



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 27.02.2020

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THE HONOURABLE MRS. JUSTICE T.KRISHNAVALLI

Crl.R.C(MD)No.489 of 2019

Vincent @ Deva Sagayam : Appellant/Sole Accused

Vs.

State rep. by the
Inspector of Police,
Thanjavur South Police Station,
Thanjavur,
Thanjavur District.
(Crime No.234 of 2015)

: Respondent/Complainant

Prayer: Criminal Revision has been filed under section 397 (1) r/w 401 of the Criminal Procedure Code, against the order, dated 12.07.2019 passed in Crl.MP No.834 of 2019 and Memo in SSC No.9 of 2019 on the file of the Sessions Judge, Mahalir Neethimandaram (Fast Track Mahila Court), Thanjavur District.

For Petitioner : Mr.A.Thiruvadikumar

For Respondent : Mr.V.Neelakandan
Additional Public Prosecutor

J U D G M E N T

This Criminal Revision is directed against the order, dated 12.07.2010 passed in Crl.MP No.834 of 2019 and Memo in SSC No.9 of 2015 on the file of the Sessions Judge, Mahalir Neethimandaram (Fast Track Mahila Court), Thanjavur.

2.The respondent police filed the petition in Crl.MP No.834 of 2019 in SSC No.9 of 2015 and Memo in SCC No.9 of 2015 seeking an order to alter the charges under section 5(c) & 5(1)r/w 6 (2 counts), section 3(b) r/w section 4 and section 13(b) r/w section 14(3) of POCSO Act, 2012 and section 506(i) IPC instead of Section 6 and 8 of POCSO Act, 2012 and section 506(i) IPC. The learned Sessions Judge, Mahalir Neethimandaram, Thanjavur, after perusing the entire materials available on record, has allowed the petition on 12.07.2019. Aggrieved by the said order, the petitioner/accused is before this court.



3. Heard both sides and perused the materials available on record.

4. The learned counsel appearing for the petitioner/accused argued that there is no evidence or material to alter the charge and only the trial court has to decide about framing of additional charge or alter the existing charge upon arraying at a subjective satisfaction on the basis of the existence of materials available on record and there was no prima facie case as against the petitioner attracting the provisions of section 13(b) of the POCSO Act, 2012 and under section 14(3) of the Act 2012 and the necessary ingredients of the above penal provision requires the usage of the child for pornographic purpose, which is totally absent in the present case and there was no iota of material against the petitioner herein nor perusal of the statement of the witnesses along with the evidence on record would go to show the involvement of the petitioner in child pornography and the necessary ingredients for the offence under section 13(b) r/w 14 (3) of the Protection of Children from Sexual Offences Act, 2012 as prayed for by the prosecution is absent and the charge under section 3(b) of POCSO Act, 2012 punishable under section 4 of the POCSO Act, 2012 is also untenable on the facts of the case when the necessary ingredients for the said penal provisions is absent and prays that the criminal revision has to be allowed.

5. On the other hand, the learned Additional Public Prosecutor appearing for the respondent submitted that from the available material evidence produced by the complainant, the petitioner is a Public Servant and he has committed aggravated sexual assault and aggravated penetrative sexual assault upon a victim girl more than once and the medical evidence are also clearly disclosed that the victim was assaulted by aggravated penetrative sexual assault and further, he has used the victim for pornographic purpose and only after hearing both sides, the trial court ordered for alteration of the charges since there is prima facie case made out against the petitioner as alleged that he has committed aggravated sexual assault and aggravated penetrative sexual assault upon a victim girl more than once and after perusing the records, the trial court allowed the petition for altering the charge and the charge has been proved at the conclusion of the trial and prima facie case is made out and prays that the criminal revision has to be dismissed.

6. In this case, the learned Additional Public Prosecutor appearing for the prosecution submitted that the prosecution has right to file petition under section 216 of the Criminal Procedure Code to alter the charge. For that, the learned Additional

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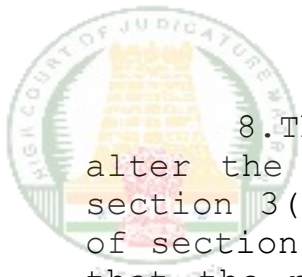


reported in (2014)11 SCC 538 (**Central Bureau of Investigation Vs. Karimullah Osan Khan**). In that case, it has been held in para 17 and 18 as follows:-

"17. Section 216 CrPC gives considerable power to the trial court, that is even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add to any charge, subject to the conditions mentioned therein. The expressions "at any time" and before the "judgment is pronounced" would indicate that the power is very wide and can be exercised, in appropriate cases, in the interest of justice, but at the same time, the courts should also see that its order would not cause any prejudice to the accused.

18. Section 216 CrPC confers jurisdiction on all courts, including the Designated Courts, to alter or add to any charge framed earlier, at any time before the judgment is pronounced and sub-section (2) to (5) prescribe the procedure which has to be followed after that addition or alteration. Needless to say, the courts can exercise the power of addition or modification of charges under Section 216 CrPC, only when there exists some material before the court, which has some connection or link with the charges sought to be amended, added or modified. In other words, alteration or addition of a charge must be for an offence made out by the evidence recorded during the course of trial before the court (See *Harihar Chakravarthy vs. State of W.B*) (AIR 1954 SCC 266). Merely because the charges are altered after conclusion of the trial, that itself will not lead to the conclusion that it has resulted in prejudice to the accused because sufficient safeguards have been built in in Section 216 CrPC and other related provisions."

7. On perusal of the decision reported in (2014)11 SCC 538 (**Central Bureau of Investigation Vs. Karimullah Osan Khan**), it is held that without any prejudice to the accused, the charge can be altered, even though the petition can be filed on the prosecution side. Hence, as per the above ruling, without any prejudice to the accused, the petition for altering the charge can be filed by the prosecution. Further, during the course of argument, the learned counsel for the petitioner conceded that the prosecution has right to file the petition to alter the charge when it was not prejudiced to the accused.



8. The prosecution had filed the present petition seeking to alter the charges under section 5(c) and 5(1) r/w 6 (2 counts), section 3(b) r/w 4, section 13(b) r/w 14(3) of POCSO Act, instead of section 6 and 8 of POCSO Act and the case of the prosecution is that the petitioner had committed sexual assault upon the victim and in continuation of his act, he had showed obscene video to the victim girl and had induced her for the sexual act and this is the charge of the prosecution as well as the evidence of the victim girl. Hence, it is necessary to decide whether there is sufficient material warranting the addition of the charge under section 13(b) r/w 14(3) of POCSO Act.

9. At this juncture, it is necessary to refer section 3(b) r/w 4 of the POCSO Act, which would run thus:-

"3. Penetrative Sexual Assault.-A person is said to commit "penetrative sexual assault" if he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person."

10. In this case, the victim was examined as PW2. The mother of PW2 was examined as PW1. PW1 gave Ex.P1 complaint. The evidence of PW1 and PW2 and their 161(3) Statements were recorded. On perusal of Ex.P1, it was not stated that PW2 told her that the accused inserted to any object or part of the body nor being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person. In 161(3) statement, it was stated that the accused attempted to insert his private part into the mouth of the victim, but she has not permitted the accused to do it. On perusal of 164(1) Statement of the victim, the victim has not stated that the accused inserted, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person and there was no iota of evidence for the offence under section 3(b) r/w 4 of the POCSO Act. Next the trial court ordered for the addition of charges under section 13(b) r/w 14(3) of POSCO Act. Hence, at this juncture, it is necessary to refer section 13(b) r/w 14(3) of POSCO Act, which would run thus:-

CHAPTER III

*USING CHILD FOR PORNOGRAPHIC
AND PUNISHMENT THEREFOR*

PURPOSE

13. Use of child for pornographic purposes:-Whoever, uses a child in any form of media (including programme or advertisement



telecast by television channels or Internet or any electric from or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purpose of sexual gratification, which includes;

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(a) representation of sexual organs of a child;

(b) usage of a child engaged in real or simulated sexual acts (with or without penetration);

(c) the indecent or obscene representation of a child, shall be guilty of the offence of using child for pornographic purpose.

Explanation: For the purpose of this section, the expression "use a child" shall include involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering transmitting, publishing, facilitation and distribution of the pornographic material.

14. Punishment for using child for pornographic purposes:- (1) Whoever, uses a child or children for pornographic purposes shall be punished with imprisonment of either description which may extend to five years and shall also be liable to fine and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also be liable to fine.

(2) If the person using the child for pornographic purposes commits an offence referred to in section 3, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(3) If the person using the child for pornographic purposes commits an offence referred to in section 5, by directly participating in pornographic acts, he shall be punished for rigorous imprisonment for life and shall also be liable to fine.



was used for pornographic. Further, in the provision the child used is clarified as follows:-

"For the purposes of this section, the expression "use a child" shall include involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material.

14. At this juncture, it is necessary to refer the chief examination of PW2. PW2 in his chief examination stated as follows:-

"ஒரு நாள் ஞாயிற்றுக் கிழமை எதிரி என் வீட்டிற்கு வந்து உனக்கு ஆக்ஷிடீஸ் செய்வதற்கு பிக்சர்ஸ் வாங்கித் தருகிறேன் என்று சொல்லி சோபாவில் உட்கார்ந்து செல்லில் கேம் காட்டினார் அப்போது அந்த செல்லில் ஒரு ஆணும்பெண்ணும் உடம்பில் டிரஸ் இல்லாமல் இருந்த படத்தை எனக்கு காண்பித்தார் இதுபோல் நம்மலும் இருக்கலாம் வா என்று என்னைக் கூப்பிட்டார் இது தப்பு இது போல் செய்யக்கூடாது என்று நான் சொன்னபோது தப்பு ஒன்றும் இல்லை வா என்று கூப்பிட்டார்.

15. On careful perusal of the above explanation, it reveals that used a child includes involving a child for the commission of the above offence. But in this case, it was never stated that the child was neither used nor involved for the commission of the above offence. A reading of the evidence, the victim only reveal the obscene photograph/video-graph had been shown to the victim by the accused and there is nothing to show that the victim was used for pornography. Hence, there is no ingredients to frame charge under section 3(b) r/w 4 & 13(b) r/w 14(3) of POCSO Act and hence, it is held that it is not necessary to frame the additional charges under section 3(b) r/w 4 and 13(b) r/w 14(3) of POCSO Act.

16. The learned Additional Public Prosecutor appearing for the prosecution submitted that the prosecution wanted to add the charge under section 5(c) and 5(1) of POCSO Act and 5(c) would speak about the penetrative sexual assault by a public servant and 5(1) speaks about repeated penetrative sexual assault on child and both the provisions are punishable under section 6 of POCSO Act and in the present case, the fact remains that the petitioner herein charged under section 6 of the POCSO Act and hence, it is not necessary to add or incorporate the definition clause.

17. The argument advanced on the side of the learned counsel appearing for the petitioner is acceptable. Since, the petitioner is prima facie charged under section 6 of the POCSO Act, 5(c) and 5(1) of POCSO Act are definition clause and hence, it is not necessary to add or incorporate the definition clause.



18. For all the reasons stated above, this court is of the considered view that the impugned order passed by the trial court is liable to be aside and accordingly, it is set aside.

19. In the result, this criminal revision is **allowed**. The order, dated 12.07.2019 passed in Cr1.MP No.834 of 2019 and Memo in SSC No.9 of 2019 by the Sessions Judge, Mahalir Neethimandaram (Fast Track Mahila Court), Thanjavur District, is set aside.

Sd/-

Assistant Registrar(AD-II)

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Sub Assistant Registrar(CS)

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To,

1. The Sessions Judge,
Mahalar Neethimandaram
((Fast Track Mahila Court),
Thanjavur District.
2. Inspector of Police,
Thanjavur South Police Station,
Thanjavur,
Thanjavur District.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.A.THIRUVADI KUMAR, Advocate (SR-9293[F] dated 28/02/2020)

Judgment made in
Cr1.R.C (MD) No.489 of 2019
27.02.2020

DB (CO)

TR(14.05.2020) 8P 5C