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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.REV.P. 1289/2023**

VICTIM N

.....Petitioner

Through: Appearance not given.

versus

THE STATE AND ORS

.....Respondents

Through: Mr. Satish Kumar, APP for the State
with IO/SI Sangeeta, SI Sukhchain,
P.S. Nihal Vihar
Mr. Kanhaiya Singhal, Mr. Prasana,
Mr. Ajay, Mr. Abhishek Prakash, Mr.
Pulkit Jolly Aditya, Ms. Parul
Sharma, Ms. Ankita Makan and Mr.
Rishabh, Advocates for R-4

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

21.02.2025

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**CRL.REV.P. 1289/2023 & CRL.M.A. 32964/2023 (Seeking stay of the
summon dated 22nd November, 2023)**

1. The instant revision petition under Sections 397 and 401 of the Code of Criminal Procedure, 1973 (hereinafter “CrPC”) (now Section 438 and 442 of the Bharatiya Nagarik Suraksha Sanhita, 2023) has been filed on behalf of the petitioner seeking setting aside of the order dated 17th November, 2023 (hereinafter “the impugned order”) passed by the learned ASJ (FTFC) (POCSO)-02, West, Tis Hazari Courts, Delhi, wherein, the



charge under Section 21 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter “POCSO Act”) was framed against respondent no. 4/co-accused.

2. It is the case of the prosecution that on 2nd June, 2019, the victim/petitioner was found lying at the road side near Nilothi Extension Sant Kabeer School and she was not in a condition to talk. Thereafter, she was taken to SGM Hospital by the police officers, in a CAT ambulance. Due to her unfit condition, no statement had been recorded by the police officer on the relevant day. Thereafter, following the victim’s treatment and statement under Section 164 of the CrPC on 19th November, 2019, the police filed chargesheet against the accused namely Sandeep on 22nd November, 2019. Pursuant to the same, the Court concerned framed charges against the said accused on 7th October, 2020. Subsequently, considering the role of co-accused namely Payal, supplementary chargesheet was filed on 7th January, 2020, cognizance of which was taken and charges against the said co-accused was framed by the Court concerned on 11th September, 2020.

3. Consequently, on 23rd January, 2023, the evidence of the victim was recorded and the counsel for the accused had been given an opportunity to cross-examine. Thereafter, during the cross-examination, the Court concerned observed active participation of another accused namely Golu @ Kritika Malik and accordingly framed charges against her under Section 21 of the POCSO Act vide order dated 17th November, 2023. Further, vide summons dated 22nd November, 2023, the victim was called to further testify in light of the newly arrayed accused. Being aggrieved by the order dated 17th November, 2023 and summons dated 22nd November, 2023, the



petitioner has filed the instant petition seeking setting aside of the same.

4. Learned counsel appearing on behalf of the petitioner submitted that the Court concerned, while framing the charges against respondent no. 4, has not properly considered the materials on record and the statements of the witnesses while framing the charge for the offence punishable under Section 21 of the POCSO Act. It is submitted that there are sufficient materials to prove the charges against respondent no. 4 under Section 16 of POCSO Act and thus, it is prayed that the charge under Section 16 of the POCSO Act may be framed against respondent no. 4 instead of Section 21 of the POCSO Act. In support of his arguments, learned counsel for the petitioner referred to the cross examination of the victim and the response given by the victim, which are quoted hereinbelow:

“...Court Question: Did he commit rape upon you anywhere else also? Ans. He committed rape upon me for the first time in the flat where we resided in Delhi. He used to commit rape upon me after every 20-25 days. He committed rape upon me in the hotel room at Ahmedabad. I used to sleep on the separate small mattress meant for the maids on the floor and there was a bid bed for Golu and Sandeep. Golu was also in the room and she knew that the accused Sandeep is committing rape upon me.

Court Question:- Who did this to you and what else did they do? Ans. Sandeep used to insert syringes but Golu and Payal also used to be there. He used to do a lot of jabardasti with me. Whenever I would not listen to something he would get angry and then Payal and Golu would tell me to calm down saying ‘woh tera bhaiya hai’ When I used to be sleeping Sandeep used to come to my room and hug me and do galat kaam with me.

....It is correct that Sandeep, Payal and Golu were gaining success due to their videos. It is wrong to suggest that I was



gradually becoming jealous of the success of Sandeep, Payal and Golu. (Vol. I never cared about their career and their success never bothered me. However, Sandeep was a very short-tempered person and he used to force me to make videos and when I would say no he would get angry). It is wrong to suggest that I asked Sandeep for a raise in my pay. It is further wrong to suggest that Sandeep refused to hike my pay due to which I got angry. It is wrong to suggest that Sandeep never forced me to make any video or that I voluntarily enjoyed making videos with Sandeep and his family. I used to talk to my mother on phone. It was Payal's phone. (Vol. They never used to give me a holiday and used to tell me 'ki waha ja ke kya karegi, kaam karegi toh behtar hai')...."

5. Learned counsel for the petitioner also referred to the statement of the victim in MLC dated 4th June, 2019. During the arguments, he handed over the copy of the same before this Court which has been taken on record. He further referred to the contents of the FIR and also referred to the MLC dated 6th June, 2019. It is submitted that the aforesaid statement and the contents made in the FIR as well as the MLC clearly establish that respondent no. 4 has committed an offence of abetment of committing rape by the main accused which has been totally ignored by the Court concerned while framing the charge against respondent no. 4. Therefore, it is submitted that the learned Trial Court erred in framing charge under Section 21 of the POCSO Act whereas the learned Trial Court ought to have framed charge under Section 16 of the POCSO Act.

6. It is submitted that the learned Trial Court has been repeatedly calling the victim to testify at different instances and recently, she was summoned vide order dated 22nd November, 2023 to testify against the newly impleaded accused, i.e., respondent no. 4 herein against whom charges were



framed under Section 21 of the POCSO Act vide order dated 17th November, 2023.

7. It is submitted that Section 33 (5) of the POCSO Act prohibits repeated calling of the victim to testify and in the instant case, the victim has been called time and again, unnecessarily, despite the fact that she has given her statement under Section 164 of the CrPC earlier itself. It is further submitted that the same is against the settled position of law. Reliance in this regard has been placed on the judgment of a Coordinate Bench of this Court passed in ***Vikas v. State*, Crl. Mc. 1615/2020**.

8. Therefore, in view of the foregoing submissions, it is prayed that the instant petition may be allowed and the reliefs be granted as prayed for.

9. *Per contra*, learned counsel appearing on behalf of respondent no. 4 submitted that instant revision petition is nothing but a gross misuse of process of law and entire arguments are advanced by learned counsel for the petitioner are only on the basis of presumptions.

10. It is submitted that the plain reading of the statements which were referred and relied by learned counsel for the petitioner does not fulfil any ingredients of Section 16 of the POCSO Act. It is fairly conceded that respondent no. 4 is rightly charged under Section 21 of the POCSO Act as she had the alleged knowledge for committing an offence by the main accused person who is her husband.

11. It is submitted that there is a difference between having knowledge of any commission of an offence (Section 21 of the POCSO Act) and the abetment act of any person for committing the offence through another person. (Section 16 of the POCSO Act).

12. It is submitted that in view of the statutory provision and its mandate



as well as the evidence which have been vehemently relied upon by the learned counsel for the petitioner itself, no charge is made out against respondent no. 4 for the offence punishable under Section 16 of the POCSO Act.

13. It is submitted that the judgment which has been cited by learned counsel for the petitioner is not applicable to the facts of the present case. It is submitted that the learned Trial Court, to ensure fair trial, may call the prosecutrix for evidence and in the instant case since respondent no. 4 has been impleaded as an accused at this stage, it is necessary to call the victim to testify. Therefore, the instant revision petition, being devoid of any merits, is liable to be dismissed.

14. Thereafter, Mr. Satish Kumar, learned APP for the State submitted that there is no illegality or error in the impugned order while framing the charge under Section 21 of the POCSO Act against respondent no. 4. It is submitted that the evidence and material which are vehemently relied by learned counsel for the petitioner does not disclose any offence committed by respondent no. 4 under Section 16 of the POCSO Act.

15. It is submitted that in view of the above facts and circumstances, there is no illegality in the impugned order and in the revisional jurisdiction, this Court has only limited scope to interfere in the order passed by the learned Trial Court, i.e., only when there is gross illegality or any gross jurisdictional illegality. It is submitted that the plain reading of the impugned order as well as the statements of the prosecutrix and other evidence on record does not reflect any material for framing the charge against respondent no. 4 under Section 16 of the POCSO Act. Therefore, taking into the consideration the entirety of the matter, the instant revision,



being devoid of any merits, is liable to be dismissed.

16. Heard learned counsel appearing on behalf of the parties and perused the impugned order passed by the learned Trial Court. This Court has also perused the contents made in the cross examination, statement given by the prosecutrix under the cross examination and the statement which has been relied by learned counsel for the petitioner in the two MLCs dated 4th June, 2019 and 6th June, 2019.

17. At the outset, it is pertinent to note that the petitioner has challenged the summons dated 22nd November, 2023 stating that the same is in violation of Section 33 (5) of the POCSO Act which prohibits repeated calling of the victim to testify.

18. Section 33 (5) of the POCSO Act does not operate as an absolute bar for recalling the child as a witness for re-examination. Although Section 33 (5) of the POCSO Act would not act as an absolute bar to recall the victim for re-examination as a witness, each case must be looked at in the context of its individual facts and circumstances.

19. Thus, the question which falls for this Court's consideration in the present case is whether in the exercise of its powers the learned Trial Court ought to have recalled the child/victim for re-examination as witness, keeping in mind the mandate under Section 33 (5) of the Act.

20. With regard to the above, it is stated that taking into consideration the contents made in the instant application as well as the fact that respondent no. 4 has been impleaded as a new accused and charge under Section 21 of the POCSO Act has been framed vide order dated 17th November, 2023, this Court does not find any merit in the petitioner's submission as the act of calling the victim to testify again does not amount to repeated calling,



rather, the same is *ex facie* necessary for the purpose of ensuring fair trial and to bring on record appropriate evidence.

21. It is noted that in light of the fact that a new accused has been arrayed as a party to the instant offence, it is in the interest of justice and to ensure fair trial to respondent no. 4 that the victim is called to testify. Furthermore, testimony of the victim *qua* the new accused is also required to determine the evidence as per the requirement of the trial.

22. Thus, this Court is of the view that the learned ASJ has not committed any error or illegality while summoning the prosecutrix/victim.

23. Moving to the second limb of the instant petition, the petitioner has challenged the order dated 17th November, 2023 by virtue of which charge under Section 21 of the POCSO Act has been framed against respondent no. 4 and it is contended that the same is an error of law as the material on record indicate that respondent no. 4 ought to be charged under Section 16 of the POCSO Act.

24. It is observed that *firstly*, there are allegations that respondent no. 4 was present in the room when she was asleep and had knowledge about the commissioning of an offence committed by her husband on the victim. *Secondly*, the victim travelled along with respondent no. 4, main accused i.e., husband and other family members to Ahmedabad. It is also alleged that she was bitten by respondent no. 4. This Court has also taken into consideration the arguments advanced by learned counsel for the petitioner that some injection has been given to the prosecutrix and respondent no. 4 was present at the relevant time, and also allegedly influenced the victim not to create hue and cry about the injection.

25. This Court has further perused the relevant portion of the FIR and



after taking into consideration the entirety of the matter, this Court does not find any allegations made by the victim regarding any abetment or addition of any act by respondent no. 4 which warrants invocation of Section 16 of the POCSO Act.

26. This Court is of the view that there is no material on record to satisfy the ingredients of Section 16 of the POCSO Act. There might be a possibility that respondent no. 4 had the knowledge about the commission of an offence as alleged but there is no material on record for *prima facie* satisfaction of this Court for framing of charge against respondent no. 4 for the offence punishable under Section 16 of the POCSO Act.

27. In view of the aforesaid discussions, this Court does not find any merit in the instant revision petition, and in light of the same, the impugned order dated 17th November, 2023 passed by the learned ASJ (FTFC) (POCSO)-02, West, Tis Hazari Courts, Delhi and the summons dated 23rd November, 2023 are, hereby, upheld.

28. Accordingly, the instant revision petition is dismissed along with the pending applications, if any.

29. It is made clear that the observations made hereinabove are for the sole purpose of deciding the instant petition and the same shall not be taken as an expression on the merits of the case pending before the Court concerned.

CHANDRA DHARI SINGH, J

FEBRUARY 21, 2025
gs/ryp/mk

Click here to check corrigendum, if any