IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 5TH DAY OF JULY 2023 / 14TH ASHADHA, 1945

CRL.MC NO. 1517 OF 2023

(AGAINST THE ORDER DATED 6.1.2023 IN CRIME NO.653/2022 OF CHITTUR POLICE STATION PASSED BY THE IST ADDL. SESSIONS JUDGE (SPECIAL JUDGE)PALAKKAD)

PETITIONER/COMPLAINANT:

STATE OF KERALA,REPRESENTED BY THE ADDITIONAL PUBLIC PROSECUTOR, HIGH COURT OF KERALA, PIN – 682031.

BY SPL.PUBLIC PROSECUTOR SRI.S.U.NAZAR

P.P.SRI.SANGEETHARAJ

RESPONDENTS/ACCUSED & DEFACTO-COMPLAINANT:

1 **ARUMUGHAM, AGED 22 YEARS S/O THANKARASU VILANAGAR, THOPPUM STREET, ARUPATHY, MAILADUMTHURAI, TAMIL NADU, PIN – 609309.**

2 **XXX XXX**

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 05.07.2023, ALONG WITH Crl.MC.1807/2023 AND CONNECTED CASES, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 5TH DAY OF JULY 2023 / 14TH ASHADHA, 1945

CRL.MC NO. 1609 OF 2023

(AGAINST THE ORDER DTD. 6.1.2023 IN CRIME NO.656/2022 OF KOZHINJAMPARA POLICE STATION PASSED BY THE IST ADDL. SESSIONS JUDGE (SPECIAL JUDGE)PALAKKAD)

PETITIONER/COMPLAINANT:

STATE OF KERALA REPRESENTED BY THE ADDITIONAL PUBLIC PROSECUTOR HIGH COURT OF KERALA, PIN – 682031.

BY SPL.PUBLIC PROSECUTOR SRI.S.U.NAZAR

P.P.SRI.SANGEETHARAJ

RESPONDENT/ACCUSED:

XXX XXX

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 05.07.2023, ALONG WITH Crl.MC.1807/2023 AND CONNECTED CASES, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 5TH DAY OF JULY 2023 / 14TH ASHADHA, 1945

CRL.MC NO. 1807 OF 2023

(AGAINST THE ORDER DTD. 21.2.2023 IN CRIME NO.174/2022 OF MALAMPUZHA POLICE STATION PASSED BY THE IST ADDL. SESSIONS JUDGE (SPECIAL JUDGE)PALAKKAD)

PETITIONER/COMPLAINANT:

**STATE OF KERALA REPRESENTED BY
THE ADDITIONAL PUBLIC PROSECUTOR
HIGH COURT OF KERALA, PIN – 682031.**

BY SPL.PUBLIC PROSECUTOR SRI.S.U.NAZAR

P.P.SRI.SANGEETHARAJ

RESPONDENT/ACCUSED:

**SHAJAHAN.K, S/O.KHALIDH.K.(LATE)
AGED 23 YEARS
NEW COLONY ANDIMADOM, OLAVAKKODE (P O)
PALAKKAD, PIN – 678002.**

BY ADV. SRI.VISHNUPRASAD NAIR

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 05.07.2023, ALONG WITH Crl.MC.1517/2023,AND CONNECTED CASES, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 5TH DAY OF JULY 2023 / 14TH ASHADHA, 1945

CRL.MC NO. 1828 OF 2023

(AGAINST THE ORDER DATED 7.1.2023 IN CRIME NO.472/2022 OF WALAYAR POLICE STATION PASSED BY THE IST ADDL. SESSIONS JUDGE (SPECIAL JUDGE) PALAKKAD)

PETITIONER/COMPLAINANT:

**STATE OF KERALA REPRESENTED BY
ADDITIONAL PUBLIC PROSECUTOR
HIGH COURT OF KERALA, PIN – 682031.**

BY SPL.PUBLIC PROSECUTOR SRI.S.U.NAZAR

P.P.DRI.SANGEETHARAJ

RESPONDENT/ACCUSED:

**ANSON BIJU, S/O BIJU, AGED 24 YEARS,
THEKKEKKARA HOUSE, KAPPIYALAKADAVU,
MUTTINAKAM, VARAPPUZHA (P.O),
ERNAKULAM, PIN – 683517.**

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 05.07.2023, ALONG WITH Crl.MC.1807/2023 AND CONNECTED CASES, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 5TH DAY OF JULY 2023 / 14TH ASHADHA, 1945

CRL.MC NO. 4380 OF 2023

(AGAINST THE ORDER DATED 4.3.2023 IN CRIME NO.744/2022 OF KOLLENGODE POLICE STATION PASSED BY THE IST ADDL. SESSIONS JUDGE (SPECIAL JUDGE)PALAKKAD)

PETITIONER/COMPLAINANT:

STATE OF KERALA REPRESENTED BY THE ADDITIONAL PUBLIC PROSECUTOR, HIGH COURT OF KERALA, PIN – 682031.

BY SPL. PUBLIC PROSECUTOR SRI.S.U.NAZAR

P.P.SMT.M.K.PUSHPALATHA

RESPONDENT/ACCUSED:

**YUVARAJ ARUMUGHAN
AGED 22 YEARS, S/O ARUMUGHAN,
NO.29, PITCHIMUTHU STREET , THEERAMPATTI,
MANAPPARAI,TIRUCHIRAPALLI,
TAMILNADU, PIN – 621307.**

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 05.07.2023, ALONG WITH Crl.MC.1807/2023 AND CONNECTED CASES, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

"C.R."

ORDER

The challenge in these Crl.M.Cs. is to the orders passed by the Additional Sessions Judge-I (Special Judge), Palakkad returning the final reports submitted in these five cases.

2. Heard Shri.S.U.Nazar, the learned Special Public Prosecutor.

FACTS:

Crl.M.C.No.1517 of 2023

3. The accused, a native of Mailadumthurai, Tamil Nadu is staying in a rented house near the house of respondent No.2. He was working as a casual labourer. On 23.7.2022 the accused kidnapped a 17 year old minor girl from the legal guardianship of respondent No.2, her mother, knowing that she belongs to Cheruma Caste. The accused committed sexual assault repeatedly on the minor girl during the period from 17.7.2022 to 30.7.2022 at Coimbatore in Tamil Nadu. The offences alleged against the accused are punishable under Sections 363, 376(2)(n) of IPC, Section 3(a) r/w Section 4(1), Section 5(1) r/w Section 6(1) of the POCSO Act, 2012 and Sections 3(2)(V), 3(2)(Va) of SC/ST POA Act.

Crl.M.C.No.1609 of 2023

4. On 7.10.2022 at 9 p.m., a girl aged 13 years went to school and had not returned home. Her mother gave a statement to the Kozhinjampara Police Station, based on which crime No.656/2022 was registered. On investigation, it was revealed that the missing girl had an affair with the accused, who is her neighbour. The Police traced the girl from Ranchi District, Jharkhand. The accused and the victim were brought to Kozhinjampara on 22.10.2022. The statement of the girl would reveal that on reaching Ranchi, they were given shelter in the house of a friend of the accused, and on 10.10.2022 and 12.10.2022, the accused committed aggravated sexual assault on the minor girl. As per the statement of the mother, the accused took her minor daughter without her consent, and thus he committed the offences punishable under Sections 363, 366, 354-A(1)(i), 376(3) of IPC and Section 10 r/w Section 9(l), Section 6(1) r/w Section 5(l), Section 3(b) r/w Section 4(2) of the POCSO Act.

Crl.M.C.No.1807 of 2023

5. The accused kidnapped a girl who was 16 years old from the lawful guardianship of her parents on 16.5.2022 from Manthakkad Sastha Colony Canal road and outraged her modesty from 16.5.2022 to

18.5.2022 and also committed penetrative sexual assault on her on several occasions. The investigation revealed that the accused had committed the offences punishable under Sections 354-A(1)(i), 376(1), 376(2)(n), 363 of IPC , Section 6(1) r/w Sections 5(j)(ii) & 5(l) and Section 4(1) r/w Section 3(a) of the POCSO Act.

Crl.M.C.No.1828 of 2023

6. The prosecution case is that between 19.10.2022 and 20.10.2022, the accused kidnapped a 15 year old minor girl from the lawful guardianship of her parents from her house in Kannode in Palakkad District. He kidnapped the girl by promising her to marry and took her to his house in Varappuzha and committed repeated penetrative sexual assault on her. Thus, the accused committed offences punishable under Sections 363, 354-A(1)(ii), 354-D, 376(2)(n), 476(3) of IPC, Section 3(a) r/w Section 4(2), Section 6 r/w Section 5(l) , Section 7 r/w Section 8 and Section 12 r/w Section 11(iv) of the POCSO Act.

Crl.M.C.No.4380 of 2023

7. The allegation against the accused is that he kidnapped a 17 year old minor girl from the Kollengode Town Bus stop without the consent of her parents and brought her to his house in Manapparai,

Tamil Nadu. The accused then committed sexual assault on the minor girl repeatedly on 19.12.2022 and 2012.2022 in his house and thus committed the offences punishable under Section 363 of IPC, Section 8 r/w Section 7 and Section 10 r/w Section 9(l) of the POCSO Act. .

8. In all these cases, the offence under Section 363 of the Indian Penal Code was allegedly committed within the territorial jurisdiction of the Sessions Court, Palakkad. According to the prosecution, the rest of the offences were allegedly committed beyond the jurisdiction of the Sessions Court, Palakkad.

9. The crux of the impugned order is that as the minor girls left their guardians on their own volition, the offence under Section 363 of IPC is not attracted.

10. Section 361 of IPC is extracted below:-

> "**361. Kidnapping from lawful guardianship**.—Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.
>
> *Explanation*.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.
>
> *Exception* —This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be

> entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

11. The ingredients of Section 361 of IPC are the following:-

(1) Taking or enticing away a minor or a person of unsound mind.
(2) Such minor must be under sixteen years of age, if a male, or under eighteen years of age, if a female.
(3) The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind.
(4) Such taking or enticing must be without the consent of such guardian.

12. The object of Section 361 of IPC is to protect minor children from being abducted or seduced for improper purposes and also to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The word `taking' or 'enticing' is crucial in attracting the offence.

13. The learned Sessions Judge relied on **S.Varadarajan** v. **State of Madras (AIR 1965 SC 942 = 1965 KHC 584)** in support of his finding. In **Varadarajan**, a minor girl on the verge of attaining majority fell in love with her neighbour. They wanted to get married. Her father came to know of the affair. He was not willing to accept the same. He, therefore, took the girl to the house of a relative, from where the girl went away from the custody of the relative. She contacted the accused. The

accused later joined her and permitted her to accompany him. There was no enticing on the side of the accused. Considering that circumstance, the Supreme Court held that when the minor had gone out of the keeping of her guardian voluntarily, and the accused had no role whatsoever in such minor going out of the keeping of her guardian and later the person allowed the girl who was already out of the keeping of the guardian to accompany him committed no offence under Section 361 of IPC. In **Varadarajan,** there had no occasion to consider the situation in which the accused had taken a role in the minor coming out of the keeping of the guardian.

14. The Supreme Court later considered the scope of the expressions 'takes' and 'entices' in **State of Haryana** v. **Raja Ram (AIR 1973 SC 819 = 1973 KHC 478)**. In that case, the Apex Court held thus:-

> "The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words "takes or entices any minor .... out of the keeping of the lawful guardian of such minor" in Section 361, are significant. The use of the word "Keeping" in the context connotes the idea of charge, protection, maintenance and control: further the

> guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial: it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section."

15. In **Shajahan** v. **State of Kerala (2010 (4) KHC 294)** this Court considered the expressions 'takes' and 'entices', contained in Section 361 of IPC, in paragraph 20 of the judgment, which reads thus:-

> "20. There is and can be difference between the expressions "takes" and "entices" in S.361 I.P.C. In certain cases, the meanings may overlap also. The expression "takes" may ordinarily refer to the gross physical act of taking away manually. But the expression must cover not merely the gross overt act of physically carrying away a minor. Subtle variants of the act of taking must also fall within the sweep of the expression 'takes' in S.361 I.P.C. It would be incorrect to assume that 'taking' is a culpable act which can take place only without the consent of the minor. A rule of the thumb that if the consent of the minor is there, the contumacious act of "taking" can never take place would be too unrealistic and impermissible. The distinction between "take" and "entice" cannot certainly be consent and absence of consent of the minor. Several subtle varieties of taking may take place with the consent of the minor and without the actual physical act of moving the minor. 'Enticing' a minor in language simply means luring or tempting or prompting a minor to move out of the custody of the guardian. Here also no gross physical act is necessary. Assurance given to a minor that if she comes out of the keeping of the guardian, the minor shall be protected and patronised must also necessarily fall within the range of contumacious conduct under S.361. In short to me it appears that the expressions "takes" and "entices" must together

> cover all acts by which it is ensured by the offender that the minor moves out of the keeping of the lawful guardian. To give true effect to the purpose or rationale of the penal provision in S.361 I.P.C, those expressions must be given such a comprehensive and exhaustive sweep."

16. In **Varadarajan** (supra), the Supreme Court appeared to have taken the view that the purpose of Section 361 IPC is the protection of vulnerable minors as also the protection of the rights of the guardian; but emphasis appears to have been located in the former. In **Raja Ram** (supra), the Supreme Court held that the object of the section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful custody of their minor wards. On this, in **Shajahan** (supra), this Court held thus:-

> "21. It is in this context that the purpose of the statutory provisions becomes important. *Varadarajan* and *Rajaram* become important in this context. Protection of the rights of the guardian and protection of the rights of the minor are not contradictory themes/purposes. They are different dimensions of the same concept. It would be myopic to assume that the two purposes conflict. The law assumes that in the Indian context the true interest of the minor and the interest of the parent/guardian concur. That is the basic plank of parental (guardians) authority and right. Consent of the minor is hence irrelevant. In a case where the true interest of the minor and the interest of the guardian conflict and the guardian acts against the interest of the minor, the expression 'takes' or 'entices' may not cover a good Samaritan who acts in the true and genuine interests of the minor and saves the child from the guardian. But except in such a rare and exceptional situation, it will have to be assumed that the right of the guardian and the true interest of the minor concur and any invasion into the right of the guardian even with the consent of the

> minor will have to be frowned upon by law by invoking S.361 I.P.C."

17. The statutory provision and the precedents referred to above lead us to conclude thus:-

(1) The consent of the minor who is taken or enticed is wholly immaterial.

(2) It is only the guardian's consent which takes the case out of the purview of the penal provision.

(3) It is not necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person, which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian, will be sufficient to attract the section.

4) With the consent of the minor, without any element of fraud, force or deceit, the minor can be moved out of the custody of the guardian, and that would attract the expression 'takes' or 'entices' under Section 361 of IPC.

18. In **Parkash** v. **State of Haryana [(2004) 1 SCC 339],** a Two Judge Bench of the Supreme Court held that Section 361 of IPC is designed to protect the sacred right of the guardians

with respect to their minor wards.

19. Coming to the facts of the cases under consideration. In all the cases mentioned above, the prosecution collected materials which prima facie established attempts to induce the minor girls to go out of the custody of the lawful guardians. There are materials to prima facie show that the accused in these cases had prevailed upon the girls offering them enticement to leave out of the keeping of their guardians. In such circumstances, the prosecution allegations, if unrebutted, would attract the offence under Section 363 read with Section 361 of IPC.

20. It is also relevant to refer to sub-section (2) of Section 181 of Cr.P.C. Sub-section (2) of Section 181 Cr.P.C. reads thus:-

> "**181. Place of trial in case of certain offences.-**
> (1) ……
> (2) Any offence of kidnapping or abduction of a person may be inquired into or tried by a Court within whose local jurisdiction the person was kidnapped or abducted or was conveyed or concealed or detained."

21. As per sub-section (2) of Section 181 Cr.P.C., in case of an offence of kidnapping or abduction, it would be inquired into or tried by a Court within whose local jurisdiction the person

was kidnapped or abducted or was conveyed or concealed or detained.

22. In the present case, the prosecution placed material to show that the girls were kidnapped within the local jurisdiction of the Sessions Court, Palakkad. Therefore, the Additional Sessions Judge-I (Special Judge), Palakkad, has jurisdiction to try the cases. The orders impugned are liable to be set aside.

23. In the result,

Orders dated 6.1.2023 in Crime No.653/2022 of Chittur Police Station & Crime No.656/2022 of Kozhinjampara Police Station, 21.2.2023 in Crime No.174/2022 of Malampuzha Police Station, 7.1.2023 in Crime No.472/2022 of Walayar Police Station and 4.3.2023 in Crime No.744/2022 of Kollengode Police Station returning the final reports are set aside. The Court below is directed to proceed with the final reports in accordance with law.

The Crl.M.Cs are allowed as above.

Sd/-
K.BABU
Judge

TKS

APPENDIX OF CRL.MC.NO.1517/2023

PETITIONER'S ANNEXURES

Annexure I	**TRUE COPY OF THE FINAL REPORT DATED 10.10.2022 FILED BY THE DEPUTY SUPERINTENDENT OF POLICE CHITTUR SUB DIVISION IN CRIME NO.653/2022 OF CHITTUR POLICE STATION.**
Annexure II	**TRUE COPY OF THE ORDER DATED 06.01.2023 IN CRIME NO.653/2022 OF CHITTUR POLICE STATION PASSED BY THE 1ST ADDITIONAL SESSIONS JUDGE (SPECIAL JUDGE) PALAKKAD DIVISION.**

TKS

APPENDIX OF CRL.MC.NO.1609/2023

PETITIONER'S ANNEXURES

Annexure I	**TRUE COPY OF THE FINAL REPORT DATED 26.11.2022 IN CRIME NO.656/2022 OF KOZHINJAMPARA POLICE STATION.**
Annexure II	**TRUE COPY OF THE ORDER DATED 06.01.2023 RETURNING THE FINAL REPORT IN CRIME NO.656/2022 OF KOZHINJAMPARA POLICE STATION PASSED BY THE 1ST ADDITIONAL SESSIONS JUDGE SPECIAL JUDGE) PALAKKAD DIVISION.**

TKS

APPENDIX OF CRL.MC 1807/2023

PETITIONER'S ANNEXURES

Annexure 1	**TRUE COPY OF THE FINAL REPORT DATED 29.8.2022 IN CRIME NO.174/2022 OF MALAMPUZHA POLICE STATION.**
Annexure 2	**TRUE COPY OF THE ORDER DATED 21.02.2023 RETURNING THE FINAL REPORT IN CRIME NO. 174/2022 OF MALAMPUZHA POLICE STATION PASSED BY THE 1ST ADDITIONAL SESSIONS JUDGE (SPECIAL JUDGE) PALAKKAD DIVISSION**

TKS

APPENDIX OF CRL.MC 1828/2023

PETITIONER'S ANNEXURES

Annexure I	**TRUE COPY OF THE FINAL REPORT DATED 24.11.2022 IN CRIME NO.472/2022 OF WALAYAR POLICE STATION.**
Annexure II	**TRUE COPY OF THE ORDER DATED 07.01.2023 IN CRIME NO.472/2022 OF WALAYAR POLICE STATION PASSED BY THE 1ST ADDITIONAL SESSIONS JUDGE (SPECIAL JUDGE) PALAKKAD.**

TKS

APPENDIX OF CRL.MC 4380/2023

PETITIONER'S ANNEXURES

Annexure 1 **THE TRUE COPY OF THE FINAL REPORT DATED 24.2.2023 FILED BY THE SUB INSPECTOR OF POLICE, KOLLENGODE POLICE STATION IN CRIME NO.744/2022.**

Annexure 2 **THE TRUE COPY OF THE ORDER DATED 04.03.2023 IN CRIME NO. 744/2022 OF KOLLENGODE POLICE STATION PASSED BY THE IST ADDITIONAL SESSIONS JUDGE (SPECIAL JUDGE) PALAKKAD DIVISION.**

TKS