

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1779 OF 2018

Vishnu S/o Bhagwan Giri,
Age 30 years, Occu. Nil,
R/o Baji Umrad, Post Wakhari,
Tq. and Dist. Jalna.

... **Petitioner**

Versus

The State of Maharashtra,
Through Police Inspector,
Police Station, Malakoli,
Tq. Loha, Dist. Nanded.

... **Respondent**

...

Mr. A.S.Kulkarni h/f Mr. V.V.Deshmukh, Advocate for
Petitioner.
Mr. S.P.Deshmukh, APP for Respondent-State.

...

**CORAM : MANGESH S. PATIL, J.
DATE : 21.01.2019**

ORAL JUDGMENT :-

Heard. Rule. Rule is made returnable forthwith.
With the consent of both the sides, the matter is heard
finally.

2. In this Writ Petition filed under Article 227 of the
Constitution of India, the petitioner who is the accused

in Sessions Case No.40 of 2013 is impugning the order passed by the learned Additional Sessions Judge on the application of the prosecution (Exh.66) seeking addition of charge under Section 4 of The Protection of Children from Sexual Offences Act, 2012 (POCSO Act), passed on the verge of completion of the trial.

3. The learned advocate for the petitioner submits by referring to the decision in the case of **P. Kartikalakshmi Vs. Sri. Ganesh and another ; (2017) 3 Supreme Court Cases 347** that the learned Additional Sessions Judge ought not to have passed the impugned order on the request of the prosecution. The power under Section 216 of the Cr.P.C. are vested in the Court to alter the charge at any stage of the proceeding and the parties are not supposed to apply as of right for alteration or addition of a charge. That is a prerogative of the Trial Court. Still the prosecution applied for addition of the charge and the learned Additional Sessions Judge by the impugned order has directed the charge under Section 4 of the POCSO Act to be added.

The order is illegal and does not conform to the observations of the Supreme Court in the case of P. Kartikalakshmi.

4. The learned advocate for the petitioner further points out that the FIR has been lodged way back in the year 2012. The trial had proceeded. The victim herself in her statement before police had stated her age to be 18 years. Her father who is the informant in his deposition has stated that the victim was aged 15 years at the time of the incident. The prosecution is relying upon a school leaving certificate (Exh.37) to prove her age. Neither the prosecution nor the learned Additional Sessions Judge inspite of such material on the record had taken care to add the charge promptly. The application was moved when the Sessions Case was fixed for final arguments. The petitioner is an under trial prisoner. The trial has protracted since October 2018. There is every possibility of the trial getting protracted further since by virtue of addition of charge under Section 4 of the POCSO Act, the matter would get complicated inasmuch as, that Act requires the trial to

be conducted by a Special Court. Therefore there is enormous delay and the impugned order tends to set the clock back and may be quashed and set aside so that the trial would get over once for all.

5. The learned APP submits that merely because the prosecution has filed the application for addition of the charge, that does not take away the right in the Trial Court under Section 216 of the Cr.P.C. to alter the charge. That provision enables the Trial Court to alter the charge at any stage of the proceeding. Going by the observations in the case of P. Kartikalakshmi (*supra*), the learned Additional Sessions Judge has taken cognizance of the facts brought to his notice by the prosecution and has passed the impugned order for addition of the charge for the plausible reasons. Merely because there is some delay, the right of the prosecution to bring it to the notice of the Court that the victim was still minor and would attract the provisions of the POCSO Act cannot be set at naught. There is no illegality in the order passed by the learned Additional Sessions Judge and the petition may be dismissed.

6. I have carefully gone through the decision of P. Kartikalakshmi (supra). With respect, there cannot be two opinion about the principle laid down therein. Indeed, no party as of right can seek alteration of the charge under Section 216 of the Cr.P.C. However, simultaneously the observations and the conclusions in paragraph No.6 of the judgment clearly show that the Court has the prerogative under that provision to add or alter the charge at any stage of the proceeding if it comes to its knowledge that necessity has arisen for the change or alteration. The paragraph No.6 reads thus :

“6. Having heard the learned counsel for the respective parties, we find force in the submission of the learned Senior Counsel for Respondent 1. Section 216 CrPC empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 CrPC to either alter or add the charge and that such power is

available with the Court any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law.”

If this be so, merely because it is the prosecution who had filed the application (Exh.66) for addition of the charge, it cannot be said that the learned Additional Sessions Judge has not exercised the power under Section 216 illegally. One can look at the facts from another angle. It can certainly be said that by filing the application the prosecution had brought to the knowledge of the learned Additional Sessions Judge that there was enough material to show that the victim was still a minor, aged about 15 years at the time of alleged incident, which was prima facie sufficient to attract the provisions of the POCSO Act.

7. Consequently, there is no apparent illegality

committed by the learned Additional Sessions Judge in directing addition of the charge under Section 4 of the POCSO Act. On the contrary, as laid down by the Supreme Court in the case of P. Kartikalakshmi, now it is for the petitioner to avail of the remedies as are available to him as is observed in paragraph No.6 (supra).

8. In view of such state of affairs, there is no merit in the Writ Petition.

9. The Writ Petition is dismissed. The Rule is discharged.

(MANGESH S. PATIL, J.)

...

vmk/-