

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.69 OF 2017

**BALASAHEB @ SURYAKANT YASHWANTRAO)
MANE)...APPLICANT**

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Rahul S. Kate, Advocate for the Applicant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 22nd MARCH 2017

ORAL ORDER :

1 By this revision petition, revision petitioner / original accused no.2 is challenging the charge framed by the learned Additional Sessions Judge, Waduj, on 7th January 2017, for offences punishable under Sections 19 read with Section 21 of the Protection of Children from Sexual Offences Act, 2012, (POCSO Act), Section 202 of the IPC and under Section 3(2)(vi) of the

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1988.

2 Heard Shri Rahul Kate, the learned advocate appearing for the revision petitioner / original accused no.2. By placing reliance on judgment in the matter of **Kamal Prasad Patade vs. State of Chhattisgarh and Others**¹, Shri Rahul Kate, the learned advocate appearing for the revision petitioner / original accused no.2 vehemently argued that initially the prosecution is obliged to prove the commission of the offence punishable under Section 5 of the POCSO Act against original accused no.1 Shahaji Anandrao Patole and then only the prosecution can file the charge-sheet against the present revision petitioner / original accused no.2 for the alleged offences under Section 19 read with Section 21 of the POCSO Act. Unless and until the principal offence is proved against the main accused, the co-accused cannot be charge-sheeted for the offence punishable under Section 19 read with Section 21 of the POCSO Act. The learned advocate further argued that in the case in hand, as yet,

¹ 2016 CRI.L.J.3759

principal offence is not proved to have been committed by the accused no.1 Shahaji Patole and therefore, composite charge-sheet could not have been filed against the revision petitioner / original accused no.2 by arraigning him as an accused with principal accused Shahaji Patole. The learned advocate further argued that immediate superior officials in-charge of the ashram school are not made as an accused by the police and unnecessarily the revision petitioner /original accused no.2, who is Director of the Trust, is joined as an accused for the offence punishable under Section 19 read with Section 21 of the POCSO Act.

3 The learned APP opposed the revision petition by contending that objects of the POCSO Act are required to be kept in mind and there cannot be charge-sheet against accused persons in piecemeal – one of the substantive / principal offence and after result thereof, the another for the offence punishable under Section 19 read with Section 21 of the POCSO Act. The learned APP further argued that mandate of Section 33(5) of the POCSO Act is to the effect that the victim child should not be called

repeatedly before the court for testifying against accused persons and if contention of the learned advocate for the revision petitioner is accepted, then that will amount to violation of provisions of Section 33(5) of the POCSO Act.

4 I have carefully considered the rival submissions and also perused the entire charge-sheet with the assistance of the learned advocate appearing for the revision petitioner / original accused no.2. The charge questioned in the instant revision petition is one punishable under Section 19 read with Section 21 of the POCSO Act. It is, therefore, necessary to quote relevant provisions of both these sections and they read thus :

“19. Reporting of offences :

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to.-

- (a) the Special Juvenile Police Unit; or
- (b) the local police.

(2) Every report given under sub-section (1) shall be

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(a) ascribed an entry number and recorded in writing;

(b) be read over to the informant;

(c) shall be entered in a book to be kept by the Police Unit.

"21. Punishment for failure to report or record a case : -

(1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions of sub-section (1) shall not apply to a child under this Act.”

5 At this stage, it is also relevant to quote statement of objects and reasons for enactment of the Protection of Children from Sexual Offences Act, 2012, which reads thus :

“Statement of Objects and Reasons –

Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Further, Article 39, inter alia provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

2. The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement of coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or

other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

3. The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the “Study on Child Abuse: India 2007” conducted by the Ministry of Women and Child Development. Moreover, sexual offences against children are not adequately addressed by the extant laws. A large number of such offences are neither specifically provided for nor are they adequately penalised. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.

4. It is, therefore, proposed to enact a self contained comprehensive legislation inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of

the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.

5. The Bill would contribute to enforcement of the right of all children to safety, security and protection from sexual abuse and exploitation.

6. The Notes on Clauses explain in detail the various provisions contained in the Bill.

7. The Bill seeks to achieve the above objectives.”

It is, thus, clear that this is a Special Act enacted for protection of children as per mandate of the Constitution of India as well as per mandate of United Nations Convention on the rights of children, ratified by our country. Keeping in mind the object of the Act, the legislature in its wisdom has enacted Section 19 thereof which casts duty on each and every person who has apprehension or knowledge that an offence under the POCSO Act has been committed, to report the same either to the Special Juvenile Police

Unit or to the local police. Failure to discharge this duty warrants punishment as prescribed under Section 21 of the POCSO Act.

6 Let us judge the case in hand keeping in mind these mandatory provisions of the POCSO Act. According to the prosecution case, the victim girl child was taking school education in a residential school named as Shri Sant Gadge Maharaj Madhyamik Ashramshala at Gondavale. Being a residential ashram school, the victim female child used to stay in the school itself along with her colleagues. It is case of the prosecution that accused no.1 Shahaji Patole used to work as the Cook in the Ashram School where the victim female child was staying for taking education. The prosecution alleged that on 11th September 2015 when because of her ill-health, the victim female child instead of attending her classes was staying in her room, accused no.1 Shahaji Patole – cook of the ashram school committed rape on her by taking her to the nearby bathroom. This incident is witnessed by Bharti D. Lokhande and Sonia Ovhal – colleagues of the victim female child. It is case of the prosecution that the

victim female child then reported the incident to the present revision petitioner / original accused no.2, who happens to be the Director of the Trust running the Ashram School. It is case of the prosecution that, thereafter, informant Anjana – aunt of the victim female girl, so also her other relatives, disclosed the incident to the revision petitioner / original accused no.2. However, instead of reporting the matter to the police, according to the prosecution case, the revision petitioner / original accused no.2 insisted the informant and other relatives of the victim female child to settle the matter on a cup of tea in order to prevent defamation of the school. Statement of the victim female child, her colleague Bharti, so also the FIR and other statements reflect the fact that the incident of aggravated penetrative sexual on the victim female child by the cook of the Ashram School came to be reported to the revision petitioner / original accused no.2 – Director of the Trust, but, he insisted for settling the matter instead of reporting the same to the police, in order to prevent defamation of his school.

7 After perusal of the material produced before it in the form of the charge-sheet, the learned Additional Sessions Judge, Waduj, on 7th January 2017, has framed charges including the charge for the offence punishable under Section 19 read with Section 21 of the POCSO Act, so also under Section 202 of the IPC against the revision petitioner /original accused no.2.

8 If averments made by the first informant in her FIR as well as in their statements by the victim female child and her colleague Bharti, so also averments made by witnesses in other statements recorded by the Investigator under Section 161 of the Code of Criminal Procedure is perused, then it becomes clear that there is enough material to come to the conclusion that despite having knowledge that the offence punishable under the POCSO Act has been committed in the Ashram School, the revision petitioner / original accused no.2, who happens to be the Director of the Trust managing that School, has, instead of reporting the matter to the Special Juvenile Police Unit or to the local police, insisted the First Informant and relatives of the victim female child

to settle the matter over a cup of tea. As such, it cannot be said that there are no sufficient grounds for proceeding against the revision petitioner / original accused no.2 so far as alleged offence is concerned.

9 At this stage, it is apposite to quote paragraphs 12 and 15 of the judgment in the matter of **Kamal Prasad Patade** (**supra**) relied by the learned advocate appearing for the revision petitioner / original accused no.2. Those read thus :

12. The qualifying word in Section 19(1) of the POSCO Act is apprehension regarding an offence is likely to be committed or has knowledge that such an offence under POSCO Act has been committed, he shall provide such information to the Special Juvenile Police Unit or local police. Thus, Section 19(1) of the POSCO Act can be invoked only when the person concerned was having exclusive knowledge of commission of offence under POSCO Act and if the person is in-charge of the institution who fails to report the commission of an offence under sub-section (1) of Section 19 of the POSCO Act in respect of a subordinate under his control, he

would be liable for prosecution under Section 21(2) of the POSCO Act.

15. Likewise, in the matter of **A.S. Krishnan v. State of Kerala, AIR 2004 SC 3229**, Their Lordships of the Supreme Court have held as under:-

“9. Under the IPC, guilt in respect of almost all the offences is fastened either on the ground of “intention” or “knowledge” or “reasons to believe”. We are now concerned with the expressions “knowledge” and “reasons to believe”. “Knowledge” is awareness on the part of person concerned indicating his state of mind. “Reasons to believe” is another facet of the state of mind. “Reasons to believe” is not the same thing as “suspicion” or “doubt” and mere seeing also cannot be equated to believing. “Reasons to believe” is higher level of state of mind. Likewise “knowledge” will be slightly on higher plane than “reasons to believe”. A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26, IPC explains the meaning of the words “reasons to believe” thus.

26. “Reasons to believe”. A person is said to have 'reasons to believe' a thing, if he has sufficient cause to believe that thing but not otherwise”.

10 If the case in hand is compared with the observations made in above paragraphs by the learned Single Judge of Hon'ble Chhattisgarh High Court, then it becomes clear that the revision petitioner /original accused no.2 was having clear perception of the fact that the offence of aggravated penetrative sexual assault had been committed in his own institution by his own employee on one of the residents of the ashram school, who happens to be a “child” under the meaning of the POCSO Act. Material collected by the Investigator during the course of the investigation indicates that the revision petitioner /original accused no.2 was certainly having the specific knowledge about commission of the offence of aggravated penetrative sexual assault on the victim female child by the employee of the Ashram School run by the Trust, of which the revision petitioner / original accused no.2 was the Director. As per mandate of Section 19 of the POCSO Act, he was enjoined

with the duty to report the matter to the police. As such, the prosecution has made out a prima facie case against the revision petitioner / original accused no.2 which has resulted in framing of the charge. Neither any procedural irregularity nor manifest error of law could be found in the act of the learned trial Judge in framing the charge against the revision petitioner / original accused no.2.

11 Now let us deal with the submissions of Shri Kate, the learned advocate appearing for the revision petitioner / original accused no.2 that unless and until the principal offence is proved against the main accused i.e. the cook, who allegedly committed penetrative sexual assault on the victim child, the revision petitioner cannot be charge-sheeted for the offence punishable under Section 19 read with Section 21 of the POCSO Act. The learned advocate placed reliance on observations of the Hon'ble Chhattisgarh High Court made in paragraph 17 in the matter of **Kamal Prasad Patade (supra)**. In that matter, accused Indrajeet had committed penetrative sexual assault on the victim child and

allegations were to the effect that though this incident came to be reported to petitioner Kamal Prasad – the Principal of the school, he had failed to report the same to the police. Paragraph 17 of the said judgment reads thus :

“17 From careful perusal of the record, it is quite vivid that in a proceeding launched by the prosecution against co-accused Indrajeet Thakur, the prosecution is yet to establish that the co-accused Indrajeet Thakur has committed penetrative sexual assault/aggravated penetrative assault within the meaning of Sections 3 & 5 of the POCSO Act which is punishable under Sections 4 & 6 of the POCSO Act respectively with grandson of respondent No.2 on 20.8.2015 and also to establish other offences, which are pending trial. Thus, this fact is to be established that such an offence has been committed by co-accused/principal offender Indrajeet Thakur with grandson of respondent No.2. In the prosecution under Section 21(2) of the POCSO Act, it is necessary for the prosecution to establish first commission of main offence under Sections 4 & 6 of the POCSO Act before making the person liable under Section 21(2) of the POCSO Act as the prosecution has firstly to establish beyond doubt in

the jurisdictional criminal court that an offence under Sections 4 & 6 of the POCSO Act has been committed by an accused person and once finding is recorded by jurisdictional criminal court convicting the accused therein for offences under Sections 4 & 6 of the POCSO Act, then to establish the petitioner had exclusive knowledge of such an offence having been committed by the co-accused under POCSO Act and despite such knowledge, he failed to report the matter under Section 19(1) of the POCSO Act to the competent authority including local police station, then only penal provision contained in Section 21(2) of the POCSO Act would attract.”

The Hon'ble Chhattisgarh High Court allowed the writ petition filed by Kamal Prasad challenging the consolidated charge-sheet implicating him as well as co-accused Indrajeet for offences under various sections of the POCSO Act, by holding that it is necessary for the prosecution to establish first commission of the main offence before making the person liable for the offence punishable under Section 21(2) of the POCSO Act.

12 Perusal of the judgment in the matter of Kamal Prasad Patade (supra) shows that the aspect as to what persons may be charged jointly was never considered in that matter. At this juncture, it is apposite to quote provisions of Section 31 of the POCSO Act which reads thus :

“31 Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court: Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 including the provisions as to bail and bonds shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.”

It is, thus clear that unless otherwise provided, offence under the POCSO Act are required to be tried by following the provisions of the Code of Criminal Procedure, 1973. Section 223 of the Code of Criminal Procedure, 1973, deals with what persons may be charged jointly and it reads thus :

“223. What persons may be charged jointly - The following persons may be charged and tried together, namely:-

(a) persons accused of the same offence committed in the course same transaction;

(b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;

(f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860) or

either of those sections in respect of stolen property the possession of which has been transferred by one offence;

(g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate or Court of Session may, if such persons by an application in writing, so desire, and if he or it is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together.”

It is, thus, clear from clause (d) of Section 223 of Code of Criminal Procedure that, persons accused of different offences committed in the course of same transaction can be charged and tried together in a single trial. In the case in hand, after sustaining aggravated penetrative sexual assault on her by the cook working in the

ashram school, the victim female child reported the incident to the present revision petitioner with a hope that he will act according to the law by reporting the incident to either the Special Juvenile Police Unit or the local police. Thereafter, the first informant and a relative of the victim female child also reported the incident to the revision petitioner / accused as seen from the record of the charge-sheet. However, instead of taking necessary action, the revision petitioner / accused had attempted for compromising the matter. It is thus clear that the allegations against the main accused are for the offence punishable under Section 5 of the POCSO Act whereas allegations against the revision petitioner / accused are in respect of commission of offence punishable under Section 21(1) of the POCSO Act, but these different offences are certainly committed in the course of the same transaction and therefore the revision petitioner / accused can be charged and tried validly together with the main accused who is stated to have committed the principal offence. Clause (d) of Section 223 of the Code of Criminal Procedure in no unclear terms prescribes and permits joint trial of persons who have committed different

offences but in the course of same transaction. The primary condition for such joint trial is that persons should have been accused either of the same offence or of different offences but committed in the course of the same transaction. The meaning of the term “same transaction” can be found in sub-section (1) of Section 220. It implies one series of act so connected together as to form the same transaction. In other words, the term “the same transaction” comprises all the act of all the persons concerned done in the cause of carrying through the affair in question and the prima facie test, as the words “in the course of” indicates, is continuity of action and continuity of purpose [see Ravindra Pal Singh vs. State of Punjab 2004 Cri.L.J. 1332]. In the case in hand the main act of commission of an aggravated penetrative sexual assault by the co-accused and non-reporting the same to the police by the revision petitioner despite knowledge depicts commission of different offences by them but in the course of the same transaction, warranting their joint charge and the consequent trial.

13 Similarly, in the wake of the fact that the revision petitioner /original accused no.2 was certainly having the knowledge of commission of the alleged offence, I am unable to persuade myself to endorse the view taken by the learned Single Judge of Chhattisgarh High Court to the effect that it is initially for the prosecution to establish first commission of the main offence under the POCSO Act for making a person liable for the offence punishable under Section 21(2) of the POCSO Act. If such view is accepted, then, it will not only defeat the very object of enactment of the POCSO Act i.e. to protect the child from sexual offences, but it will also violate the provision of Section 33(5) of the POCSO Act, which provides that the child should not be called repeatedly to testify in the court.

14 In this view of the matter, no case for interference in revisional jurisdiction is made out.

15 The revision petition is devoid of merit and the same is dismissed.

(A. M. BADAR, J.)

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