

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.61636 of 2021

Arising Out of PS. Case No.-983 Year-2019 Thana- KOTWALI District- Patna

Vikash Kumar Pankaj, Son of Late Kamlesh Singh, Resident of Flat No. -09 (Old), Block No. -3, Mohalla Adalatganj, Near Talab Patna High Court Colony, P.S. - Kotwali, District - Patna.

... .. Petitioner/s

Versus

1. The State of Bihar
2. Xxxxx

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. P.N. Shahi, Sr. Advocate Mrs. Archana Sinha, Advocate
For the State	:	Mr. Pranav Kumar, APP
For the O.P.No.2	:	Mr. Sanjeev Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA

C.A.V. JUDGMENT

Date : 30-09-2022

Heard Mr. P.N Shahi, learned senior counsel along with Mrs. Archana Sinha, learned counsel for the petitioner, Mr. Pranav Kumar, learned counsel for the State and Mr. Sanjeev Kumar, learned counsel for the opposite party no.2.

2. The present petition has been filed for quashing the order of cognizance dated 03.04.2021 passed in Special (POCSO) Case No. 231 of 2019, arising out of Kotwali P.S. Case No. 983 of 2019, registered under Sections 341, 342, 448, 354, 354 A, 354 B, 506 of the Indian Penal Code and Sections 6 and 8 of the Protection of Child from Sexual Offences Act



(hereinafter referred to as the POCSO Act), whereby and whereunder the learned Additional Sessions Judge-VI-cum-Special Court POCSO, Patna has taken cognizance for the offences under Sections 342, 354 A, 506 of the Indian Penal Code and Section 8 of the POCSO Act.

3. Brief facts of the case are that the minor informant got registered the aforesaid FIR stating in her written report that she and her sister were alone in the house on 01.11.2019 as her parents went to Deo (Aurangabad) on the occasion of *Chhath* festival and the petitioner, her neighbour, entered into the house of the informant by pushing her. The petitioner tried to forcibly pull the informant inside the room and started touching her body parts inappropriately. She and her sister started shouting and when the persons nearby started coming to their house, then the petitioner fled away from the place and while leaving threatened them not to say anything to any person. After return of her parents on 06.11.2019, the informant told her mother about the occurrence in the night of 07.11.2019 and informed the police on 08.11.2019. She also stated that she was very fearful and for this reason she told about the occurrence quite late to her family members.

4. The matter was investigated and the statement of



the victim girl/informant was recorded under Section 164 Cr.P.C. wherein she stated that her parents had been gone to Aurangabad for performing *Chhath*. The petitioner who stays besides her quarter came to her house on 01.11.2019 and inquired about her from her sister and thereafter came to her room. He started touching her body parts. She became very fearful. Both of them started shouting. The neighbours came and then the petitioner fled away from there. He also threatened the informant that if she uttered a word to any one he would kill her.

5. During investigation, a protest petition was filed on behalf of the informant by her father submitting that the investigating officer has not been doing the investigation properly. Thereafter, the final form has been submitted along with the case diary with noting 'lack of evidence' and thus the petitioner was not sent up for facing trial.

6. Considering the material on record, the protest petition filed on behalf of the informant and also the rejoinder to it filed by the petitioner, learned Special Court took cognizance in the matter as already noted above. Aggrieved by the order of cognizance dated 03.04.2021, the petitioner has preferred the present petition for quashing of the cognizance order.



7. The impugned order has been assailed mainly on two grounds - on the facts of the case and on legal point.

It has been submitted by the learned senior counsel for the petitioner that there are a number of discrepancies and absurdities in the case of the informant. For an occurrence dated 01.11.2019, the FIR has only been lodged on 08.11.2019. From the perusal of the FIR, statement under Section 164 Cr.P.C. and the case diary, it is apparent that none of the provisions of POCSO Act are applicable against the petitioner. The statement of the victim in her written report, under Section 161 Cr.P.C. and under Section 164 Cr.P.C. are contradictory to each other on certain points. The learned court failed to take into consideration the fact that none of the independent witnesses has supported the case of the informant and the Call Detail Report of the mobile number of the petitioner shows he was not present at the spot. The sister of the victim girl went to visit a super store with the wife of the informant on the next day of alleged occurrence which shows everything was normal during those days. Further, the learned trial court has not considered the anomalies in the case of the informant. The victim girl was medically examined on 20.11.2019 and the medical report shows that there was no violence mark seen either on the private part or body of the



victim. The victim has cast aspersion over the investigation by filing a protest petition, but it is with the motive to harass the accused. Even the birth certificate of the victim girl is a fraudulent document and thus contradictory to radiological report, Section 164 Cr.P.C. and from the FIR.

8. The learned senior counsel for the petitioner has further submitted that it is a peculiar case in which the police submitted final form and did not sent up the petitioner for facing trial, still the learned trial court on the basis of protest petition, written report of the victim and her statement recorded under Section 164 Cr.P.C. took a view that there was sufficient material to proceed against the accused against whom the allegation has been made by the victim. The learned senior counsel has further submitted that the learned trial court has neither granted permission to Special PP nor to the APP to argue on the acceptance of the final form. The learned trial court has also not recorded the statement of the victim girl on protest and it has not examined the witnesses before taking cognizance. Though the court has taken cognizance exercising its power under Section 33 (1) of POCSO Act, yet it has not taken into consideration the other statutory provisions of law. The learned senior counsel has further submitted that once a protest petition



has been brought on record, the same should have been converted into a complaint case. Since POCSO Act is a stringent statute, all safeguards provided to the accused must be followed in letter and spirit. If the learned Special Court treated the protest petition as complaint, it should have declared so and once the protest petition was made the basis for cognizance being taken then in that case, it should have proceeded in the manner a complaint case proceeds. The learned counsel further submits that though the protest petition was taken on record, it was not converted into a complaint petition and neither the victim girl was examined nor the witnesses were examined. Even the reply on protest filed by the petitioner was not considered by the learned trial court and it went on to take cognizance in the matter in violation of the principles of natural justice.

The learned counsel has also submitted that in this case, the learned trial court without supplying any documents and without either accepting or rejecting the final form and without considering the rejoinder on protest, has taken cognizance against this petitioner. On this aspect, the learned counsel placed her reliance on a decision of the Division Bench of this Court reported in **2022 SCC Online Pat 2069 (State of**



Bihar Vs. Md. Major) wherein it has been emphasized that procedural law, i.e., Cr.P.C. takes care of principles of natural justice and fair play in action while conducting the trial.

The learned senior counsel has submitted that the protest petition of the father of the informant was required to be treated as a complaint petition and placed reliance on the decision reported in in the case of ***2021 SCC Online Utt 507 (Goldy Rajiv Santhoji vs. State of Uttarakhand and others***

Thus, the learned senior counsel has submitted that the order of cognizance passed by the learned trial court is not sustainable and the same needs to be set aside and the proceeding taking place in Special (POCSO) Case No. 231 of 2019, arising out of Kotwali P.S. Case No. 983 of 2019, against the petitioner be quashed.

9. The learned senior counsel for the petitioner has further submitted that the learned court below has made a number of procedural lapses and such lapses would vitiate the whole trial.

10. Section 33 (9) of POCSO Act provides that subject to the provisions of this act a special court shall for the purpose of the trial of any offence under this act, have all the powers of a court of session and shall try such offence as if it were a court of



session and as far as may be in accordance with the procedure specified in the code of criminal procedure, 1973 for trial before court of sessions. But the learned Special Court has not followed the procedure of Cr.P.C. before taking cognizance on the basis of protest petition.

11. Further Section 35 (1) of POCSO Act provides that the evidence of the child shall be recorded within a period of thirty days of the special court taking cognizance of the offence and reason for delay, if any shall be recorded by the court.

The learned senior counsel for the petitioner has further submitted that the Special Court has committed this procedural lapse/mistake as it has not recorded the evidence of the victim girl till today. The learned counsel has placed reliance on the decision of the Supreme Court reported in ***ILR 2021 Kar 3469=2021 SCC Online Karnatka 12300 (Hanumantha Mogaveera vs. State of Karnataka by Women Police Station)***.

12. The learned senior counsel has also submitted that when the final form showing lack of evidence against the petitioner has been filed, the learned trial court could have either accepted the report of the police or rejected the same, but it has not chosen to do so. Further it has not taken recourse to Section



173 (8) of Cr.P.C. to direct the Investigating Officer to do further investigation and the same would not be construed as an act of the court in interfering with the jurisdiction of the investigating agency and placed her reliance on a decision reported in **2020 SCC Online Ker 7693 (Sreenivasan Vs. State of Kerala)**.

13. It has further been submitted on behalf of the petitioner that the learned trial court ignored the provisions of Section 34 (2) of POCSO Act regarding determination of age. The petitioner has raised objection regarding the age of the victim by filing of the rejoinder to the protest petition before the learned trial court, but the learned trial court has not considered the same and has taken cognizance without following the procedure under Section 34 (2) of POCSO Act. Further the learned court below has to ascertain the age of the victim girl within thirty days. In the present case, there has been objection to the age claimed by the victim since there are many contradictions, the victim stated her age as 13 years in the statement recorded under Section 161 and 164 of Cr.P.C., whereas certificate of age filed by her shows her age to be 15 years and the certificate has not been issued by the school first attended. Even the medical report shows incomplete fusion of



the bones and her age cannot be below 19 years. On this aspect of the determination of the age, learned counsel placed her reliance on the decision rendered in *Sreenivasan (supra)*.

14. The learned counsel for the opposite party no.2 has vehemently opposed the submission made on behalf of the petitioner. It has been submitted on behalf of the opposite party no.2 that the informant is herself the victim and is a minor and delayed lodging of the FIR has already been explained in the FIR itself. Considering the mental condition of the victim, a helpless child, who suffered a traumatic experience intruding upon her privacy, it sufficiently explain the delay in lodging of the FIR. Delayed lodging of the FIR in not all cases would cast doubt over the prosecution case when the same has been properly explained as held by the Hon'ble Supreme Court in the case of *Harbans Kaur Vs. State of Haryana (2005) 9 SCC 195*.

15. The learned counsel for the opposite party no.2 has further submitted that the father of the informant and the petitioner, both have been working in the High Court and the father of the informant has no motive to falsely implicate the petitioner and anything said on this point on behalf of the petitioner is just an eye wash and creating the false defence.

16. The learned counsel has further submitted that



the victim has been consistent in her statement regarding sexual assault by the petitioner in her written report to the police leading to the registration of the FIR, her statement recorded under Section 161 Cr.P.C. as well as her statement recorded under Section 164 Cr.P.C. She has been duly supported by the parents of the victim who would be the natural witnesses in the given circumstances and placing reliance on outsiders and their statements will be denying justice to the minor victim. The investigating officer was clearly biased and ignoring the statements of the victim and other witnesses he filed a final form for not sending up the petitioner for trial showing lack of evidence. So filing of the protest petition was in right earnest and the suspicion of the informant on this count came to be true when a final report was filed not sending up the petitioner as an accused to face trial.

17. The learned counsel has further submitted that the medical report has clearly mentioned that the age of the victim girl is between 14-15 years and even from the birth certificate submitted by the victim, her date of birth is 11.03.2005 and thus this also supports and corroborates the medical report. Th petitioner is trying to dispute the age as a last resort and even this claim should fail.



18. The plea of alibi taken by the petitioner is not sustainable and so far as tower location of the mobile phone of the petitioner is concerned, the same was approximately 100 meters from the place of occurrence and this fact has been mentioned in the case diary at paragraph 90. So the presence of the petitioner at the given distance from the place of occurrence cannot be termed as 'presence elsewhere'. Moreover, the plea of *alibi* is based on physical impossibility of being at the scene of crime and so the distance is a very material factor. The learned counsel placed his reliance on the decision of the Supreme Court reported in **(2002) 1 SCC 315 (Munshi Prasad Vs. State of Bihar)**.

19. Talking about the behaviour of the sister of the victim, learned counsel has submitted that the wife of the petitioner very cleverly took her to some shop in a smart attempt to show normalcy and to create defence for her husband. The contention regarding absence of violence marks in medical report is concerned she was examined after lapse of 19 days. The learned counsel has further submitted that so far as the contention of the petitioner regarding not making any sexual overture against the victim is concerned, the act of the petitioner in touching the body of the victim in itself would come under



the purview of sexual assault under Section 7 of the POCSO Act since sexual intent is the most important ingredient under Section 7 of the POCSO Act. The learned counsel placed his reliance on the decision reported in **2022 (1) PLJR (SC) 211 (Attorney General for India Vs. Satish)**. Thus, the learned counsel has submitted that there is no merit in the case of the petitioner for quashing the cognizance order and the same needs to be dismissed.

20. Perused the records.

21. I have given my thoughtful consideration to the different aspects of the matter including the rival submissions made on behalf of the parties.

22. The petitioner has invoked the inherent jurisdiction of this Court under Section 482 Cr.P.C. while challenging the order of cognizance and the proceeding taking place in the learned trial court. Section 482 Cr.P.C. provides that in order to prevent abuse of process of any court or otherwise to secure the ends of justice, this inherent power could be exercised. The Supreme Court in the case of **State of Haryana and Others Vs. Bhajan Lal and Others, AIR 1992 SC 604**, has enumerated certain guidelines based on certain instances in which the prosecution could be quashed :-

“(1) Where the allegations made in the first



information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and



continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

23. Further, the Supreme Court in the case of ***Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi, AIR 1976 SC 1947*** and ***Madhavrao Jiwagi Rao Sciendia Vs. Sambhajirao Chandiojirao Angre, AIR 1988 SC 709*** has held that the Court would not go into the disputed questions of facts while exercising its power under Section 482 Cr.P.C. It has no jurisdiction to examine the correctness or otherwise of the allegation.

24. Having regard to the facts of the present case, as already discussed, the contention of the petitioner is two fold; firstly he has challenged the cognizance order on the basis of facts in support of his contention and secondly, on legal aspect of the matter. The petitioner has pointed out a number of factual discrepancies in the case of the prosecution as well as procedural lapses by the learned trial court, but I am afraid these



contentions disputing and challenging the facts and procedure could not be taken into consideration by this Court as the disputed question of facts would not be looked into by this Court while exercising the power under Section 482 Cr.P.C. However, the petitioner is at liberty to raise these issues before the learned trial court as and when the occasion arises and on this point, I can quote with advantage the decisions of the Supreme Court *Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi*, AIR 1976 SC 1947 and *Madhavrao Jiwagi Rao Sciendia Vs. Sambhajirao Chandiojirao Angre*, AIR 1988 SC 709. So, the contentions raised in this regard do not need further discussion.

25. Second aspect of the submission of the petitioner is that the learned trial court erred when it took cognizance on the basis of protest petition filed by the father of the minor informant.

26. Section 33 (1) of POCSO Act provides (plain section) a special court may take cognizance of any offence without the accused being committed to it for trial upon receiving a complaint of facts which constitute such offence or upon a police report of such facts.

27. It is obvious from the plain reading of this



section that the learned trial court could have proceeded on the basis of complaint made to it. Now, in the present case, the learned trial court has treated the protest petition as complaint petition without following the procedure under Section 200 of Cr.P.C. The learned trial court could have accepted the police report, treated the protest petition as complaint petition and further taking recourse to Section 200 Cr.P.C. proceeded in the matter for recording the evidence of the informant and other witnesses and if it was satisfied that a prima facie case made out then it could have taken the cognizance in this case.

28. It was open for the learned trial court to proceed in the matter either on the basis of the police report either by accepting it and dropping the proceeding or rejecting or differing with the police report and to take cognizance on the basis of material collected by the police during investigation. Then recourse was to treat the protest petition as complaint petition and thereafter recoding evidence on its basis and then to come to the conclusion that a prima facie case was made out. Another option which was open to the learned trial court was that if it found that the police investigation was not proper and inadequate, it could have ordered for further investigation. But in no case, it could have proceeded in the matter on the basis of



composite material, i.e., protest petition, written report of the victim and the statement under Section 164 Cr.P.C. recorded by the learned Magistrate. This makes the order impugned non-sustainable.

29. At this point, I want to clarify one thing on the point of contention that in case where the police has submitted a final report not sending up the accused to face trial, it is not necessary for the learned trial Judge to mention in express term that he is differing from the report of the police or not accepting the same or rejecting the same if it proceeds to take cognizance on the basis of material available in the police report. If the learned trial court proceeds to take cognizance without stating anything regarding acceptance, rejection or difference with the police report, the stand taken by it whether it takes cognizance or drops the proceeding would by implication make its view clear and it is not necessary for the learned trial court to say so in express words.

30. While taking cognizance, the learned trial court has, though, referred the material placed before him by the Investigating Officer, i.e., written report of the informant as well as her statement recorded under Section 164 Cr.P.C. nonetheless, it proceeded to take cognizance on the basis of



above-noted materials and also on the basis of facts stated in the protest petition filed by the father of the informant. The learned trial court would have been justified if it would have proceeded only on the basis of material collected during investigation by the police or if it were to reject the police report, on the basis of protest petition by the recording statements under Section 200 Cr.P.C.

It could also be said that the learned trial court might have proceeded in the belief that it was taking cognizance only on the basis of material collected during investigation by the police differing from the report submitted by the Investigating Officer and have not considered the protest petition at all and has not relied upon it while passing the order. But such interpretation would always be debatable.

31. So on the plain reading of the impugned order, I find that the learned trial court committed an error on record when it took cognizance against the petitioner in a composite manner relying both on the protest petition as well as material collected during investigation.

32. Hence, the order of cognizance dated 03.04.2021 is not sustainable in the eyes of law and is quashed and set aside. The matter is remitted back to the learned trial



court for taking decision afresh in accordance with law as well as in the light of observations made here-in-above. The learned trial court would keep the mandate of law in mind and take all necessary steps for expeditious disposal of the matter in a time bound manner.

However, it is made clear that this Court has interfered with the impugned order merely on technicalities and illegality committed by the trial court. This order shall not be treated to be an order expressing any opinion on the merits of the case.

33. The petition stands allowed.

34. Let the trial court records be returned forthwith.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	A.F.R
CAV DATE	13.09.2022
Uploading Date	01.10.2022
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