

GAHC010055412022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/40/2022

DIPAK NAYAK
DIBRUGARH, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR. K GOSWAMI, AMICUS CURIAE
Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE THE CHIEF JUSTICE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

ORDER

Date : 23.06.2023
(Sandeep Mehta, CJ)

This criminal appeal has been preferred by the accused Dipak Nayak, under Section 374 CrPC for assailing his conviction and sentences awarded to him by the learned Sessions Judge, Dibrugarh vide judgment dated 11.02.2022, passed in POCSO Case No. 36/2020 for the offences under Section 376(AB) IPC and Section 6 of the POCSO Act. The appeal has been received from jail.

2. On a perusal of the Memo. of Appeal, we find that the child victim/her family member/support person has not been impleaded as a party in the appeal. Learned

Public Prosecutor Ms. S. Jahan drew the court's attention to this aspect of the matter, whereafter we requested the learned Advocate General, Assam, to assist the court in prescribing proper procedure whereby the provisions of Protection of Children from Sexual Offences Act, 2012 (POCSO Act), the Protection of Children from Sexual Offences Rules, 2020 (hereinafter referred to as "Rules of 2020") and the mandate of Section 439(1A) CrPC can be followed and intimation of the appeals can be provided to the victim/ family member/support person.

3. Mr. K. Goswami, learned *amicus curiae*, representing the accused also assisted the court in this regard. He submitted that the Division Bench judgment of this court in the case of ***Bormoty Panggeng vs. The State of Arunachal Pradesh and Ors.***, reported in **(2021) 1 GLT 833** lays down that it is not obligatory on the part of the accused or the court to implead the informant as a party or to serve the informant with notice in a criminal appeal. However, as per Mr. Goswami, the said judgment deals with general law, i.e. IPC. Mr. Goswami contends that the scheme of the POCSO Act and the model Rules framed by the Central Government and the provisions of CrPC, i.e. 439(1A) CrPC, mandate that the informant/victim/ person authorised by the informant should be present during the hearing of an application for bail, or the appeal, as the case may be. Learned Advocate General, Mr. Saikia, assisted by learned Public Prosecutor Ms. Jahan and Mr. Goswami also drew the court's attention to the Division Bench judgment of the Delhi High Court in the case of ***Reena Jha and Another vs. Union of India and Others***, reported in **2020 SCC OnLine Del 1389** and urged that in the said judgment, Practice Directions formulated by the Delhi High Court governing the procedure of notice of hearing to the victim/informant in cases covered by Section 439 (1A) CrPC have been *mutatis mutandis* applied to the offences under the POCSO Act. Attention of the court was also drawn to an order passed by a Single Bench of the Delhi High Court in the case of ***Miss G. (Minor) vs. State of NCT of Delhi and Another***, reported in **2020 SCC OnLine Del 629**, wherein it was held as below:

“23. The non-issuance of notice to the complainants/ informants/victims is not merely a procedural lapse, but is clearly contrary to the unequivocal legislative mandate as also the declared and settled law. There could be various reasons for the same, which have been mentioned in the reports submitted by the Ld. District Judges to the Registrar General. The said reasons need not be gone into at this stage. Suffice to say, that the lockdown period has thrown up several challenges to the Court system which Courts are bracing for on an everyday basis. However, the non-issuance of notice to the complainant/victim/informant is such a fundamental pre-condition that such a requirement of law cannot be bypassed, ignored or neglected. After perusal of the reasons given, this Court is of the opinion that they clearly do not justify non-issuance of notice.”

It was thus contended that appropriate procedure is required to be laid down so that the victims are provided with effective opportunity of participation in cases involving offences punishable under the POCSO Act and the offences punishable under Sections 376-AB, 376-DA or 376-DB of the IPC.

4. We have given our thoughtful consideration to the submissions advanced at the Bar and have gone through the material available on record.

5. The relevant provisions of law essential for consideration of the issue highlighted before this court are reproduced herein below for the sake of ready reference:

(i) Section 33 of the POCSO Act:

“33.(1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the chi

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to

testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.--For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974) for trial before a Court of Session.”

(ii) Section 39 of the POCSO Act:

“39. Subject to such rules as may be made in this behalf, the State Government shall prepare guidelines for use of non-governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child.”

(iii) Section 40 of the POCSO Act:

“40. Subject to the proviso to section 301 of the Code of Criminal Procedure, 1973 (2 of 1974) the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act:

Provided that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them.”

iv) Section 439 (1A) of CrPC:

“[(1A) The presence of the informant or any person authorised by him

shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of section 376 or section 376AB or section 376DA or section DB of the Indian Penal Code (45 of 1860).]”

Model guidelines have been issued by the Ministry of Women and Child Development, Government of India, under Section 39 of the POCSO Act. Clauses 2.2(i) and 2.2(ii) of the said Model Guidelines would also have a bearing on the issue placed for consideration and, hence, the same are reproduced herein below for the sake of reference:

“2.2 At trial

- (i) *Children have the right to be heard in any judicial and administrative proceedings affecting them. They must be given a reasonable opportunity to express their views in all matters affecting him and these must be taken into account. He should also be allowed to provide initial and further information, views or evidence during the proceedings.*
- (ii) *Children have the right to information about the case in which they are involved, including information on the progress and outcome of that case, unless the lawyer considers that it would be contrary to the welfare and best interests of the child. It would be best if the lawyer coordinates with other persons or agencies concerned with the child’s welfare, such as the support person, so that this information is conveyed in the most effective manner. Victims should receive the most appropriate information on the proceedings from all their representatives, and the assistance of a support person appointed under Rule 4(7) most often constitutes the best practice in ensuring that full information is conveyed to the victim.”*

6. On going through the scheme of Section 40 of the POCSO Act, it is clear that subject to the proviso to Section 301 CrPC, the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act. Proviso to Section 40 lays down that if the family, or the guardian of the child is unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them. Section 42A of the POCSO Act lays down that the provisions of this Act shall be in addition and not in derogation of the provisions of any other law and shall have overriding effect on the provisions of any such law to the extent of the inconsistency. Learned Advocate General Mr. Saikia is correct in contending that in case of

inconsistency with the provisions of the POCSO Act, the special Act will prevail over the provisions of General Law, i.e. Section 301 CrPC.

7. Rule 4, sub-Rule (13) of the POCSO Rules of 2020 provides that it shall be the responsibility of the SJPU, or the local police to keep the child and child's parent or guardian or other person in whom the child has trust and confidence, or the support person, as the case may be, informed about the developments, including the arrest of the accused, applications filed and other court proceedings. The amplitude of this Rule is very wide and it would include the requirement of keeping the child victim, his or her guardian/support person intimated about all court proceedings pursuant to the registration of a case for sexual assault upon a child. The judgment of this court in the case of **Bormoty Panggeng** (supra) was limited to the issue of impleadment of the victim/complainant in the case under the general law. Thus, the said judgment would not in any manner have any bearing upon this issue when a case under the POCSO Act and/or for the offences under Sections 376(3), 376-AB, 376-DA and Section 376-DB of the Indian Penal Code is being considered.

8. Having considered the judgments of the Delhi High Court in the cases of **Reena Jha** (supra) and **Miss G. (Minor)** (supra), we feel that giving intimation and providing opportunity of participation to the victim, *albeit* by scrupulously screening the identity as per the mandate of Section 33(7) of the POCSO Act, is the requirement of law and prudence. Hence, we are inclined to adopt the Practice Directions dated 24.09.2019, formulated by the Delhi High Court which have been followed in the case of **Reena Jha** (supra) while directing that the same shall *mutatis mutandis* apply to the offences under POCSO Act. The Practice Directions formulated by the Delhi High Court are quoted herein below for the sake of reference:

“(a) *Before granting bail to a person who is accused of an offence triable under sub-Section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code, the High Court or the Court of Session shall give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application; and*

(b) *The Courts shall ensure that the Investigating Officer has, in writing as per Annexure A, communicated to the informant or any person authorized by her that her presence is obligatory at the time of hearing of the application for bail to the person under sub-Section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code. Annexure A shall be filed by the I.O. along with the Reply/Status Report to such bail application and the Courts shall make all endeavour to ensure presence of the informant or any person authorized by her.”*

9. These guidelines, which have been *mutatis mutandis* applied by Delhi High Court to cases arising from POCSO Act, are thus fit to be adopted for the proceedings in the Gauhati High Court and the Benches. Thus, we further expand the scope of these Directions and mandate that these would also apply to all proceedings, viz. Criminal Appeals/Revisions or Criminal Petitions filed in cases arising from prosecution under the POCSO Act. Thus, in order to amplify the scope of the guidelines, the following steps/measures shall be added to the ones already formulated by the Delhi High Court.

In every Bail Application/Criminal Appeal/Criminal Revision/Criminal Petition arising from cases involving offences under the POCSO Act and those covered by Section 439 (1A) CrPC; the Registry shall

(i) Serve a copy of such Bail Application/ Criminal Appeal/Criminal Revision/Criminal Petition to the Public Prosecutor concerned who, in turn, shall forward the same to the Investigating Officer concerned, or the Officer-in-Charge of the concerned Police Station, through email and also as a hard copy requiring the officer(s) to apprise the victim/guardian/ support person regarding filing of such proceedings before the High Court.

(ii) In every such Bail Application/Criminal Appeal/Criminal Revision/Criminal Petition filed in the High Court, it shall be mandatory to implead the victim/guardian/support person, as the case may be. While making such impleadment identity of the victim shall be properly

screened strictly adhering to the mandate of Section 33(7) of the POCSO Act. Upon impleadment of the victim/guardian/ support person in the Bail Application/Criminal Appeal/Criminal Revision/ Criminal Petition, as the case may be, formal notice shall be issued to such victim/guardian/support person through the Investigating Officer/Officer-in-Charge of the concerned Police Station. It shall be the responsibility of the officer(s) to get the notice served.

(iii) The notice issued to the victim/guardian/ support person shall also contain a stipulation that in case he/she is unable to engage a counsel of choice, services of free legal aid counsel shall be provided to represent him/her in the proceedings filed before the High Court.

The learned Advocate General shall ensure that a proper electronic communication channel is put in place at all police stations across the State so that the notices can be transmitted without any delay. Similar exercise shall be undertaken in the States of Nagaland, Arunachal Pradesh and Mizoram.

Copy of this order shall also be transmitted to the Director Generals of Police, Assam, Nagaland, Arunachal Pradesh and Mizoram. They shall, in turn, communicate this order to all Superintendents of Police in their respective States. The Director Generals shall take measures to sensitize the Officers-in-Charge of the Police stations/SJPUs concerned about these guidelines and the need to comply with the same without any exceptions.

List the Criminal Appeal before the appropriate Bench.

JUDGE

CHIEF JUSTICE

Comparing Assistant