

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO.269 OF 2018

Nishant Harishchandra Salvi .. Applicant

Vs.

The State of Maharashtra .. Respondent

.....
Mr.Silvin Y. Kale, Advocate for the Applicant.
Mr.S.R. Shinde, APP for the Respondent – State.
.....

CORAM : PRAKASH D. NAIK, J.

DATED : JUNE 18, 2018.

ORAL JUDGMENT :

Heard both sides for final disposal of Criminal
Revision Application.

2 The applicant has invoked the inherent powers of this Court under Section 482 of Cr.P.C. challenging the order passed by the learned Special Judge under the POCSO Act rejecting the application preferred by the petitioner to call the report of probation officer under Section 4(1)(2) of Probation of Offenders Act, 1958.

3 The applicant is prosecuted for the offence punishable under Section 354A of Indian Penal Code and Section

8 of Protection of Children from Sexual Offences Act (hereinafter referred to as "POCSO Act", for short). The prosecution case is that the accused was working as field officer at Apnalaya Sanstha. The said sanstha was conducting free coaching classes for students. Many children including victim used to attend classes. The applicant accused molested and outraged modesty of the victim girl. FIR was registered and, thereafter, charge-sheet was filed. The trial had commenced. The evidence of the witnesses was recorded. The statement of accused was also recorded under Section 313 of Cr.P.C.

3 On recording statement under Section 313 of Cr.P.C., the trial Court recorded that, this is not a case of no evidence against accused and he cannot be acquitted in accordance with Section 232 of Cr.P.C. and, hence, accused was called upon to enter on his defence if he so desired. At this stage, the applicant preferred an application before the Court and sought directions to call for the report under the provisions of Probation of Offender's Act. The applicant contended that even in case under POCSO Act such report can be called.

4 Special Court while rejecting the application vide

order dated 2nd April, 2018 has observed that the accused is facing trial for the offence punishable under Section 354A of IPC and Section 8 of POCSO Act. The minimum punishment prescribed for the offence under Section POCSO Act is imprisonment of three years. It is further observed that the provisions of the Probation of Offender's Act cannot be invoked in the present case as the accused is prosecuted under provision of POCSO Act. It was also observed that benefits under provisions of Section 4 of the Probation of Offender's Act can be given to the accused when it is expedient to release him on probation of good conduct. It is for the Court to consider the circumstances of the case and the nature of offence as to when the benefit of the said provisions can be given to the accused. The Court is required to pass appropriate orders in the facts and circumstances of the case having regard to the nature of offence, its general effect on the society and the character of offender etc.

5 Learned advocate for the applicant submitted that the trial Court has committed an error in rejecting the application. To determine the requirement of grant of the facility under the said provisions, it was mandatory for the trial Court to call for a report and without calling for such a report, the Court ought not to have

rejected the application. The character of the accused or the need to exercise powers under the provisions of the Act can be looked into only after receipt of the report from the probation officer and it is premature to reject the application without calling for report. It is submitted that the Court has already formed its opinion that it is not a case of no evidence and the accused was called upon to enter upon his defence, if he so desires. The Court has committed error in rejecting application as calling report of Probation Officer was mandatory. It is further submitted that, the Court has committed serious error by refusing to call for report, since, without knowing socio-economic, psychological background, the Court could not come to the conclusion whether benefit of the said Act can be given or not. The applicant has no previous criminal antecedents and his family consisting of wife and children is dependent on him.

6 Learned counsel placed reliance on the decision of this Court in the case of ***State, Through Police Inspector, Mapusa Police Station Goa Vs. Shaikh Mohammad Rafiq s/o. Shaikh Amrual Hassan***¹; (2) ***Dnyandeo s/o. Shrirang Bhade Vs. Laxman Yashwant Bhade & Ors.***²

1 2009 ALL MR (Cri) 3489

2 2016 ALL MR (Cri) 2967

7 Learned APP submitted that the accused is facing prosecution for a serious offence under Section 354A of IPC and Section 8 of the POCSO Act. It is submitted that the offence punishable under Section 8 of POCSO Act stipulates minimum punishment of three years. It is submitted that the trial Court has rightly rejected the application preferred by the petitioner. The factual aspects of the prosecution case does not warrant exercise of powers under the provisions of Probation of Offender's Act.

8 I have perused the documents and the impugned order passed by the Special Court. The applicant accused is charged for the offences, as stated above. The evidence of witnesses is recorded and the statement of the accused under Section 313 of Cr.P.C. is recorded. The applicant then preferred an application calling for the report of the Probation Officer under the provisions of Probation of Offenders Act. It would be relevant to embark upon the relevant provisions of the Probation of Offender's Act, which is sought to be invoked in the present application.

Section 4 of the Probation of Offender's Act, reads as follows:

“4. Power of court to release certain offenders on probation of good conduct.—

(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour: Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

9 On perusal of the aforesaid provisions, it is implicit that when any person is found guilty of having committed an

offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour

10 The tenor of the aforesaid provisions makes it clear that it is for the Court to decide whether it is expedient to release the person on probation of good conduct. The Court should be of the opinion that the circumstance of the case including nature of the offence and character of the offender is required to be taken into consideration while invoking the provisions of the Probation of Offender's Act. In the present case, the trial Court has observed that the accused is facing prosecution under Section 354A of IPC and is also prosecuted for an offence punishable

under Section 8 of POCSO Act. The prosecution case is that the accused has sexually assaulted the minor girl and has also outraged her modesty for which he has been tried. On the basis of the observations made in paragraph no.3 of the impugned order, the Court has refused to call for the report. The submissions of the learned counsel for the applicant that whenever an application is made, it is mandatory for the Court to call for report and then to decide whether the powers can be exercised is devoid of merits. The Court is always required to apply its mind to the requirements for exercising such powers, as contemplated under Section 4 of the Probation of Offender's Act. In the case of ***State, Through Police Inspector, Mapusa Police Station Goa Vs. Shaikh Mohammad Rafiq s/o. Shaikh Amrual Hassan (Supra)***, this Court considered whether the benefit of Probation of Offenders Act given to accused who was convicted for the offence under Section 8(2) of Goa Children Act, 2003, by the Children's Court was justified. The accused on being convicted for the aforesaid offences was ordered to be released on probation, without even calling for report of the probation officer. This Court, thus, observed that, the question which arises is on what basis the Children Court came to the conclusion or reasoning on the basis of which accused was provided benefit of

the said Act. It is in this circumstances, it was observed that the report of Probation Officer is fundamental document for the guidance of the Court whether to grant the benefit of probation or not. The Court did not observe that whenever an application is made seeking benefit under the provisions of the said Act, it is mandatory for Court to call for report. The Court also considered whether benefit of the said Act can be given to such offence under the Children Act. The request of the advocate representing accused that, the report of Probation Officer be called upon by Court was not granted and the order passed by trial Court giving benefit of Section 4(1) of the said Act was set aside and the accused was sentenced to undergo imprisonment and pay fine. It would be relevant to quote observation of this Court in paragraph 36 of the said decision.

“The P. O. Act is still in force, but 50 years down the line with ever increasing crime rate, the benefits of the P.O. Act, by judicial trend are not being extended to large number of cases. This is not to say that it ought not to be extended in appropriate cases. The benefits have not been encouraged in cases involving socio-economic offences, offences involving sex perversity cases involving moral turpitude or moral delinquency, cases involving

misappropriation of property, gold smuggling, food adulteration offences, offences under Prevention and Corruption Act, and even in cases under Section 304A of IPC. Judicial trend has been cautious in not extending probation to persons who are educated and experienced in life and deliberately flout the law with impunity and to those who are potential dangers to the society. It would be apt to refer to the decision of the Supreme Court in Isher Das v. State of Punjab : AIR 1972 SC 1295 though it was case relating to food adulteration, but the observations are very much relevant to our case as well. The Apex Court stated that adulteration of food is menace to public health. The Prevention of Food Adulteration has been enacted with the aim of eradicating that anti-social evil and for ensuring purity in the articles of food. In view of the above object of the P.F.A. Act and the intention of the legislature as revealed by the fact that a minimum sentence of imprisonment for a period of six months and a fine of rupees one thousand has been prescribed, the Courts should not lightly resort to the provisions of the Probation of Offenders Act in the case of persons above 21 years of age found guilty of offences under the Prevention of Food Adulteration Act. As regards persons under 21 years of age, however, the policy of the law appears to be that such a person inspite of his conviction under the Prevention of Food Adulteration Act, should not be deprived of the

advantage of Probation of Offenders Act which is a beneficent measure and reflects and incorporates the modern approach and latest trend in penology. Again, in Pyarali K. Tejani AIR 1974 SC 288 another case of adulteration of supari with saccharin, the Apex Court observed:-

The kindly application of the probation principle is negated by the imperatives of social defence and the probabilities of moral proselytisation. No chances can be taken by society with a man whose anti-social operations guised as respectable trade, imperil numerous innocents. He is a security risk.

The same thing could be said of the offences under the Act, wherein the legislature has also provided minimum fine which by virtue of an amendment carried out by Act 20 of 2005 is enhanced. Offences against children who are vulnerable sections of society are also anti-social and in this case is the result of a depraved mind of the offender. In cases like this, Courts are required to exercise utmost caution in interpreting the provisions of probation law and keep in forefront the public policy and the impact of the offender's act on the society. If today, it was PW2, tomorrow it will be someone else. Observations of the Apex Court in Dalbir Singh AIR 2000 SC 1677 are also relevant. An offender against

children must also constantly inform himself that if he commits a crime against them, he might not be convicted of the offence and if convicted he would be dealt leniently by the Court. He too must keep in mind the fear psyche that if he is convicted, he will not escape from jail sentence."

11 While keeping the object of POCSO Act in mind, it must also be borne in mind that the exercise of discretion given to the Court under Section 4 of the Act needs considerable sense of responsibility and the Court should not be misled into the free use of Section by misplaced leniency and sympathy. The provisions of the Act must be applied with discretion.

12 The Apex Court in ***Commandant 20 BN, ITB v. Sanjay Binjola : 2001 5 SCC 317*** held that:

"Nobody can claim the benefit of Sections 3 and 4 of Probation of Offenders Act, as a matter of right and the Court has to pass appropriate orders in the facts and circumstances of each case having regard to the nature of the offence, its general effects on the society and character of the offenders etc."

The Apex Court also observed that:

“There are laws which specifically direct that the provisions of Probation of Offenders Act shall not apply to the persons convicted for those offences and there may be cases under laws as well which may not justify the exercise of the powers of Probation of Offenders Act. Even apart from such exclusions the Courts should be wary of extending the benefit of Probation of Offenders Act to offences relating to corruption, narcotic drugs, etc.”

Referring the ***Dalbir Singh v. State of Haryana (Supra)***, the Apex Court has reiterated that the benefit of Probation of Offenders Act should not normally be afforded in respect of the offences under Section 304-A of IPC when it involves rash or negligent driving. Those are instances for showing how the nature of offence could dissuade from giving the benefit. However, considering that the case under Section 10 of Central Reserve Police Force Act, 1949, was of trivial nature, the Apex Court extended the benefit of Section 3 of the P. O. Act.

13 In ***State of U.P. v. Kishan : 2005 Cr.L.J. 333***, the Apex Court has observed that:-

“Undue sympathy to impose inadequate sentence would do more harm to the justice system to

undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.”

The Apex Court further observed that:

“For deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task and referring the case of Dennis Councle (402 US 183) observed that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.”

14 In ***State of M.P. v. Saleem : 2005 Cr. L.J. 3435***, the Apex Court has observed as follows:-

“Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The Social impact of the crime, eg. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitudes by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.”

(emphasis supplied)

15 In ***State of M.P. v. Munna Choubey and Anr. : (2005 Cr. L.J. 913: [2005 ALL MR (Cri) 812 (S.C.)]***, the Apex Court has observed that:-

“The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what

is inflicted is not merely physical injury but the deep sense of some deathless shame.”

The Apex Court has referred to ***Dhananjoy Chatterjee v. State of W.B. : 1994 (2) SCC 220*** and stated that:-

“Shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society crying for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.”

16 ***The Apex Court in Hussein V. Mohammed Saiyed v. State of Gujarat*** has stated as follows:-

“The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to break the law by imposing appropriate sentence. It is expected that the Courts would operate the

sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the victim of the crime but the society at large while considering the imposition of appropriate punishment. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong.”

If offences against women and those involving moral turpitude or moral delinquency including kidnapping require exemplary treatment, as observed by the Apex Court in the State of M. P. v. Saleem (supra) the offences against children cannot be left far behind, for they too constitute a weaker section of the society. The offences committed by the accused involves moral turpitude

or moral delinquency. The accused is educated man over 40 years of age. The accused has committed offences obviously because he has propensity or tendency to commit such offences and facts show that it was committed with due deliberation and there is no reason at all that he will not commit it again. As already stated, if PW2 was the victim today, some else will be tomorrow. Considering his age, even assuming that he gave a lift to the victim boy, the accused was expected to show greater sense of responsibility but manifested a very mischievous disposition and therefore judicial attitude ought to have been against allowing the benefit of probation to him, who was otherwise an educated and experienced person in life. In my opinion, considering the nature of offences committed by the accused, the accused is not entitled to be released on probation.

17 In the case of ***Dnyandeo Bhade (Supra)***, the benefit of probation of Offenders Act was granted by Court without calling for report. The Court feel that although it is mandatory to call for report, calling such report, it would be futile exercise and waste of judicial time to remand matter to trial Court for passing appropriate order. The accused in that case were convicted under Sections 325 and 341 read with 34 of IPC.

18 Such powers are required to be exercised when it is expedient to release the person under the provisions of Probation of Offender's Act. The Court has to look into the factual aspects of the case, circumstances of the case including the nature of the offence and the character of the offender and after considering the said aspects, if the Court finds it is proper to exercise its inherent powers under the provisions of the Probation of Offender's Act, such a facility can be provided to the accused after calling for report of probation of offenders Act. The submission that it is mandatory to call for report, whenever application is made for invoking provisions of said Act as a matter of course and decide the application cannot be accepted. This would lead to situation that every accused would prefer such application and would insists upon calling for report of Probation Officer. In the present case, such report was not warranted and trial Court was not inclined to exercise the powers considering the nature of crime committed by applicant accused. Such powers cannot be exercised randomly in every case. The offences against children who are vulnerable sections of society are anti social. The Courts are required to exercise utmost caution in interpreting provisions of Probation of Offenders Act. The Law Commission in the 47th report opined that the POCSO Act should

not be applicable to soci-economic offences. It is observed that “But ultimately, the justification of all sentencing is the protection of society. There are occasions when an offender is so anti social that his immediate and sometime prolonged confinement is the best assurance of society's protection. The consideration of rehabilitation has to give way because of the paramount need of society.”

19 Considering the circumstances and the prosecution case in the present case, I do not find any merit in the application. There is no infirmity in the order of the Sessions Court and hence, this application is required to be rejected.

20 Hence, I pass the following order:

:: ORDER ::

- (i) Criminal Revision Application stands rejected;
- (ii) It is clarified that the observations made in this order are for adjudicating the issues involved in this application. The trial Court shall not be influenced by this order while deciding the case.

(PRAKASH D. NAIK, J.)