

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

PUBLIC INTEREST LITIGATION NO.5 OF 2021

Arjun Kishanrao Malge. ... **Petitioner**
versus
1. State of Maharashtra
2. Director General of Police
3. Maharashtra State Commission for
Protection of Child Rights. ... **Respondents**

.....
Mr.Somasekhar Sundaresan with Ms.Saziya Mukadam & Ms.Kanchi Trivedi, for the Petitioner.

Mr.Deepak Thakre, Government Pleader & Smt.P.P.Shinde, APP, for the State.

Mr.Wesley Menezes with Mr.Waqar Nasir Pathan, Mr.Rajdeep Lahri, for Respondent No.3.

.....
**CORAM :- DIPANKAR DATTA, CJ &
G. S. KULKARNI, J.**
RESERVED ON :- MARCH 17, 2021.
PRONOUNCED ON :- APRIL 08, 2021

JUDGEMENT (Per. G.S.Kulkarni,J.) :

1. The petitioner who is a social worker, working with child victims of sexual abuse and their families, across Mumbai and who is also performing the role as a support person in child sexual abuse cases in cases before the Child Welfare Committee, is before the Court *pro bono publico*, raising issues in regard to the rights of the children to participate in the trial of offences under the Protection of Children from Sexual Offences Act (for short '**the POCSO Act**'). The petitioner raises a concern in regard to the implementation and compliance of

Section 40 of the POCSO Act read with Rule 4 of the Protection of Children from Sexual Offences Rule, 2012 (for short “**the POCSO Rules**”).

2. The petitioner’s case is : That he has come across several cases under the POCSO Act, in which the Courts and the police have overlooked or failed to give effect to the mandate of Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules. The petitioner also raises a concern of the oblivity and non-recognition of the provisions of Section 439(1-A) of the Code of Criminal Procedure (for short ‘**Cr.PC**’) as inserted by the Act 22 of 2018 with effect from 21 April 2019 in cases under the POCSO Act.

3. It is contended that POCSO Act is a special law enacted interalia for protection of children, from offences of sexual assault, sexual harassment etc. and for trial of such offences. It is in such context considering the special circumstances which arise to protect the interest of the victim and the social interest, the legislature has framed Section 40 which postulates the rights of a child, to take assistance of a legal practitioner. Such provision stipulates that subject to the proviso to section 301 of the Cr.PC., the family or guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any

offence committed under the POCSO Act. The proviso below Section 40 mandates that if the family or the guardian of the child are unable to afford a legal counsel, the “Legal Services Authority” shall provide a lawyer to them. According to the petitioner, relevant to Section 40 is the provision of Rule 4 of the POCSO Rules which provides for a procedure for care and protection of the child, which according to the petitioner, is required to be considered and given effect to, in letter and spirit, and more particularly qua the implementation of Rule 4(13) and 4(15). These sub-rules interalia provide for an obligation interalia on the Special Juvenile Police Unit (**SJPU**), or the local police to keep the child and child’s parents or guardian to be informed about the developments, including the arrest of the accused, applications filed and other Court proceedings, and the nature of the information to be provided. The object of such provision being to ensure participation of the victim in the administration of justice, in POCSO cases.

4. The petitioner also refers to the Criminal Law (Amendment) Act, 2018, whereby Section 439 of the Cr.P.C. which deals with the “Special power of the High Courts or Court of Session regarding bail”, being amended, incorporating sub-section (1A) with effect from 21 April 2019, to provide that the presence of the informant or any person authorised by him, shall be obligatory at the time of

hearing of an application for bail of a person accused of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code. These are offences under the Indian Penal Code in relation to the children. The petitioner contends that considering the mandate of Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules, the amendment to the provisions of sub-section (1A) of Section 439 of the Cr.P.C. are required to be applied *mutatis mutandis* to the offences under the POCSO Act. Such application of these provisions, would ensure a fair representation to the victims of child sexual assault, their families and the public in general. More particularly, as Rule 4 of the POCSO is not restricted to informing the victims/complainants about the bail applications moved by the accused, but is also applicable to any/ all the applications moved by the accused before the trial Court.

5. The petitioner has contended that although Rule 4 of the POCSO Rules is ingrained in the Rule book since 2012, the same has been neglected and ignored in practice. It is his contention that the amendment to Section 439 of the Cr.P.C. by incorporating sub-section (1A) has also been overlooked by the police and the trial Courts as appropriate steps, to inform the victims/complainants of the bail applications moved by the accused, which are falling within the purview

of the POCSO Act, the offences in relation to children as specified in sub-section (1A) of Section 439 of the Cr.PC., are not taken. It is contended that the said amendment to Section 439 cannot be interpreted to be directory when its purport is mandatory. In supporting the contention that these provisions are overlooked and/or not implemented, the petitioner has placed on record orders which are passed by the different Sessions Court, which clearly show that neither the victims or the complainants at any point of time were informed of the proceedings nor any notice was served in compliance of Section 40 read with Rule 4 of the POCSO Act and Rules, or the mandate of Section 439(1-A) of the Cr.PC followed.

6. The petitioner has contended that there are several such cases where the victims, victim's parents, complainants, support persons are not being informed about applications being moved by the accused persons despite the fact that the POCSO Act and Rules clearly mandate the right of the victim and/or parents, complainants, support persons to participate in the proceedings and be afforded a fair representation in the same. The petitioner would urge that such concern was addressed also by the Delhi High Court when it issued "Practice directions" dated 24 September 2019. Being intrigued with the non-compliance of such practice directions, a learned Single Judge of the Delhi High Court in

Jeena Jha Vs. Union of India, (Writ Petition (C) no.5011 of 2017)

passed orders directing that a strict compliance of the Practice Directions dated 24 September 2019 be ensured. The said order also requires District Judges to file a report in the High Court as to whether the 'practice directions' are being followed and if not, the reasons for such omission. The High Court also observed that these practice directions were to *mutatis mutandis* apply to the offences under the POCSO Act. The petitioner has also referred to similar directions of the Delhi High Court in Criminal M.C.No.1474 of 2020.

7. On the above conspectus, the primary grievance as raised by the petitioner in these proceedings is in regard to the non-compliance of the provisions of Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules and of the procedure under Section 439(1-A) of the Cr.PC by the police and the Courts. It is contended that non-observance of these provisions infringes the fundamental rights of such children guaranteed under Articles 14 and 21 of the Constitution. The petitioner has accordingly prayed for the following reliefs:

- “i. Issue directions to all the criminal courts to exercise jurisdiction to secure efficient and effective participation of child victims through their legal representatives at all stages of the judicial process;
- ii. Frame Guidelines / issue directions to the Respondent No.1, 2 and 3 to ensure strict compliance of Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules so

that the Child Victims of sexual abuse / assault are necessarily protected and their interests safeguarded;

- iii. Declare that Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules mandates that the Child Victim, Parents, or Guardian as the case may be, have to be informed regarding any Application for Bail preferred by a suspected offender / accused person;
- iv. Declare Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules necessarily require that the Legal Representative of the Child Victim, Parents, or Guardians as the case may be, is heard before releasing the suspected offender on Bail;
- v. Frame Guidelines / issue directions to the Respondent No.1, 2 and 3 to ensure strict compliance of Section 439 (1-A) of the Cr.P.C. and declare that the provisions/practices to be followed under Section 439 (1-A) of the Cr.P.C. are also made *mutatis mutandis* applicable to offences under the POCSO Act with respect to the bail applications moved by the Accused/ Offender in such cases;
- vi. Direct Respondent No.5 to develop a mechanism to monitor compliance of Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules.”

8. A reply affidavit is filed on behalf of the State of Mr.Manoj Naval Patil, Superintendent of Police. Referring to the provisions of Section 40 of the POCSO Act and Rule 4(13) and 4(15) of the POCSO Rules as also the provisions of Section 439 of the Cr.P.C., it is stated that to sensitize all the Unit Commanders of the said provisions, instructions have been issued to all the Unit Commanders vide Circular dated 6 October 2020. It is contended that in this view of the matter the

petition ought to be disposed of, as adequate steps are being taken on behalf of the State Government.

9. A reply affidavit has been filed on behalf of respondent no.3/Maharashtra State Commission for Protection of Child Rights, of Smt.Rohini Madhukar Lade, Assistant Administrative Officer, to contend that respondent no.3 would concur with the petitioner that the entitlement to a legal counsel of the choice of the family or the guardian of the child as conferred by Section 40 of the POCSO Act depicts the statutory mandate that the child is entitled to be legally represented, at all stages of the legal proceedings under the POCSO Act. It is contended that the said provision is coherent and consistent with the wider scheme of the legislation. It is contended that Article 39A of the Constitution of India casts an obligation upon the State to provide free legal aid, thereby clearly bolstering the need for legal representation of the victim at all stages of the proceedings. It is also contended that the guidelines issued by the Government of India, Ministry of Women and Child Development, also inter alia recognizes the rights, namely, of the child to be informed; right to be heard and to express views and concerns; right to effective assistance, right to be protected from hardship during the justice process; right to compensation. In short, the

affidavit of respondent no.3 supports the contentions as urged by the petitioner.

Discussion and conclusion

10. We have heard Mr.Somasekhar Sundaresan, learned Counsel for the petitioner and Mr.Deepak Thakre, learned Government Pleader alongwith Smt.Shinde, learned APP for the State, and Mr.Wesley Menezes, learned Counsel for the respondent no.3.

11. Before we embark upon the discussion, it would be imperative for us to note the provisions of Section 40 of the POCSO Act, the provisions of Rule 4(13), 4(14) and 4(15) of the POCSO Rules, as also the provisions of Section 439(1-A) of the Cr.P.C. Such provisions read thus:-

POSCO Act

“40. Right of child to take assistance of legal practitioner – Subject to the proviso to Section 301 of the Code of Criminal Procedure, 1973 (2 of 1974) the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act;

Provide that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Service Authority shall provide a lawyer to them.”

POSCO Rules, 2020

“4. Procedure regarding care and protection of child. - (1) Where any Special Juvenile Police Unit (hereafter referred to as "SJPU") or the local police receives any information under sub-section (1) of section 19 of the Act from any person including the child, the SJPU or local police receiving the report of such information shall forthwith disclose to the person making the report, the following details:-

- (i) his or her name and designation;
- (ii) the address and telephone number;
- (iii) the name, designation and contact details of the officer who supervises the officer receiving the information.

(13) It shall be the responsibility of the SJPU, or the local police to keep the child and child's parent or guardian or other person in whom the child has trust and confidence, and where a support person has been assigned, such person, informed about the developments, including the arrest of the accused, applications filed and other court proceedings.

(14) SJPU or the local police shall also inform the child and child's parents or guardian or other person in whom the child has trust and confidence about their entitlements and services available to them under the Act or any other law for the time being applicable as per Form-A. It shall also complete the Preliminary Assessment Report in Form B within 24 hours of the registration of the First Information Report and submit it to the CWC.

(15) The information to be provided by the SJPU, local police, or support person, to the child and child's parents or guardian or other person in whom the child has trust and confidence, includes but is not limited to the following:-

- (i) the availability of public and private emergency and crisis services;
- (ii) the procedural steps involved in a criminal prosecution;
- (iii) the availability of victim's compensation benefits;
- (iv) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;
- (v) the arrest of a suspected offender;
- (vi) the filing of charges against a suspected offender;

- (vii) the schedule of court proceedings that the child is either required to attend or is entitled to attend;
- (viii) the bail, release or detention status of an offender or suspected offender;
- (ix) the rendering of a verdict after trial; and
- (x) the sentence imposed on an offender.”

CODE OF CRIMINAL PROCEDURE

“439. Special powers of High Court or Court of Session regarding bail
—

(1) A High Court or Court of Session may direct—

- (a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub-Section (3) of section [437](#), may impose any condition which it considers necessary for the purposes mentioned in that Sub-Section;
- (b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified;

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code, give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.

(1A) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and committed to custody.”

12. The POCSO Act is a special legislation enacted by the Parliament with an object to provide a statutory shield to protect children from the offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences. The scheme of this legislation is clear from the different Chapters and its contents. Chapter II deals with sexual offences against children which are differently categorized and for punishment of such offences. Chapter III provides for using child for pornographic purposes and punishment therefor. Chapter IV deals with abetment and attempt to commit an offence. Chapter V provides for the procedure for reporting of cases. Chapter VI contains the provisions in relation to procedures for recording statement of the child. Chapter VII provides for Special Courts to be designated for providing speedy trial for offences falling under such legislation; provisions on presumption as to certain offences; presumption of culpable mental state, as also application of the Cr.P.C. to the proceedings before a Special Court. Chapter VIII provides for the procedure and powers of Special Courts and recording of evidence. Chapter IX provides for miscellaneous provisions as to guidelines for child to take assistance of experts etc. (Section 39); right to child to take assistance of legal practitioner (Section 40).

13. On a perusal of the scheme of the said legislation, it is clear that a robust mechanism recognizing the need to protect children from the offences falling within the purview of this legislation and the method and manner to deal judicially such offences, is prescribed as a part of the administration of criminal justice.

14. Section 40 of the POSCO Act, falling under Chapter IX titled “Miscellaneous Provisions”, confers a right upon a child to take assistance of a legal practitioner. It provides that the family or the guardian of the child shall be entitled to the assistance of a legal counsel “of their choice” for any offence under this Act, and as per the proviso, if the family or the guardian of the child are unable to afford a legal counsel “the Legal Services Authority” shall provide a lawyer to them. From a bare reading of Section 40, it is limpid that it mandates entitlement interalia conferred on the family or the guardian of the child of the assistance of legal Counsel of their choice in regard to any offences under the Act, and if the family or the guardian of the child are unable to afford a legal counsel of their choice, it is mandatory and an obligation of the ‘Legal Service Authority’, to provide a lawyer to them from its panel. Such mandate of Section 40 is made procedurally effective by framing of Rule 4(13), 4(14) and 4(15) of the POSCO Rules. Sub-rule (13) provides that it shall be the responsibility of the

SJPU, or the local police to keep the child and child's parent or guardian etc., informed about the developments, including the arrest of the accused, applications filed and other court proceedings. Sub-rule (14) provides that information in relation to the services available to them under the Act or any other law for time being in force as per Form-A, be provided for, as also to complete the 'Preliminary Assessment Report' in Form B, within 24 hours of the registration of the First Information Report and submit it to the Child Welfare Committee. Sub-rule (15) of Rule 4 postulates information to be provided by the SJPU, local police, or support person interalia to the child and child's parents or guardians and which includes information as described under Clause (i) to (x) which speaks of the variety of information interalia of availability of public and private emergency and crisis service; the procedural steps involved in a criminal prosecution; the availability of victim's compensation benefits; the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent not interfering with the investigation; the arrest of a suspected offender; the filing of charges against a suspected offender; the schedule of court proceedings that the child is either required to attend or is entitled to attend; the bail, release or detention status of an offender or suspected offender; rendering of a verdict after trial; and the sentence imposed on an offender.

15. On a conjoint reading of Section 40 of the POCSO Act read with Rule 4 of the POSCO Rules the legislative mandate is that of complete information to be made available, of all the proceedings and its progress in relation to the offences under the said Act, to the parent or the guardian of the child, with the sole object to safeguard the interest and well being of the child at every stage of the judicial process, to give effect to the mandate of Articles 15 and 39 of the Constitution. On behalf of the petitioner, we have been shown several orders passed by the Courts trying such offences. We see from such orders, that the concerned Courts have completely overlooked the mandate of Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules.

16. Considering the avowed legislative intent of such provisions, it thus cannot be countenanced, that when it comes to the administration of criminal justice, the stakeholders who are concerned with the investigation of such offences, as also the Special Courts dealing with the proceedings under Act, overlook and/or not recognize and/or implement the mandate of such solemn provisions.

17. In our opinion, the petitioner is correct in his contention, also referring to the provisions of Section 439 of the Cr.PC and the

amendment made thereto by incorporation of Sub-section (1A) [(by Act 22 of 2018) with effect from 21 April 2019] stipulating that "*the presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code.*" It needs to be noted that such provisions of the Indian Penal Code referring to sub-section (1A) of Section 439 of the Cr.P.C. are in relation to the offences under sub-section (3) of Section 376 or Section 376AB or Section 376DA or Section 376DB of the IPC which relate to children. We thus find ourselves in agreement with the contention of the petitioner that akin to the offences which fall under the Indian Penal Code as set out in sub-section (1A) of Section 439 of Cr.P.C., with respect to applications for bail under the POCSO Act, the presence of the informant or any person authorised by him shall be made obligatory at the time of hearing of the application for bail. This would certainly be in consonance with the object of Section 40 of the POCSO Act read with Rule 4(13) and 4(15) of the POCSO Rules. To such extent, we also find ourselves, in agreement with the directions of the Delhi High Court in its orders as noted above.

18. It would be apposite to refer to the decision of the Supreme Court in *Eera Through Dr.Manjula Krippendorf Vs. State (NCT of Delhi) and Anr. {(2017)15 SCC 133}* in which the Supreme Court observes that the purpose of bringing such legislation, is to secure the best interest of the child pertaining to the offences against the children. It is held that the interest of the child both as victim as well as witness need to be protected and the stress of the legislation is providing a child friendly procedure, and that the dignity of the child is of immense emphasis, in the scheme of the legislation.

19. The importance of this legislation in the context of the directions which were issued in regard to the speedy disposal of such cases and the sensitivity required in the adjudication of such cases can also be seen from the following observations as made by the Supreme Court in *Alakh Alok Srivastava Vs. Union of India & Ors. {(2018)17 SCC 291}*:-

“20. Speaking about the child, a three-Judge Bench in *M.C.Mehta V. State of T.N. (1996)6 SCC 756*, opined that: (SCC p.759, para 1)

“1. ... “child is the father of man”. To enable fathering of a valiant and vibrant man, the child must be groomed well in the formative years of his life. He must received education, acquire knowledge of man and materials and blossom in such an atmosphere that on reaching age, he is found to be a man with a mission, a man who matters so far as the society is concerned.”

21. The Supreme Court Women Lawyers Assn. Vs. Union of India, (2016)3 SCC 680, this Court has observed: (SCC p.685, para 9)

“9. In the case at hand, we are concerned with the rape committed on a girl child. As has been urged before us that such crimes are rampant for unfathomable reasons and it is the obligation of the law and law-makers to cultivate respect for the children and especially the girl children who are treated with such barbarity and savageness as indicated earlier. The learned Senior Counsel appearing for the petitioner has emphasised on the obtaining horrendous and repulsive situation.”

22. Alice Miller, a Swiss psychologist, speaking about child abuse has said:

“Child abuse damages a person for life and that damage is in no way diminished by the ignorance of the perpetrator. It is only with the uncovering of the complete truth as it affects all those involved that a genuinely viable solution can be found to the dangers of child abuse.”

23. Keeping in view the protection of the children and the statutory scheme conceived under the POCSO Act, it is necessary to issue certain directions so that the legislative intent and the purpose are actually fructified at the ground level and it becomes possible to bridge the gap between the legislation remaining a mere parchment or blueprint of social change and its practice or implementation in true essence and spirit is achieved.”

20. We are thus of the clear opinion that the POCSO Act read with Rules 4(13) and 4(15) of the POCSO Rules recognize a statutory entitlement to the assistance of and representation by legal counsel for the family or the guardian of the child and entitlement to be present and to participate in proceedings in accordance with the said provision. As a necessary corollary, there is also an entitlement of such persons to be made aware of the filing of applications and the hearings scheduled

on such applications at the various stages of the proceedings. We are accordingly inclined to dispose of the petition with the following directions:-

(i) Notwithstanding the duty of the SJPU to intimate the child's family or guardian or the legal counsel under Rule 4 of the POCSO Rules:-

- a. where an application is made before the Court on behalf of the prosecution, it shall be the duty of the office of the public prosecutor to issue notice of hearing of such application to the child's family or as the case may be, the guardian, and where a legal counsel on behalf of the child is already on record, to such legal counsel, along with all relevant documents and the record necessary for effective participation in the proceedings;
- b. when an application is made before the Court on behalf of the accused, it shall be the duty of the accused to issue notice of hearing of such application to the child's family or as the case may be, the guardian, and where a legal counsel on behalf of the child is already on record, to such legal counsel, along with all relevant documents and the record necessary for effective participation in the proceedings.

(ii) When an application is made on behalf of the prosecution, it shall be the duty of the Police Officer to confirm to the relevant Court that service of such application alongwith all relevant documents and the record necessary for effective participation in the

proceedings, and the notice of hearing has been undertaken and completed along with proof of service.

(iii) In the event, it has not been possible to serve the child's family, guardian or legal counsel, it shall be the duty of the SJPU to inform the reasons in writing to the relevant court.

(iv) The appropriate Court, before proceeding to hear the application, shall ascertain the status of service of notice, and if it is found that notice has not been issued, the Court may make such reasoned order as it deems fit to secure the ends of justice, taking into account any emergent circumstances that warrant dealing with the application in the absence of the child's family or guardian or legal counsel.

(v) In the event despite issuance of notice, the child's family, guardian or legal counsel, does not attend the hearing, the Court may proceed further without the presence of such noticee, or issue a fresh notice, as the Court may deem fit and proper, considering the interest of justice.

(vi) When the proceedings under the Act would also relate to an offence against Sections 376(3), 376-AB, 376-DA or 376-DB of the Indian Penal Code, the notice to the victim shall be issued under Section 439(1-A) read with Rule 4(13) and 4(15).

(vii) This order shall be brought to the notice of all the Sessions Judges and Special Court Judges in the State of Maharashtra.

21. A copy of this order be forwarded to the Director General of Police, the Director of Prosecution, State of Maharashtra, and the Superintendent of Police of each of the districts in the State of Maharashtra, so that all the concerned police personnel dealing with such offences are appraised of the directions for effective implementation of the POCSO Act and the Rules as noted above. It be also forwarded to the Member Secretary, Maharashtra State Legal Services Authority, who shall forward the same to the Secretary of each District Legal Services Authority within the State.

22. Disposed of in the aforesaid terms. No costs.

(G. S. KULKARNI, J.)

(CHIEF JUSTICE)