the penis into the vagina is not essential to constitute rape. Then, it was held that, "we have no hesitation in holding that the offence of rape, as well as penetrative sexual assault, is clearly made out in this case."

12. Apart from the above, learned Public Prosecutor has placed reliance on the Apex Court decision in **Nawabuddin v. State of Uttarakhand (2022 KHC OnLine 6155)**, in paragraphs 7 and 8, to contend that when the doctor opines that the victim girl felt pain and irritation in urination, where, the victim had given evidence that the accused penetrated his finger into the vagina, then penetrative sexual assault to be found.

14. Adverting to the rival arguments, the points arise for

consideration are:

(i) Whether the Special Court is right in holding that the appellant/accused committed offence punishable under Section 376AB of IPC?

(ii) Whether the Special Court erred in holding that the appellant/accused committed the offence under Section 3(a) r/w 4(2) of IPC and under Section 5(m) r/w 6 of POCSO Act*?*

(iii) Whether the verdict would require interference?

(iv) The order to be passed?

Point Nos.(i) to (iv)

15. Here the status of the child, a girl aged 3 years, is not disputed; rather, the same is proved by the prosecution with the aid of Ext.P3 birth certificate tendered in evidence. Here the prosecution examined the victim as PW1, her parents as PWs.2 and 3, the doctor as PW4, and PWs.5 to 13, including the Investigating Officer to prove the prosecution case.

16. PW1, the minor, aged 5 years, as on 5th May 2023 (the date of examination before the Court), was subjected to *voir dire* examination to find her competency to depose before the Court and, noticing that she was competent to give rational answers to the questions put to her, the learned Special Judge recorded her

evidence. The precise evidence given by PW1, which got recorded as questions and answers, is that when she was at the house of the accused, who is her neighbour, he placed his mutta (according to PW1, the same is intended as penis) on her choochappi (she had shown choochappi as her private part/vagina). On further questioning, she stated that she felt pain and thereby she cried, and it was done at the house of the accused. Regarding the occurrence, she stated that her sheddy was removed and it was done thereafter. Even though the overt acts spoken by her were denied by the learned counsel for the accused, during her cross-examination, she emphatically denied the suggestion and reiterated that the incident occurred and she also spoken about the pain she had felt.

17. PWs.2 and 3, parents of PW1 supported the occurrence to the extent known to them. PW4 is the doctor who had examined PW1 at 6.05 pm on 02.09.2021 while she was working as Consulting Medical Officer at Taluk Headquarters Hospital, North Paravur. She reiterated the history stated by PW2 in terms of the evidence given by PW1 and PW3. Her finding on examination was that “the vaginal region appears

patulous. No external injury is seen. No active bleed is seen". Further, she opined that, "findings of examination are not inconsistent with the history of stated sexual assault. History suggestive of recent vaginal sexual assault".

18. PW8, the doctor who had examined the accused to test his potency, on 05.09.2021, testified that he had issued Ext.P8 certificate which would suggest that "the accused is a person capable of performing sexual act".

19. The Investigating Officer got examined as PW13. He deposed that he had conducted investigation of the case, that he prepared Ext. P6 scene mahazar, that on 05.09.2021 arrested the accused and had prepared Ext.P13 arrest memo Ext.P14 inspection memo, Ext. P15 custody memo and Ext.P16 arrest intimation, that filed Ext.P17 report showing the name and address of the accused, that the samples collected by the Doctor were sent to the chemical examination as per Ext.P18 forwarding note, that seized MO1 and MO2, that filed Ext. P20 report to alter section and that after completing investigation filed the final report before the Court. He would further state that Exts.P7, P7(a) and P7(b) are the portions of the statement that were given

by PW7 when he questioned her. Ext.D1 an Acknowledgment Note of Vadakkekkara Police was marked through him.

20. The main contention raised by the learned counsel for the appellant herein is that penetrative sexual assault or aggravated penetrative sexual assault could not be found in the instant case, even if the evidence given by PW1, in toto, is accepted. Such a contention has been mooted on the premise that mere placement of the penis into the vagina would not amount to penetration so as to constitute penetrative sexual assault, though the same may attract the offence of 'sexual assault' defined under Section 7 of the POCSO Act.

21. While adverting to this contention, in **Laxman Jangde**'s case (supra), the Apex Court held that when the statements given by the victim in the said case, which had a common thread, would indicate mere touching of private parts of the victim, penetrative sexual assault under Section 376AB of IPC or under Section 6 of the POCSO Act could not be found. At the same time, in **Kuttappan @ Babukuttan**'s case (supra), the Division Bench of this Court held that when the victim deposed that the accused attempted to insert his genitals on her vagina

but it did not enter or penetrate, the same would not attract penetrative sexual assault. In **Raveendran V.S.**'s case (supra), where the allegation was that "മാമൻ ചുണ്ണി (penis) കൊണ്ട് എൻറെ മൂത്രമൊഴിക്കുന്നിടത്തു കുത്തി." It was found that the same is penetration of the male genital organ within the labia majora or the vulva, with or without any emission of semen. This Court considered the same as penetration for the purpose of finding rape punishable under Section 376 of the IPC, after its amendment. Similarly, in the decision in **Nawabuddin**'s case (supra) pointed out by the learned Public Prosecutor, on examination of the victim, when the doctor had opined that the victim had felt pain or irritation during urination, where the victim gave evidence that the accused had penetrated his finger into her vagina, the same would satisfy the requirement of penetrative sexual assault.

22. While addressing the question as to whether an offence under Section 3(a) r/w 4(2) and 5(m) r/w 6 of the POCSO Act as well as Section 376AB of the IPC are made out, in the instant case, the overt acts spoken by the victim are very relevant. Here, PW1 deposed that the accused placed his mutta (penis) on her choochappi (private part/vagina) and she felt pain

and she cried out of pain.

Section 3 of the POCSO Act provides as under:

> "**3. Penetrative sexual assault** : 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; or
>
> (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."

23. Similarly, Section 5 deals with 'aggravated penetrative sexual assault'. Section 5(m) provides that 'whoever commits penetrative sexual assault on a child below twelve years' shall commit the offence of aggravated penetrative sexual assault. Tracing the definition under Section 3 of the POCSO Act, Sections (b) to (d) do not provide penetration to a higher degree and even penetration of slightest degree or manipulation into

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 application of the mouth to the penis, anus, vagina or urethra of the child, would satisfy the requirement for the offence of penetrative sexual assault. At the same time, Section 7 of the POCSO Act provides as under:

> "**7. Sexual assault** : 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."

24. Thus, there is a subtle difference between penetrative sexual assault and sexual assault. In case of mere sexual assault, a touch on the vagina, penis, anus, or breast of the child with sexual intent is sufficient. But Section 7 does not provide that the placement of the penis on the vagina, as spoken by PW1 here. Now the question for consideration is whether placing the penis on the vagina would come under overt acts narrated in Section 3(a) to (d). As already pointed out, Section 3(b) to (d) deals with penetration to the anus, even the slightest degree of

penetration, and also manipulation to any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the body of the child and would be sufficient to find penetrative sexual assault.

25. In this connection, it is relevant to note that there is a difference between the acts of touching and placing. 'Touching' means 'an emotional movement to evoke the feeling in a person who was touched.' 'Placing' means 'setting something in a specific spot or orientation', 'placing something in a particular physical location or the contact'. In fact, placing and touching are not synonymous. That is to say, a touch may not last long and a placement may last longer than a mere touch. Here, PW1 deposed that the accused placed his penis on her vagina and soon she felt pain and cried. Before that, the accused removed her undergarment. If so, the overt act should not be viewed so lightly to hold that the same is nothing but a mere 'touch' as defined under Section 7 of the POCSO Act. But the same would indicate that there was, either a slightest degree of penetration without emission of semen, which resulted in pain to the victim and, in turn, she cried. Otherwise, the accused manipulated the

vagina to cause penetration; thereby, penetration not fully occurred either due to pain felt by the victim or due to the tender age of the victim, ie., 3 years. Thus, placing the penis on the vagina after removing the undergarment of the minor victim aged 3 years, which in turn caused pain to the victim which led the victim to cry, is nothing but slightest degree of penetration or manipulation of the vagina to cause penetration as defined under Section 3(a) to (d) of the POCSO Act. In view of the above discussion, the offence to be found in the instant case is nothing but penetrative as well as aggravated sexual assault as defined under Section 3(a) r/w 4(2) and 5(m) r/w 6 of the POCSO Act as well as Section 376AB of IPC.

26. To sum up, the evidence discussed in this case would show the ingredients for the commission of offences punishable under Sections 370 and 376AB of IPC as well as under Section 3(a) r/w 4(2) and 5(m) r/w 6 of the POCSO Act. Therefore, learned Special Judge rightly found so. Thus, the conviction does not require interference. Coming to the sentence, the minimum punishment provided for the offence punishable under Section 6 of the POCSO Act is 20 years. It is noticed that

despite sentencing the accused for the offence punishable under Section 6 of the POCSO Act, the learned Special Judge sentenced the accused to undergo rigorous imprisonment for 20 years and to pay a fine of Rs.50,000/- for the offence punishable under Section 376AB of IPC, with a default sentence of six months. In this connection, the learned Special Judge lost sight of Section 42 of the POCSO Act, which provides as under:

> "**42. Alternate punishment**: Where an act or omission constitutes an offence punishable under this Act and also under section 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376 [376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], [376E, section 509 of the Indian Penal Code (45 of 1860) or section 67B of the information Technology Act, 2000 (21 of 2000)], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree."

27. Therefore, in the instant case, there is no reason to impose sentence for the offence punishable under Section 376AB of IPC after imposing sentence for the offence punishable under Section 6 of the POCSO Act. Therefore, the sentence imposed for the offence punishable under Section 376AB of IPC is set aside.

28. Accordingly, this appeal is allowed in part. The conviction imposed by the learned Special Judge is confirmed. But the sentence imposed is modified. Accordingly, the sentence imposed for the offence punishable under Section 376AB of IPC is set aside while upholding the sentence imposed for the other offences.

Since the appellant/accused has been undergoing sentence, no further orders are required.

The Registry is directed to forward a copy of the judgment to the learned Special Court for information and compliance.

Sd/-

A. BADHARUDEEN
JUDGE

Sbna/