

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 26.11.2018

CORAM

THE HON'BLE THIRU JUSTICE V.PARTHIBAN

Crl.R.C.No.941 of 2018 &
Crl.M.P.No.10884 of 2018

Dr.P.Rajendran

...Petitioner

Versus

1. STATE, represented by
the Inspector of Police,
Orleanpet Police Station,
Puducherry.

2. B.Loganathan @ Logesh ...Respondents
(R2 impleaded as per the order of this court dated 26.11.2018
made in Crl.M.P. 11163/2018)

Prayer: This Criminal Revision Case is filed under Section 397 &
401 Cr.P.C., against the order dated 31.07.2018 passed in
C.M.P.No.718 of 2018 in Spl.S.C.No.22 of 2017 by the learned
Special Judge (Under POCSO Act, 2012)-cum-Principal Sessions
Judge at Puducherry.

For Petitioner : Mr.N.R.Elango, SC for
Mr.V.Kalakumar

For Respondents : Mr.V.Balamurugan, AGP (P)-R1
Mr.T.R.Udayakumar for R2
(Defacto complainant)

ORDER

This Criminal Revision Case has been filed against the order
dated 31.07.2018 passed in C.M.P.No.718 of 2018 in Spl.S.C.No.22
of 2017 by the learned Special Judge (Under POCSO Act, 2012)-
cum-Principal Sessions Judge at Puducherry, rejecting the
petition filed by the petitioner, seeking to discharge him from
the alleged offence under Section 9(e) of the Protection of
Children from Sexual Offences Act, 2012 (in short, POCSO Act)
punishable under Section 10 of the POCSO Act.

2. On a complaint lodged by one Balasundaram, the respondent
police registered a case in Crime No.172 of 2016 against the
petitioner herein for the offences under Sections 9(e) and 10 of

the POCSO Act.

3. The charge against the petitioner is that on 09.07.2016, the victim girl, aged about 13 years, studying IX standard visited Madhava hospital run by Dr.Rajendran, the petitioner herein, along with her maternal uncle Vinoth and maid servant Sivasankari since she was suffering from stomach ache and they met the petitioner at 2.30 p.m., who prescribed for scan and it was taken. Thereafter, it is alleged that the petitioner has made the minor girl to lie on a testing bed in his room, instead of giving treatment for stomach ache, wrongly removed her tops pressed her breast and pinched her chin with sexual intent and also misbehaved with her and caused the minor girl feel uncomfortable and thereby committed aggravated sexual assault on the victim girl as defined under Section 9(e) of POCSO Act and thereby rendered himself liable to be punished under Section 10 of the Act.

4. It appears that on earlier occasion, the petitioner had moved this Court by way of filing a petition in Crl.O.P.No.22247 of 2016, invoking inherent powers of this Court under Section 492 Cr.P.C., to quash the First Information Report bearing Crime No.172 of 2016 registered with the respondent police. By order dated 03.10.2016, this Court dismissed the said Crl.O.P.

5. Thereafter, on completion of the investigation, the respondent-police filed a final report, which was taken cognizance by the learned Special Judge, (under POCSO Act, 2012), Puducherry vide Spl.S.C.No. 22 of 2017. The petitioner moved a petition under Section 227 Cr.P.C. before the Court below, seeking to discharge hi from the proceedings pending in Spl.S.C.No.22 of 2017. By order in detail, dated 31.07.2018, the Court below dismissed the petition, which is put to challenge in the present petition.

6. Assailing the order of the Court below, Mr.N.R.Elango, learned senior counsel appearing for the petitioner would contend that absolutely no ingredients were made out by the prosecution to constitute the offence under Section 9(e) of POCSO Act to connect the petitioner with the alleged offence. He pointed out that Section 41 excluded medical examination/treatment done by Medical Examiner from the purview of Sections 3 to 13 of POCSO Act when such medical examination/treatment is undertaken with the consent of his parents or guardian. Therefore, the learned counsel would submit that since the medical examination was conducted on the victim girl with the consent of her uncle who brought the victim to the hospital and hence, in terms of Section 41, the petitioner cannot be charged under Section 9(e) of the POCSO Act and hence, he is entitled to be discharged from the pending criminal proceedings. The learned senior counsel placed reliance on a

medical book, titled "A manual on Clinical Surgery" (Special Investigations and Differential diagnosis), wherein, at page 462, under the Head- "General Examination", it has been mentioned as under:

"General Examination:

When the abdominal findings are not sufficient to account for the symptoms the patient is complaining of, one should think of extra-abdominal causes and proceed to examine in the following way:

1.Examine the chest and chest wall.-Pain is often referred to the abdomen from the thorax in such conditions as diaphragmatic pleurisy, basal pneumonia, angina pectoris, myocardial infarction etc. Pain may reflect from the upper and middle lobes of the right lung to the right hypochondrium and may wrongly lead to the diagnosis of acute appendicitis. Abdominal distension of present, adds to confusion. Typical findings of pneumonia may be lacking but presence of fever occurred respiration with lowered pulse/respiration ratio, working of the alae nasi and absence of vesicular breathing all lead to a probable diagnosis of lobar pneumonia. In the case of children, confusion is much more due to lack of good history. Thoracic compression test by compressing the lower part of the chest from side to side will bring about pain in presence of thoracic diseases but not with typical acute abdomen."

7. Therefore, while referring to the above, the learned senior counsel would submit that when a patient complains of abdomen pain, being a Doctor, in order to diagnose the patient properly, he has to necessarily examine chest and chest wall, which the petitioner did such medical examination on the victim girl and the same does not constitute any offence much less Section 9(e) of POCSO Act as the same is excluded by virtue of Section 41 of the Act. Therefore, the learned senior counsel would submit that the alleged act attributed against the petitioner, need not be required to be examined in the form of trial and the learned Sessions Judge, without dealing with the issue in proper perspective, rejected the claim of the petitioner to discharge him from the proceedings, which requires interference of this Court. The learned senior counsel would submit that the petitioner was not having any mens rea in committing aggravated sexual assault over the victim girl and the petitioner is an acclaimed Urologist with number of accolades and practicing the profession for the past two decades and without proper investigation, the respondent police registered the case against the petitioner, which creates a blemish in his professional career. Therefore, the learned senior counsel would implore this Court to set aside the order

of the Court below and quash the proceedings pending against the petitioner in Spl.S.C.No.22 of 2017 on the file of the Spl.Sessions Judge (under POCSO Act, 2012).

8. On the other hand, the learned Addl. Government Pleader (Prosecution) would submit that already this Court rejected the petition filed by the petitioner raising with similar grounds for quashing the FIR and now in the present petition, the petitioner once again sought for quashing the proceedings on the same grounds. He would submit that after completion stage of recording of evidence, it would not be proper for this Court to go into the merits of the case and decide the Revision Petition under the provisions of Cr.P.C. Therefore, he prayed this Court to reject the petition.

9. Learned counsel appearing for the defacto complainant/second respondent herein would submit that though the petitioner sought for discharge by invoking Section 41 of the POCSO Act, which exempted the provisions of Sections 3 to 13 of the Act in case of medical examination of a child when such examination is undertaken with the consent of parents or guardian, however, no such permission either sought for or obtained by the petitioner before conducting the medical examination from the parents of the victim girl or anybody who brought her. He would also submit that when the petitioner has been charged that he committed aggravated sexual assault under Section 9 of the Act, as per Section 29 of the Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

Section 29 of POCSO Act reads as under:

"29. Presumption as to certain offences-

Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3,5,7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

Therefore, the petitioner cannot seek exemption under the provision of Section 41, unless the petitioner proves contrary to the prosecution case. Therefore, in the circumstances, it is just and necessary to conduct trial and hence the learned counsel sought for rejection of the petition.

10. Heard the learned senior counsel appearing for the petitioner and the learned Addl. Government Pleader (Prosecution) for the State and the learned counsel appearing for the defacto complainant/second respondent.

11. The specific charge against the petitioner is that he committed aggravated sexual assault on a child, i.e., victim girl in his hospital, by making her to lie on bed, under the guise of medical examination, he removed her tops and fondled her breast and pinched her chin with sexual intent and also misbehaved with her and hence, the petitioner is liable to be tried under Section 9(e) and punished under Section 10 of the POCSO Act. The petitioner seeks protection under Section 41 of POCSO Act, which no doubt, excludes medical examination/treatment done by Medical Examiner from the purview of Sections 3 to 13 of POCSO Act when such medical examination/treatment is undertaken with the consent of child patient's parents or guardian. However, here it is pertinent to note two aspects, firstly, whether the alleged medical examination/treatment of the victim girl was undertaken by the petitioner with the consent of the parents/guardian of the victim girl and secondly, under the guise of medical examination, whether the petitioner misbehaved with the victim girl by fondling her breast and pinching her chin with sexual intent and thereby committed aggravated sexual assault on her. These alleged facts, in the opinion of this Court, have to be necessarily tested in the form of the trial by adducing evidence in order to find out truthfulness or veracity of the charge framed against the petitioner.

12. As regards the contention of the learned counsel for the defacto complainant/second respondent regarding the application of Section 29 of POCSO Act, Mr.N.R.Elango, learned Senior Counsel appearing for the petitioner would submit that the application of Section 29, namely, 'presumption as to certain offences' would arise only when Section 3 to 13 can be pressed into service and not in the case where the petitioner seeks application of Section 41 of the Act.

13. This Court finds that there is force in the contention put forth on behalf of the petitioner by the learned Senior Counsel that Section 29 of POCSO Act may not have application at this stage where this Court is only called upon to decide as to whether the petitioner is entitled to the protection as provided for under Section 41 of POCSO Act.

14. The learned trial Court, while adverting to the various materials and pleadings placed on record, had come to a definite conclusion that there was a prima facie case against the petitioner, particularly on the examination of this victim girl. Further, the learned trial Court has also held that at the present stage, the Court has to look into the materials placed for consideration by the prosecution and need not go through the documents produced by the accused. In fact, the Trial Court has given legally acceptable reasons as to why Section 41 of POSCO

Act cannot be pressed into service at the present stage. It is useful to extract the reasoning adopted by the trial Court, found in paragraph 8, which reads as under:

"8. Heard both sides arguments and perused the records. On perusal of the records, it is observed that the petitioner has filed this petition to discharge him from the case by stating that as per Section 41 of POCSO Act, Sections 3 to 13 of the Act shall not apply and therefore the petitioner need not be put to face the trial and at this stage, the petitioner has to be discharged. Further, the petitioner has produced some documents and those documents need not be looked into at this stage, because it is well settled law that at the stage of framing of charge, the Court has to take into account the materials placed before the Court by the prosecution and need not go through the documents produced by the accused. Further, the contention of the petitioner that he has given medical treatment to the victim girl and the same has been admitted by the victim girl and thereby he is seeking the aid of Section 41 of POCSO Act, 2012. As per Section 41 of POCSO Act, 2012-

"41. Provisions of Sections 3 to 13 not to apply in certain cases-

The Provisions of Sections 3 to 13 (both inclusive) shall not apply in case of medical examination or medical treatment of a child when such medical examination or medical treatment is undertaken with the consent of his parents or guardian."

In the case on hand, the victim girl admitted that the petitioner had given medical treatment to her. But as per statement of victim, the petitioner touched her breast and chin. Therefore, only after examination of the victim, we can come to a fair conclusion about the said fact. Though protection is available the petitioner, now at the stage of framing of charge, it is not possible to decide the applicability of protection under Section 41 of POCSO Act, 2012. However, the statement of witnesses clearly shows the involvement of the petitioner on sexual assault. Further, the intention of the accused also to be tested by adducing evidence and at this stage, we have to

see as to whether any prima facie materials available to frame charge. On perusal of the statement of witnesses and other records produced by the prosecution, they reveal that there are prima facie materials available to frame charge as against the petitioner/accused. Further, the applicability of Section 41 of POCSO Act, 2012 would be testified only after the trial. Therefore, this Court is of the opinion that this petition has no merits and thereby liable to be dismissed. The point is answered accordingly."

15. This Court is entirely in agreement with the reasoning given by the trial Court for accepting the case of the petitioner herein to discharge him from the offence under Section 9(e) of POCSO Act by applying Section 41 which is extracted supra in the trial Court's order itself. Moreover, this Court is of the considered view that the conduct of the petitioner at the time of undertaking the medical examination has to be established one way or the other only during the trial in order to conclusively come to a conclusion as to whether the petitioner was exercising bona fide medical examination on the victim girl or in the guise of such examination whether he had committed aggravated sexual assault, as the adage goes, 'even devil knoweth not the man's mind.' In such event, only during the trial, the intent of the petitioner would stand established. By facing the trial, no prejudice would be caused to the petitioner since it is always open to him to come out unscathed by establishing his professional credentials and bona fides as claimed by the petitioner himself. At the same time, he cannot shut out the prosecution at the threshold and seek to discharge himself by mechanical application of Section 41 of POCSO Act.

16. If the case of the petitioner is to be accepted that the medical practitioners need to be protected under all circumstances under Section 41 of POCSO Act, which would mean that no medical practitioner can ever be prosecuted and convicted even if there is involvement in POCSO offence. Such scenario would not have been the intention of the Parliament while enacting the law. After all, the objective of the POCSO Act is to protect the children from the perpetrators of sexual assault and the objectives of the Act have to be given effect to and such objectives cannot stand stymied at the threshold by discharging the person like the petitioner who stood charged for offences under Sections 9(e) and 10 of POCSO Act. As stated earlier, nothing is lost for the petitioner except to face the trial and come out clean of the trial in case he is able to discharge the burden of his non-complicity in the offence.

17. For the foregoing reasons, this Court finds no infirmity in the order passed by the Court below and accordingly, the Criminal Revision Case is dismissed. Consequently, connected CMP is closed.

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

To

1. The Special Judge
(under POCSO Act 2012) cum Principal Sessions Judge
Puducherry.
2. The Inspector of Police,
Orleanpet Police Station,
Puducherry.
3. The Public Prosecutor
for Puducherry
High Court, Madras 104.

+1 CC to Public Prosecutor sr 80547

+1 CC to Mr.T.R.Udayakumar, Advocate sr 80299.

Cr1.R.C.No.941 of 2018

KAN(CO)
SP(22/01/2019)

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