



IN THE HIGH COURT OF KERALA AT ERNAKULAM  
PRESENT

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

FRIDAY, THE 31<sup>ST</sup> DAY OF JANUARY 2025/11TH MAGHA, 1946

OP(CRL.) NO.630 OF 2024

CRIME NO.641/2022 OF CHEVAYUR POLICE STATION, KOZHIKODE  
AGAINST S.C.NO.37 OF 2023 OF FAST TRACK SPECIAL COURT,  
KOZHIKODE

PETITIONER/ACCUSED:

ABDUL AZEEZ, AGED 52 YEARS, S/O.MOHAMMED,  
VELLACHALIL HOUSE, PARANNUR P.O., NARIKUNI,  
KOZHIKODE, PIN - 673585.

BY ADVS.  
NIRMAL.S  
VEENA HARI

RESPONDENTS/STATE:

1 STATE OF KERALA,  
REPRESENTED BY PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA,  
(THROUGH S.H.O,  
CHEVAYOOR POLICE STATION), PIN - 682031.

\*ADDL.R2 THE HIGH COURT OF KERALA,  
REPRESENTED BY THE  
REGISTRAR (DISTRICT JUDICIARY).

\*ADDITIONAL R2 IS SUO MOTU IMPLEADED VIDE ORDER  
DATED 17/12/2024 IN OP(CRL)NO.630/2024



BY ADVS.

SUNIL JACOB JOSE

P.NARAYANAN, SPL. G.P. TO DGP AND ADDL. P.P.

SAJJU.S., SENIOR GOVERNMENT PLEADER

THIS OP (CRIMINAL) HAVING COME UP FOR ADMISSION ON  
31.01.2025, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:



'C.R'

JUDGMENT

Dated, this the 31<sup>st</sup> day of January, 2025

*“The face is the mirror of the mind, and eyes without speaking confess the secrets of the heart.” - St.Jerome*

In the scheme of the Protection of Children from Sexual offences Act and the guidelines in accord therewith, whether a child/vulnerable witness can be screened from the defense counsel is one interesting question which surface for consideration in this Original Petition.

2. The petitioner is the sole accused in S.C.No.37/2023 of the Fast Track Special Court, Kozhikode. He is charged with offences under Sections 452 and 354 A(i) of the Penal Code, and also, under Section 10, read with Section 9(m) of the Protection of Children from Sexual Offences Act (for short, 'P.O.C.S.O Act'). The issue raised in this Original Petition is one with respect to the procedure while examining a child witness. Two specific reliefs are sought for in this



Original Petition, which are extracted here below:

*“1. Direct the trial court in S.C.37/2023 to permit the counsel for the petitioner/accused to cross examine the survivor (PW1) by putting questions directly in cross examination.*

*2. Direct the trial court in S.C.37/2023 to remove the screen placed between the survivor and the defense counsel to enable a proper cross examination and fair conduct of trial.”*

3. Having regard to the significance of the matter, this Court directed the High Court of Kerala to be impleaded as an additional respondent. The same was done and a counter has been placed on record, wherein the “Guidelines for Recording of Evidence of Vulnerable Witnesses, 2024” ('guidelines', for short) issued by the High Court - pursuant to, and in accordance with, the judgment of the Hon'ble Supreme Court in ***Smruti Tukaram Badade v. State of Maharashtra*** [2022 INSC 39] - has been produced.

4. Heard **Smt.Veena Hari**, learned counsel on behalf of the petitioner; **Sri.P.Narayanan**, learned Special Government Pleader to D.G.P and Additional Public Prosecutor on behalf



of the 1<sup>st</sup> respondent and **Sri.Sunil Jacob Jose**, learned counsel on behalf of the 2<sup>nd</sup> respondent High Court. Perused the records.

5. Learned counsel for the petitioner submits that, though Section 33(2) of the P.O.C.S.O Act stipulates that, questions in cross-examination have to be put through the Special Court, the same is not mandatory. According to the learned counsel, the term 'shall' used in Section 33(2) of the P.O.C.S.O Act is not conclusive, as regards the mandatory nature of the said provision. An impediment/restriction on the counsel to put questions directly to the child witness would impinge upon the right to fair trial of the accused. On such premise, the first relief, that is, to permit the petitioner's counsel to put questions directly to the witness, is sought to be allowed.

6. As regards the second limb, which pertains to screening the witness even from the defense lawyer, learned counsel would submit that the same seriously impinges the salutary right of an accused for fair trial. It was pointed out that



neither Section 36, nor the guidelines issued by the High Court prevents screening of the witnesses from the counsel for the accused. The provision only seeks to screen the child witness from the accused; and not from his counsel. Learned counsel would hasten to add that the demeanour of the witness is quite important and relevant for effective cross-examination of witnesses; and, unless the counsel is in a position to see the child witness and his/her demeanour, such right of the accused will be seriously jeopardized. Learned counsel would invite the attention of this Court to clause (3) of the guidelines, wherein the right of the accused for a fair trial is also protected. Clause (24) of the guidelines is pointed out, which provides that even a gesture made by a vulnerable witness has to be taken stock of by the Judge concerned. He shall interpret the same and record the inference thereof. Learned counsel would point out that, unless the defense counsel is in a position to see the gesture shown by a child witness, the inference or the impression created by such gesture will not be decipherable to the Counsel, for which reason also, there cannot be any impediment as between the Counsel and the



vulnerable witness. On such premise, learned counsel would seek the second relief also to be allowed. In this regard, reliance is placed upon the judgment of a learned Single Judge of this Court in ***Unnikrishnan R. v. Sub Inspector of Police and others*** [2018 SCC OnLine Ker 4642]. Relying upon, ***Asha Ranjan v. State of Bihar*** [(2017) 4 SCC 397], learned counsel would submit that the basic right of an accused for fair trial cannot be compromised, while balancing the protection being extended to a vulnerable witness.

7. As regards the first relief, learned counsel for the 2<sup>nd</sup> respondent High Court would submit that the embargo contained in Section 33(2) is absolute, as could be seen from the term 'shall', employed therein, wherefore, the 1<sup>st</sup> relief sought for - to permit the defense counsel to put questions directly to the vulnerable witness - cannot be countenanced at all. Section 33 speaks of the special procedure and powers of the Special Court. When there is a peremptory direction in the form of Section 33(2) that questions has to be put through the Special Court, the same can only mean that the stipulation thereof is compulsory,



rather mandatory. Learned counsel would point out that the same embargo is put to the prosecutor as well, while putting questions during examination-in-chief.

8. Coming to the second limb, learned counsel would first invite the attention of this Court to a report called for by the 2<sup>nd</sup> respondent from the learned Special Judge, Fast Track Court, Kozhikode, where the accused is facing trial in S.C.No.37/2023. The learned Sessions Judge has stated that a screen is placed between the accused and the victim/vulnerable witness and it is so placed, that even the defense counsel could not see the witness. It was stated that in a given situation, if the defense counsel seeks to see the witness answering, the same will be permitted. Learned counsel then invited my attention to the guidelines issued by the High Court, which was produced along with the counter. It was first pointed out that the guidelines were issued in accordance with the directions of the Hon'ble Supreme Court in *Smruti Tukaram Badade* (supra), as also, the new criminal laws, namely, the Bharatiya Nyaya Sanhita, 2023 (for short, 'B.N.S'), Bharatiya Nagarik Suraksha





Sanhita, 2023 (for short, 'B.N.S.S') and the Bharatiya Sakshya Adhiniyam, 2023 (for short, 'B.S.A'). Clause 3(a)(i) of the guidelines stipulates that a vulnerable witness includes any child witness or a witness, who has not completed 18 years of age. As per clause (5), there cannot be any inference of any prejudice to be drawn from the special measures adopted in the guidelines. The guidelines goes to the extent of acclimatizing the vulnerable witnesses by permitting a visit to the Court by virtue of clause (10). Coming to the relevant clause (17), where a duty is cast to provide a comfortable environment to the child witness, learned counsel would point out that permission is granted only for the accused, as also, his counsel to have a frontal or profile view of the vulnerable witness, while deposing before the Court; and not vice versa. If the vulnerable witness, choose to look at the accused person or their counsel, the same is permissible in terms of clause 17(iv) of the guidelines. Reliance was also placed on clause (21), which enables the Court to act either *suo motu* or on an application made by the vulnerable witness, prosecutor, counsel etc., to order testimonial aid such as, screens,



one-way mirror, curtains or other devices to be placed in the Court room, in such a manner that the vulnerable witness cannot see the accused/opposite party while testifying; and at the same time, ensuring that the opposite party/accused is in a position to hear the statement of the vulnerable witness. To a specific query put by this Court as to whether there is any enabling position in the parent Act or in the guidelines, which prevents the defense counsel from seeing the vulnerable witness, the answer was in the negative. Learned counsel would, however, hasten to add that an objection as to a screen being put between the defense counsel and the vulnerable witness was never raised before the trial court and that the same is raised for first time in this Original Petition. For that reason, it may not be compulsory for this Court to answer that question, or for that matter, to allow relief no.(2), is the submission made.

9. Learned Special Government Pleader to D.G.P and Additional Public Prosecutor would submit that the language employed in Section 33(2) is couched in mandatory terms, which permits of no exception, whatsoever. Learned counsel



would rely upon a judgment of the Bombay High Court in ***Dnyandeo Bhujang Dahiphale v. State of Maharashtra and another*** [2023 SCC OnLine Bom 1672] to point out that, where the counsel for the accused had agreed before the trial court to put a screen between the counsel and the vulnerable witness, a challenge in this regard at the appellate stage was repelled by the Bombay High Court. Reference in this regard was made in paragraph no.11 of the judgment. Learned counsel would rely upon another judgment of the Bombay High Court in ***Osban Fernandes v. State*** [2020 SCC OnLine Bom 845], wherein the procedure adopted to keep the vulnerable witness behind a curtain, so that she is not exposed to the accused persons was approved and favoured by the High Court of Bombay. Learned counsel also invited the attention of this Court to Section 308 of the B.N.S.S, especially to the proviso therein, to point out that the Court has been given ample power to safeguard the interest of a victim of rape or other sexual offence, in such a manner that such woman is not confronted by the accused, simultaneous with ensuring the right of cross-examination of the accused. Learned counsel would also submit that, having regard to the



protective measures as available in the parent Code, in the guidelines and also in the new provisions of the B.N.S.S, it will not go foul of law in an appropriate case, if the court choose to screen the vulnerable witness, even from the defense counsel.

**10.** Having heard the learned counsel appearing for the respective parties, this Court is partially in favour of the petitioner, and partially otherwise. Insofar as the first relief is concerned, that is, to permit the defense counsel to put questions directly to the child witness, the same is specifically tabooed by Section 33(2) of the P.O.C.S.O Act, besides by virtue of clause (21) of the guidelines. It is relevant in this regard to take note that the guidelines have been adopted by the High Court in tune with the directions of the Hon'ble Supreme Court as contained in ***Smruti Tukaram Badade*** (supra), and also, in accordance with the new criminal laws, namely, B.N.S, B.N.S.S and B.S.A. Learned counsel for the petitioner, though argued that the term 'shall' employed in Section 33(2) would not indicate its mandatory nature, this Court cannot accept the same.



Having regard to the special enactment - the name of which, itself, speaks of Protection of Children from Sexual Offences Act - where protection is extended not merely from sexual offences, but also with respect to the procedure for trial and dispensation of justice, it cannot be held that the term 'shall' is used with any other purpose, but to indicate the mandatory character of the provision. When it is specifically stipulated that questions shall be put through the Special Court by virtue of an enabling provision - in deviation from the practice in other cases - the only possible conclusion is that the special safeguard is mandatory; and not otherwise. In the circumstances, the relief no.(1) sought for in the Original Petition will stand declined.

11. Now, coming to the second relief - about which this Court is inclined in favour of the petitioner - it requires to be noticed from the report called for from the Special Judge concerned that, as a matter of practice, a screen is put so as to block the vision of the child witness even from the defense counsel. The relevant portion of the report is



extracted here below:

*"I may most humbly submit that in my court a practice is being followed in which when the child witness who is the victim enters the box, a screen will be placed in front of her/him so that the accused cannot see her and she cannot see the accused and counsels at the time of giving evidence. It is true that by placing such a screen the counsel for accused is also not in a position to see the victim. Such a practice has been followed due to some incidents in which counsels for accused made certain facial expressions which resulted in making the child witnesses discomfort and it resulted in denying them child friendly atmosphere in the court. In order to avoid such situations and to make a child friendly atmosphere I also continued to follow the said practice which has already been followed by my learned predecessor. But whenever, the counsels for the accused insist to see the victim during examination, permission will be granted and no impediment is there for the counsel to come forward and see the child from a comfortable distance..."*

**12.** The reason stated is based on certain past instances, where some defense counsel has shown some facial



expressions/gestures, which are disquieting to the child witness. The learned Special Judge would hasten to add that in a given situation, if permission is sought for to see the witness, the same is also being allowed.

13. Having considered the above practice being followed - at least in the Special Court which is in seisin of the instant Sessions Case S.C.No.37/2023 - this Court is of the opinion that the same cannot survive the test of law. What ought to have been an exception, has been made the rule; and what ought to have been the rule is made an exception, is the impression which this Court gathers from the report of the learned Special Judge. It is beyond the cavil of any doubt that there is no statutory provision, which permits screening of the child witness from the defense counsel. No such provision is there in the parent Act/the P.O.C.S.O Act; or in the guidelines. Section 36 of the P.O.C.S.O Act contemplates screening only from the accused and not from his counsel. When a special enactment is made and a special procedure is prescribed, which is in deviation from the procedure applicable to other types of



cases, all necessary matters relevant should be presumed to have been considered by the legislature and the legislature consciously took a call not to screen the vulnerable witness from the defense counsel. Nor is there any provision to do so in the guidelines issued by the High Court - which was one issued pursuant to the judgment of the Hon'ble Supreme Court in ***Smruti Tukaram Badade*** (supra), and also, in tune with the new criminal laws. Learned counsel for the 2<sup>nd</sup> respondent/High Court or the learned Special Government Pleader to D.G.P and Additional Public Prosecutor, could not point out any provision of the B.N.S.S, which enables the screening of the child witness from the defense lawyer concerned.

14. Dilating on the significance of cross-examination, a Constitution Bench of the Supreme Court in ***State of M.P v. Chintaman Sadashiva Waishampayan*** [AIR 1961 SC 1623], held, as far as back in 1961, that depriving an opportunity to cross-examine a witness would violate the principles of natural justice. Relying on that decision, as also, on other cases, the Supreme Court in ***Ayaubkhan***





**Noorkhan Pathan v. State of Maharashtra and Others**

[(2013) 4 SCC 465] held thus:

*“30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice.”*

In **Kartar Singh v. State of Punjab** [(1994) 3 SCC 569], the Supreme Court held that jurisprudentially, cross-examination is an acid test of the truthfulness of the statement made by a witness on oath in chief-examination. Now, coming to a fundamental aspect of criminal jurisprudence vis-a-vis the cross-examination, it is not as if that a defense counsel come with a definite set of questions and puts it to the witnesses, mechanically. It is a slow and gradual process through which a counsel would elaborate and expand his line of cross-examination; and that is why, it is often called the



art of cross-examination. It is upon getting an answer to a question put first, that the second question or the subsequent questions are framed. The demeanour and the witness is quite important and significant to effectively cross-examine a witness. The same situation cannot undergo any change in the legal position, even if the witness is a child witness or a vulnerable witness. To deprive that right of the cross-examining counsel is something which seriously impinges the right to fair trial of the accused, is the opinion of this Court. The same cannot be done, especially in absence of any enabling statutory or other provision.

15. The situation is different, if a defense counsel misuses his liberty by showing gestures or facial expression, so as to make the witness uncomfortable. If such a thing is noticed by the Special Court, at the first instance, this Court is of the opinion that the counsel should be warned, not to indulge in such practice; and if the same is repeated, there cannot be any doubt that the Special Court is fully powerful to screen the witness from



the defense counsel by adopting appropriate measures. In that case, the action is justified, not because it is sanctioned by any statutory provision, but on the premise that the defense counsel has misused his liberty. Except in situations like the one referred above, as a general rule or as a matter of general practice, it is neither legal, nor proper to screen the vulnerable witnesses from the defense counsel. Such a course can be adopted only as an exception, in circumstances which would warrant the same based on individual facts. By way of clarification, it is held that the benefit is also liable to be extended to the prosecutor as well, who conducts the chief-examination.

16. In the circumstances, the second relief sought for is only to be allowed. There will be a direction to the learned Special Judge to remove the screen between the survivor/victim/child/vulnerable witness and the defense counsel, so as to enable proper cross-examination, but ensuring that such witness is adequately screened from the accused.



17. Taking into account the possibility of the above referred practice continuing in some other Special Courts also, this Court directs the Registrar (District Judiciary) of the High Court to communicate this judgment to the Special Courts; or in the alternative, to issue modified guidelines incorporating the gist of the dictum laid down herein.

O.P.(Cr1.) is allowed in part, as above.

Sd/-

**C.JAYACHANDRAN, JUDGE**

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APPENDIX OF OP (CRL.) 630/2024

PETITIONER'S EXHIBITS:

ANNEXURE A1	TRUE COPY OF THE F.I.R NO.0641/2022 DATED 08.10.2022 OF THE CHEVAYOOR POLICE STATION ALONG WITH F.I.S.
ANNEXURE A2	TRUE COPY OF THE 164 STATEMENT OF THE SURVIVOR DATED 10.10.2022.
ANNEXURE A3	TRUE COPY OF THE EXAMINATION IN CHIEF OF PW1.

RESPONDENTS' EXHIBITS:

EXHIBIT R2 (A)	A TRUE COPY OF THE NOTIFICATION NO.D1-7/17562/2022 DATED 21/12/2024 ALONG WITH THE AMENDED GUIDELINES.
EXHIBIT R2 (B)	A TRUE COPY OF THE COVERING LETTER NO.A4-463/2025 DATED 13/1/2025 OF THE DISTRICT JUDGE, KOZHIKODE ADDRESSED TO THIS RESPONDENT ALONG WITH THE REPORT OF THE SPECIAL JUDGE, FAST TRACK SPECIAL COURT, KOZHIKODE.