

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.118 OF 2016

Asha Patil @ Asha Sagar Rath,
Age : 25 years, Hindu, Occu.: Labour,
R/o.Near Big Bazar, Near Vithhal Mandir,
College Road, parking place,
Nashik, Dist. Nashik.
(at present in Nasik Central Prison)

... **Appellant**

Versus

The State of Maharashtra,
(Through Sarkarwada Police Station,
Nashik, in CR. No.3157/2013)

... **Respondent**

.....

Mr.Vikas Singh, learned Advocate Appointed for the Appellant.

Mr.A.R.Kapadnis, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATE : RESERVED ON 11th SEPTEMBER 2019.
PRONOUNCED ON 18th SEPTEMBER 2019.

ORAL JUDGMENT :

1 By this Appeal, appellant/accused No.2 Asha Patil @ Asha Sagar Rath is challenging the Judgment and Order dated 23rd March 2015 in Sessions Case No.306 of 2013 passed by the learned Additional Sessions Judge, Nashik thereby convicting her of the offence punishable under Section 17 of the Protection of

Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act' for the sake of brevity) and sentencing her to rigorous imprisonment for ten years apart from direction to pay fine of Rs.10,000/- and in default of payment of fine to undergo further rigorous imprisonment for two years.

2 Facts in brief leading to the prosecution and resultant conviction of appellant/accused No.2 Asha Patil @ Asha Sagar Rathi can be summarized thus :

- (a) Victim of the crime in question, at the relevant time, was a female child aged about five years. Appellant/accused No.2 Asha Patil @ Asha Sagar Rathi is her biological mother. Accused No.1 Sagar Raju Rathi is her step-father. He was working as watchman whereas appellant/accused No.2 Asha Patil @ Asha Sagar Rathi was working as maid-servant. They all were residing at the outhouse of bungalow of Dr.Palve situated in Gopurum Society of Nashik.
- (b) P.W.No.2 Sunanda Pawar is the First Informant, who lodged report on 15/10/2013 with Sarkarwada Police Station, Nashik. This report has resulted in registration of Crime No.3157 of 2013 against appellant/accused No.2 Asha Patil @ Asha Sagar Rathi and the co-accused. First Informant/P.W.No.2 Sunanda Pawar used to reside in the

neighbourhood of accused persons and the victim female child/P.W.No.1 used to visit her house for playing with her daughter. When appellant/accused No.2 Asha Patil @ Asha Sagar Rathi became pregnant, she kept the victim female child/P.W.No.1 at the house of First Informant/P.W.No.2 Sunanda Pawar for a period of about six to seven months. After delivery of appellant/accused No.2 Asha Patil @ Asha Sagar Rathi, the victim female child/P.W.No.1 was taken back by her.

- (c) At the time of Dashera festival, appellant/accused No.2 Asha Patil @ Asha Sagar Rathi accompanied by the victim female child/P.W.No.1 visited house of First Informant/P.W.No.2 Sunanda Pawar, who noticed injuries on person of the victim female child/P.W.No.1. Appellant/accused No.2 Asha Patil @ Asha Sagar Rathi informed that injuries were caused because of a fall on the water tap. However, the victim female child/P.W.No.1 disclosed to First Informant/P.W.No.2 Sunanda Pawar that she was beaten by her step-father i.e. accused No.1 Sagar Raju Rathi. Appellant/accused No.2 Asha Patil @ Asha Sagar Rathi, however, declined to accompany First Informant/P.W.No.2 Sunanda Pawar for lodging report. That day, the victim female child/P.W.No.1 stayed at the house of First Informant/P.W.No.2 Sunanda Pawar. On the next day i.e. on 14/10/2013 while the victim female

child/P.W.No.1 was being bathed by First Informant/P.W.No.2 Sunanda Pawar, she noticed injuries on person of the victim female child/P.W.No.1. First Informant/P.W.No.2 Sunanda Pawar even noticed injuries on private part of the victim female child/P.W.No.1. Upon inquiry, the victim female child/P.W.No.1 informed First Informant/P.W.No.2 Sunanda Pawar that her step-father i.e. accused No.1 Sagar Raju Rathi inserted something in her vagina and also put chilly powder in her vagina. She disclosed that she is beaten by him after tying her hands with wire of the mobile charger. First Informant/P.W.No.2 Sunanda Pawar then asked appellant/accused No.2 Asha Patil @ Asha Sagar Rathi to accompany her for lodging report with police station. However, she refused and, therefore, on 15/10/2013, First Informant/P.W.No.2 Sunanda Pawar lodged report (Exhibit 25) with Police Station, Sarkarwada, Nashik.

- (d) During the course of investigation, P.W.No.6 Anuja Rajguru, API inspected the spot and prepared spot panchanama in presence of P.W.No.4 Shivaji Ahire panch witness. Two mobile chargers were came to be seized. In presence of P.W.No.3 Yamuna Dagale, vide seizure panchanama (Exhibit 30) pink slack of the victim female child/P.W.No.1 came to be seized. The victim female child/P.W.No.1 was got examined

at the Civil Hospital, Nashik. P.W.No.5 Dr.Pramod Chaudhari examined her. On completion of investigation, accused persons came to be charge-sheeted.

3. So far as appellant/accused No.2 Asha Patil @ Asha Sagar Rathi is concerned, the learned trial Court had framed the charge for the offence punishable under Section 17 of the POCSO Act. She pleaded not guilty. Charge for the offences punishable under Sections 4 and 10 of the POCSO Act was framed against accused No.1 Sagar Raju Rathi and he also pleaded not guilty. Both accused persons were accordingly tried.

4. In order to bring home the guilt to the accused persons, prosecution has examined in all six witnesses. Victim female child is examined as P.W.No.1. First Informant Sunanda Pawar is examined as P.W.No.2 and the report lodged by her dated 15/10/2013 is at Exhibit 25. Panch witness Yamuna Dagale is examined as P.W.No.3 and seizure panchanama of slack of the victim female child/P.W.No.1 is at Exhibit 30. Shivaji Ahire panch witness to the spot panchanama is examined as P.W.No.4. The spot panchanama is at Exhibit 34. Dr.Pramod Chaudhari, Medical Officer working at the Civil Hospital, Nashik is examined as P.W.No.5. Exhibit 39 is the report of medical examination of the victim female child/P.W.No.1 and papers of Medico Legal Case are at Exhibit 40. Investigating Officer Anuja Rajguru, API, Sarkarwada Police Station is examined as P.W.No.6.

5. Defence of the appellant/accused No.2 Asha Patil @ Asha Sagar Rathi was that of total denial.

6 After hearing the parties, the learned trial Court came to the conclusion that the victim female child/P.W.No.1 informed her mother i.e. appellant/accused No.2 Asha Patil @ Asha Sagar Rathi that she is assaulted by accused No.1 Sagar Raju Rathi, but appellant/accused No.2 Asha Patil @ Asha Sagar Rathi ignored this fact. The learned trial Court further held that though First Informant/P.W.No.2 Sunanda Pawar had disclosed appellant/accused No.2 Asha Patil @ Asha Sagar Rathi that her daughter is sexually assaulted by accused No.1 Sagar Raju Rathi, still appellant/accused No.2 Asha Patil @ Asha Sagar Rathi maintained silence and not interfered with the act of accused No.1 Sagar Raju Rathi. This amounted to 'abetment by illegal omission as well as intentional aid'. With this finding, the learned trial Court was pleased to convict appellant/accused No.2 Asha Patil @ Asha Sagar Rathi for the offence punishable under Section 17 of the POSCO Act and accordingly she is sentenced as indicated in the opening paragraph of this Judgment.

7 I heard Mr.Vikas Singh, the learned Advocate appointed to represent appellant/accused No.2 Asha Patil @ Asha Sagar Rathi at the cost of the State. He vehemently argued that even if evidence of the prosecution is accepted in its entirety, no

case for abetment is made out. It cannot be inferred that appellant/accused No.2 Asha Patil @ Asha Sagar Rathi intentionally aided the co-accused or had abetted him to commit the act of offence by illegal omission. Evidence of First Informant/P.W.No.2 Sunanda Pawar so far as alleged disclosure by the victim female child/P.W.No.1 to her mother i.e. appellant/accused No.2 Asha Patil @ Asha Sagar Rathi is hearsay and, therefore, not admissible. The learned Advocate further argued that even if it is assumed that the victim female child/P.W.No.1 has disclosed the incident to her mother, that would not amount to abetment by illegal omission.

8 The learned Additional Public Prosecutor supported the impugned Judgment and Order of conviction and resultant sentence by arguing that by evidence of the victim female child/P.W.No.1 and that of First Informant/P.W.No.2 Sunanda Pawar, the prosecution has bring home the guilt to appellant/accused No.2 Asha Patil @ Asha Sagar Rathi

9 I have considered the submissions so advanced and also perused the Record and Proceedings including oral as well as documentary evidence.

10 At the outset, it is necessary to reproduce Section 16 of the POCSO Act, which defines the term 'abetment' of offence under the POCSO Act. It reads thus :

“16. Abetment of an offence.- A person abets an offence, who -

First.- Instigates any person to do that offence; or

Secondly.- Engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that offence; or

Thirdly.- Intentionally aids, by any act or illegal omission, the doing of that offence.

Explanation I.- A person who, by wilful misrepresentation, or by wilful concealment of a material fact, which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that offence.

Explanation II.- Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

*Explanation III.-*Whoever employs, harbours, receives or transports a child, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position, vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of any offence under this Act, is said to aid the doing of that act.”

11 Case of the prosecution set out in the charge-sheet is that of facilitating co-accused Sagar Raju Rathi by appellant/accused No.2 Asha Patil @ Asha Sagar Rathi to commit the offence by aiding him intentionally by her omission to report to the police the incident narrated to her by the victim child and First Informant/P.W.No.2 Sunanda Pawar. The offence of abatement of an offence is made punishable under Section 17 of

the POCSO Act and the Abettor is made liable for punishment which is provided for the offence abetted. At this juncture, it becomes relevant to place on record reasoning given by the trial Court for convicting the appellant/accused No.2 Asha Patil @ Asha Sagar Rathi for the offence punishable under Section 17 of the POCSO Act. The same can be found in paragraph 39 of the impugned Judgment and Order and it reads thus :

“39. Considering the evidence of PW 1 and PW 2, it appears that though PW 1 had informed accused no.2-her mother that she was assaulted by accused no.1, still she has ignored the same. Thereafter she narrated the said incident to PW 2 and PW 2 had also disclosed to the accused no.2 that her daughter is sexually assaulted by accused no.1 still she kept silent and not interfered with the act of the accused no.1. Said act of the accused no.2 covers under the “abetment” by illegal omission. The accused no.2 intentionally aided the commission of offence by her non interference. In cases of abetment by illegal omission, it has to be proved that accused must be present at the time and place of occurrence and must fail to interfere.”

It is thus clear that the learned trial Court also held that case of the prosecution is covered by Clause *Thirdly* of Section 16 of the POCSO Act which deals with intentional aid by any act or illegal omission. At the cost of repetition it needs to mention here that the learned trial Court was alive to the legal position that in case of abetment by illegal omission, it is required to be proved by the prosecution that the accused was present at the time of

commission of an act and at place of occurrence, but had failed to interfere in it which amounts to illegal omission. Second explanation to Section 16 of the POCSO Act deals with the situation as to what amounts to intentionally aiding the offender. For making an accused liable for abetment by intentional aiding by an act or illegal omission, it is required to be established by the prosecution that either prior to or at the time of commission of act of offence, such Abettor does anything in order to facilitate the commission of the act of offence and facilitate the commission of offence. Thus presence of the Abettor either before commission of the offence for facilitating commission of the offence or at the time of commission of an act constituting the offence is necessary; for making out the offence of abetment. Let us, therefore, examine whether appellant /accused No.2 Asha Patil @ Asha Sagar Rathi intentionally aided co-accused No.1 Sagar Raju Rathi in commission of the act of offence by her illegal omission.

12 On this aspect, it is in evidence of the victim female child/P.W.No.1 that the co-accused No.1 Sagar Raju Rathi put chilly powder in her vagina and assaulted her by means of wire of mobile charger after tying her hands. The victim female child/P.W.No.1 has stated that she narrated the incident to her mother i.e. the appellant/convicted accused. Her cross-examination reveals that her mother used to go for work in the morning and used to return in the afternoon. Plain reading of evidence of the victim female child/P.W.No.1, as such, makes it

clear that appellant/accused No.2 Asha Patil @ Asha Sagar Rathi, who happens to be her biological mother was not present either before or at the time of commission of act constituting offence by co-accused Sagar Raju Rathi.

13 So far as First Informant/P.W.No.2 Sunanda Pawar is concerned, her evidence is to the effect that at the time of Dashera festival appellant/convicted accused No.2 Asha Patil @ Asha Sagar Rathi along with her daughter i.e. the victim female child/P.W.No.1 came to her house. This witness noticed injuries on person of the victim female child/P.W.No.1 and upon getting information from the victim female child/P.W.No.1 that she is assaulted by her father, had asked appellant/accused No.2 Asha Patil @ Asha Sagar Rathi to accompany her to the police station. First Informant /P.W.No.2 Sunanda Pawar stated that when such request was made, appellant/accused No.2 Asha Patil @ Asha Sagar Rathi refused to oblige. First Informant/P.W.No.2 Sunanda Pawar further stated that on the next day also when she noticed injuries on body of the victim female child/P.W.No.1, she asked appellant/ accused No.2 Asha Patil @ Asha Sagar Rathi to report the matter to the police, but the appellant/accused No.2 Asha Patil @ Asha Sagar Rathi was not ready to lodge the report. Thus, evidence of First Informant/P.W.No.2 Sunanda Pawar unerringly points out that such request to accompany her to the police station was made after commission of the offence by co-accused No.1 Sagar Raju Rathi.

14 Neither evidence of P.W.No.1 i.e. the victim female child nor that of First Informant/P.W.No.2 Sunanda Pawar, as such, shows that appellant/accused No.2 Asha Patil @ Asha Sagar Rathi had done an act of illegal omission prior to or at the time of commission of acts constituting the offence by co-accused No.1 Sagar Raju Rathi. Shri.Vikas Singh, the learned Advocate appointed to represent appellant/accused No.2 Asha Patil @ Asha Sagar Rathi has rightly relied on Judgment of the Nagpur High Court in the matter of *Mt.Shevanti v. Emperor*¹ in order to buttress his contention that subsequent acts of the accused charged with the offence of abetment cannot fall in Clause thirdly of Section 16 of the POCSO Act. Clause *Thirdly* of Section 16 of the POCSO Act makes it clear that a person abets by aiding when by any act done either prior to or at the time of commission of act he intends to facilitate and does in fact facilitate the commission thereof. The intention should be to aid the commission of a crime. Mere giving of an aid will not make the act an abetment of an offence if the person who give the aid did not know that the offence was being committed or contemplated. In order to convict a person of abetment by illegal omission, it is necessary to show that the accused intentionally aided the commission of offence by his non-interference and that the omission involved a breach of legal obligation. Abetment by omission would only be punishable if the omission were an illegal omission i.e. breach of a legal obligation. In this view of the matter, subsequent failure on the

¹ MAN U/NA/0118/1928.

part of appellant/accused No.2 Asha Patil @ Asha Sagar Rathi in non-reporting the matter to police, as such, does not amount to intentionally aiding the commission of offence by co-accused No.1 Sagar Raju Rathi. *Mens rea* is an essential element of the offence of abetment. Her subsequent failure to take recourse to law by lodging the FIR does not aid the commission of the offence by accused Sagar Rathi though it might aid the concealment of an offence already perpetrated. However, there is no such charge against the appellant/convicted accused. Mere negligence or carelessness on the part of the accused cannot be termed as 'abetment'.

15 In this view of the matter, it cannot be said that appellant/accused No.2 Asha Patil @ Asha Sagar Rathi, who at the most, subsequently came to know about the act of co-accused No.1 Sagar Raju Rathi, had abetted co-accused No.1 Sagar Raju Rathi in commission of the crime by intentionally aiding him. The appeal, therefore, deserves to be allowed.

16 Before parting with the Judgment, I deem it proper to put on record the appreciation for the efforts taken by Mr.Vikas Singh, the learned appointed Advocate in prosecuting this appeal and assisting the Court in coming to the correct conclusion.

17 Therefore, the Order :

ORDER

- (i) The Appeal is allowed.
- (ii) The impugned Judgment and Order, so far as it relates to appellant/accused No.2 Asha Patil @ Asha Sagar Rathi, in convicting her of the offence punishable under Section 17 of the Protection of Children from Sexual Offences Act, 2012 and sentencing her to suffer rigorous imprisonment for ten years apart from direction to pay fine of Rs.10,000/- and in default to undergo rigorous imprisonment for two years; is quashed and set aside.
- (iii) Appellant/accused No.2 Asha Patil @ Asha Sagar Rathi is acquitted of the offence with which she is charged. She be set at liberty if not required in any other case.
- (iv) The fine amount, if any paid by her, be refunded to her.
- (v) The Appeal is accordingly disposed of.

(A.M.BADAR, J.)