

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO. 851 OF 2023

DARSHAN
PRAKASH
PATIL

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'X' is minor through her mother
and natural guardian

...Applicant

Versus

State Of Maharashtra

...Respondent

Mr. B. K. Barve and Ms. Sonali Patil i/b B.K. Barve and Co.
for the Applicant.

Ms. Anamika Malhotra, APP for the State.

CORAM: M. S. KARNIK, J
DATED: AUGUST 2, 2023

ORAL ORDER:-

1. Heard learned counsel for the applicant and learned
APP for the State.

2. This is an application filed under Section 482 of the
Code of Criminal Procedure, 1973, (for short "Cr.P.C.") by
the victim for a direction to the trial Court to conduct the
trial on a day to day basis against the accused. The First
Information Report (FIR) No. 206 of 2021 was registered
under Sections 376(2)(f), (n), 376(3) and 354A of the
Indian Penal Code (IPC) read with Sections 4, 5(m), (n), 6,
10, 11(iii) and 12 of the Protection of Children from Sexual

Offences Act, 2012 (for short "POCSO Act").

3. The victim was 13 years of age when the aforesaid offence is alleged to have taken place. The offence is alleged to have been committed by the paternal uncle of the victim. The accused is released on bail by order dated 09/10/2021.

4. It is contented in this application that the paternal uncle of the victim is pressurising the victim and the mother of the victim to withdraw the case and also giving threats to the victim. In paragraph 5 of the petition, it is stated by the applicant that the victim is facing hardship and harassment at the instigation of the accused person who is on bail. The victim is a minor school-going girl who is presently in 10th standard.

5. It is specifically averred in the application that the victim and her mother want to shift to some other location to avoid harassment and social impact on them as a result of ongoing proceedings. The relief prayed for in this application is that apart from the trial be heard

expeditiously, the statement of the victim be recorded under Section 35 of the POCSO Act at the earliest. It is also prayed that the deposition of the mother be recorded by the trial Court at the earliest.

6. In paragraph No. 7 of the application, it is averred thus:

"The Applicant respectfully submit that the present application is filed before this Hon'ble Court with request with folded hand that the justice should be given to victim girl by recording her statement and allow her to leave the location for better future and higher education by an appropriate order of this Hon'ble Court with directions to the Ld. Sessions Court, Belapur, Navi Mumbai to expedite the trial on day to day basis by recording the statement of victim minor girl and her mother and rest of the proceedings will be conducted in their absence through the public prosecutor as well as the advocate appointed by the Applicant to protect her interest."

7. Learned APP opposed the application. It is submitted by her that the Special Courts under the POCSO Act are overburdened with work and therefore, no priority should be given to the applicant. Learned APP relied upon the decision of the Supreme Court in the case of **M. Gopalakrishnan and Ors. Vs. Pasumpon Muthuramalingam and Anr.**¹ in support of her

¹ 2022 LiveLaw (SC) 298

submission. Learned APP is conscious of the sensitivity of the matter but her submissions are in the context of burden of cases the Special Court is facing. It is contended that unwarranted priority given to a particular case over and above other cases pending before a Special Judge will result in sufferance to other cases which are equally sensitive for no reason or no fault of litigants involved therein. It is further submitted that the question of recording the statement of the victim under Section 35 of the POCSO Act will arise only if the Special Court has taken cognizance of the offence and in the present case there is nothing on record to indicate that the Special Court has taken cognizance. The mere filing of the charge-sheet before the Special Court will not amount to taking cognizance of the offence in the submission of learned APP. She, therefore, submits that the stage of Section 35 of the POCSO Act has not yet arisen to entertain the request made by the applicant.

8. Heard. The victim at the time of the alleged assault was 13 years of age. The FIR was registered on

22/06/2021. The victim prays that the trial be expedited or at least her statement and her mother's deposition be recorded so that she can leave her present location and move out of the area, for her and her mother's safety as the accused who is her paternal uncle is residing in the very same locality. Learned counsel for the applicant submitted that he will be satisfied if the statements of the victim and her mother are recorded at the earliest by the Special Court.

9. In the context of the relief prayed, a reference to Section 33 of the POCSO Act is necessary. Section 33 is a part of Chapter VIII of the POCSO Act which provides for the procedure and powers of the Special Court in recording evidence. Section 33 reads thus:

"(1) 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.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those

questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.--For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) 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 (2 of 1974) for trial before a Court of Session."

(emphasis mine)

10. The object of Section 33 is laudable as the section provides that the trial has to be conducted in a child friendly atmosphere. The intention obviously is that the trial should not result in adding to the trauma which the child has already suffered but to proceed in a manner which is comforting and least stressful to the child. A provision in the nature of sub-section (8) of Section 33 is made to direct payment of compensation for the physical or mental trauma suffered in addition to the punishment.

11. Section 35 of the POCSO Act, in Chapter VIII, provides for the period within which the evidence of a child is to be recorded. The same reads thus:

"(1) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.

(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence."

12. The Hon'ble Supreme Court in the case of **Alakh Alok**

Srivastava Vs. Union of India and Ors.² had an occasion to deal with Sections 33 and 35 of the POCSO Act. The Hon'ble Supreme Court in paragraph No. 10, in the context of the POCSO Act has observed thus:

"10. The POCSO Act has been legislated keeping in view the fundamental concept under Article 15 of the Constitution that empowers the State to make special provisions for children and also Article 39(f) which provides that the State shall in particular direct its policy towards securing that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. The Statement of Objects and Reasons of the Act indicate the focus for reduction of child abuse and protection of children from the offences of sexual assault, sexual harassment and pornography, etc. The relevant part of the Statement of Objects and Reasons of the POCSO Act is extracted below:-

"3. The data collected by the National Crime Records Bureau shows that there has been increase in cases sexual offences against children. This is corroborated by the 'Study on Child Abuse: India 2007' conducted by the Ministry of Women and Child Development. Moreover, sexual offences against children are not adequately addressed by the existing laws. A large number of such offences are neither specifically provided for nor are they adequately penalized. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences Against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.

2 Writ Petition (C) No. 76 of 2018

4. It is, therefore, proposed to enact a self contained comprehensive legislation inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process incorporating child friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.””

13. After dealing with the provisions of Sections 33 and 35 of the POCSO Act, the Supreme Court in paragraph No. 17 has observed as under:

“17. The aforesaid provisions make it clear as crystal that the legislature has commanded the State to take various steps at many levels so that the child is protected and the trial is appropriately conducted.”

14. I am conscious of the fact that the Special Courts are burdened with similar such cases and am mindful of the observation of the Hon’ble Supreme Court in the case of **M. Gopalakrishnan and Ors.** (supra), relied upon by the learned APP, the relevant observation reads thus:

“Looking to the nature of the order passed by the High Court, we are not inclined to grant leave to appeal in this matter but feel impelled to observe that ordinarily, before passing any such order for expeditious proceedings in a particular case (which might appear to be rather of innocuous nature), it would be appropriate for the higher Court to appreciate that any such order for one case, without cogent and extremely compelling reasons, might

upset the calendar and schedule of the subordinate Court; might result in assigning an unwarranted priority to that particular case over and above other cases pending in that Court; and progression of such other cases might suffer for no reason and none of the fault of the litigants involved therein.

Moreover, such petitions, even when moved before the higher Court, need to be examined from all angles. It has transpired in the present matter that the said petition was filed by the complainant without even joining the accused persons as parties and the High Court had passed the impugned order while being not informed of the other relevant facts, including pendency of the revision petitions in the same High Court, as filed by the accused persons."

15. The accused has not been impleaded as party-respondent in this application. However, in light of the order I propose to pass, which does not cause any prejudice to the accused, I do not consider it necessary to insist upon the presence of the accused. Hence, I proceed to dispose of this application on the basis of the submissions advanced by the learned counsel for the applicant and learned APP.

16. It is the applicant's case that she wants to shift from her present location to avoid social impact and harassment, as a result of the pending trial for the prospect of better future and higher education. In my opinion, cogent reasons exists for expediting recording of the statement of the child

and the deposition of her mother. I am conscious of the fact that the Special Court is overburdened with work but circumstances exists necessitating issuance of appropriate directions in the present facts. In the application, it is averred that the statement of the minor victim and her mother be recorded at the earliest and the rest of the proceedings be conducted in their absence through the public prosecutor as well as the advocate appointed by the applicant to protect their interest.

17. Section 33(1) of the POCSO Act provides that the 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. The charge-sheet has been filed. In such circumstances, if the Special Court has already taken cognizance in terms of Section 33(1) of the POCSO Act, in the peculiar facts of this case stated in the application, the statement of the child witness will undoubtedly be recorded within the period stipulated under Section 35 of the POCSO Act. In any case, the mandate of

Section 35 needs to be adhered to once the Special Court has taken cognizance of the offence.

18. I have no manner of doubt that the Special Judge will bear in mind the intent of Section 33(1) and Section 35 of the POCSO Act and adhere to the mandate of Section 35 if it has taken cognizance of the offence in terms of Section 33(1). The Special Court is requested to record the deposition of the child's mother expeditiously.

19. In the light of the submissions made by learned counsel for the applicant, the directions to the Special Court are limited to recording the statement of the child in view of Section 35 of the POCSO Act and the deposition of the mother expeditiously.

20. I am not inclined to issue any direction for expediting the trial in view of the averment of the applicant in paragraph No. 7 of the application. It is open for the applicant to make a request to the trial Court, bringing to its notice the circumstances necessitating the expeditious disposal of the matter and seeking protection if the victim

and her mother are facing harassment from the accused. Needless to say that if such an application is made, the trial Court shall consider the same on its own merits.

21. The application is partly allowed in the above terms.

(M. S. KARNIK, J.)