



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23RD DAY OF FEBRUARY, 2022

PRESENT

THE HON'BLE MR. RITU RAJ AWASTHI, CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE SURAJ GOVINDARAJ

WRIT PETITION NO.2318 OF 2022 (GM-POLICE)

BETWEEN:

1. BIBI AYESHA KHANUM

2. DIVYA CHRISTINE

3. PENCHILAMMA

...PETITIONERS

(BY SRI. ROHAN KOTHARI, ADVOCATE)

AND:

1. UNION OF INDIA
THROUGH ITS SECRETARY
MINISTRY OF LAW AND JUSTICE
4TH FLOOR, A-WING SHASTRI BHAWAN
NEW DELHI-110001

2. STATE OF KARNATAKA
THROUGH ITS SECRETARY
HOME DEPARTMENT
VIDHANA SOUDHA
DR. AMBEDKAR VEEDHI
BANGALORE-560001
3. KARNATAKA STATE POLICE
THROUGH THE DIRECTOR-GENERAL
AND INSPECTOR GENERAL OF POLICE
NRUPATUNGA ROAD, BANGALORE-560001
4. KARNATAKA STATE LEGAL SERVICES AUTHORITY
1ST FLOOR, NYAYA DEGULA BUILDING
H. SIDDIAIAH ROAD, BENGALURU-560027

... RESPONDENTS

(BY SRI. KUMAR.M.N, CGC FOR R1;
SMT. VANI.H, AGA FOR R2 & 3;
SRI. SHRIDHAR PRABHU, ADVOCATE FOR R4)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO ISSUE DIRECTIONS TO RESPONDENTS TO ENSURE EFFECTIVE IMPLEMENTATION OF THE POCSO ACT, 2012 AND THE POCSO RULES, 2020 AND ETC.

THIS PETITION COMING ON FOR ORDERS THIS DAY,
SURAJ GOVINDARAJ J MADE THE FOLLOWING:

ORDER

1. Sri.M.N.Kumar, learned CGSC accepts notice for respondent No.1. Smt.H.Vani, learned Additional Government Advocate accepts notice for respondents No.2 and 3. Sri.Shridhar Prabhu, learned counsel accepts notice for respondent No.4.

2. The petitioners are before this Court seeking for the following reliefs:

- a. *Issue directions to Respondents to ensure effective implementation of the POCSO Act, 2012 and the POCSO Rules, 2020.*
- b. *Declare that Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules mandates that the child victim/parent/guardian/complainant as the case may be shall be informed through the issuance of a notice regarding any application for bail preferred by an accused person.*
- c. *Declare that Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules mandates that the legal representative of the child victim/parent or guardians/complainant as the case may be, is heard before granting of bail to the accused;*
- d. *Issue directions to the effect that all the relevant documents required for the victim/complainant/informant to effectively represent themselves during hearing of bail applications filed by the accused shall be provided to them by the concerned police or SJPU;*
- e. *Issue directions to all criminal courts to exercise their jurisdiction with a view to secure efficient and effective participation of child victims/their caregivers through their legal representatives at all stages of the judicial process;*
- f. *Issue directions to Respondents No.1 to 3 to ensure that the interests of child victims of sexual abuse/their families are protected with particular reference to Section 40 of the POCSO Act and Rule 4 of the POCSO Rules;*
- g. *Issue directions to the effect that in cases where child sexual offences have been perpetrated by a close family member, a notice regarding filing of bail application by an accused also be issued by the concerned police or SJPU the concerned Child Welfare Committee and a copy of such notice/information be also sent to Respondent No.4;*

- h. Direct Respondents No.3 and 4 to develop a mechanism to monitor compliance of Section 40 of the POCSO Act, Rule 4 of the POCSO Rules;*
- i. Pass any other orders/directions that this Hon'ble Court deems fit in the circumstances of the present case.*

3. In this Public Interest Litigation, the petitioners are seeking for effective implementation of the Protection of Children From Sexual Offences Act 2012 ('POCSO Act' for short) and the Protection of Children from Sexual Offences Rules, 2020 ('POCSO Rules' for short) as also the amended provisions of Section 438 and 439 of the Code of Criminal Procedure, 1973.

4. The grievance of the petitioners is that in prosecution for offences under the POCSO Act when the accused were to move the Court for grant of bail, the *defacto* complainant and/or caregiver of the minor victim are not informed of the application filed for bail, thereby an opportunity to the complainant/victim or informants/caregiver to place their contentions and/or oppose an application for bail is denied.

5. The petitioners are stated to be mothers of children who have been subjected to sexual offences punishable under the POCSO Act, the petitioners being the complainants or informants in the complaints registered under the provisions of POCSO Act, the petitioners being the complainants or informants in the complaints registered under the provisions of the POCSO Act have gone through an harrowing time inasmuch as in the proceedings which had been initiated against the accused, the petitioners were not provided with an opportunity to object to the same and as such the accused having been granted bail without consideration of any objections that they had. It is with an intention that similar situations are not faced by the mothers who are the complainants or informants and/or other complainants and informants in POCSO matters that the present petition has been filed.

6. It is the contention of the petitioners that any orders that may be passed in the present petition may not enure to the benefit of the petitioners inasmuch as in respect of the complaints filed by the petitioners, where bail had already been granted any directions passed in favour of the petitioners would have no effect on the said orders already passed.

7. Sri. Rohan Kothari, learned counsel for the petitioners would submit that:

7.1. POCSO Act is a special enactment for protection of children from offences of sexual assault, sexual harassment, etc. which constitutes a heinous offence and in such circumstances, it is required that when a bail application of an accused is being considered, the complainants/victims and or caregivers of the victims be made aware of such an application being filed so as to

enable them to appear in the said proceedings and oppose application for bail;

7.2. Criminal Law Amendment Act, 2018 has amended Section 439 by including Section 439(1)(A) which has come into effect from 20.04.2019 and in terms thereof, a Court while considering an application for bail, is required to issue notice not only to the State, the *dejure* complainant but also to the *defacto* complainants so as to provide them with an opportunity to place their objections.

7.3. By relying upon Section 40 of the POCSO Act he submits that it is a provision made to enable the victim child to avail legal assistance and if they are not able to afford a legal counsel, the Legal Services Authority is obligated to provide such legal assistance. Legal representation and assistance is required even at the stage of consideration

of bail application, it is not restricted to the stage of trial or arguments in a proceedings.

7.4. By way of Criminal Law Amendment Act, 2018, Section 376(3), 376(ab), (da), (db) of the Indian Penal Code have been amended by which offences as regards women under 16 years and/or 12 years are made punishable. It is on that basis that he submits that the provisions of Section 439(1-A) which are applicable to offences under Section 376 are also to be made applicable to offences under the POCSO Act.

7.5. On the basis of the above he submits that necessary directions are required to be issued by this Court for effective implementation of the POCSO Act and Rules to the courts handling matters relating to offences under the POCSO Act, Police Stations more particularly the Special

Juvenile Police Units (SJPU) as also the Prosecutors.

7.6. In similar Public Interest Litigation having been filed before the High Court of Judicature at Bombay, directions have been issued which he submits is required to be issued in the present matter also.

8. Shri M G Kumar, Learned Counsel for Respondent No.1- Union of India, submits that most of the directions are sought for against the State Authorities and not against the Union, he however submits that the Union will comply with any directions that may be issued in this regards.

9. Ms. Vani, learned Additional Government Advocate, submitted that the State Authorities are issuing notices to the complainant in respect of the aforesaid offences and as such following the mandate of law. In view of the same, there may not be a requirement for issuance of any

fresh directions. However, directions if any issued will be followed by the State and its authorities.

10. Heard Shri Rohan Kothari, learned counsel for the Petitioners, Shri M.G. Kumar, learned Counsel for the Respondent No.1- Union of India and Ms. Vani, learned AGA for Respondent No. 2 to 4 the State authorities.

11. Section 439(1-A) is reproduced hereunder for easy reference:

(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 (45 of 1860).

12. Section 40 of the POCSO Act reads as under:

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:

PROVIDED 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.

13. The amended Provisions of Sections 376(3), 376(AB), (DA), (DB) of the Indian Penal Code

376(3) *Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:*

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.

376 (AB) Punishment for rape on woman under twelve years of age

Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

376 (DA) Punishment for gang rape on woman under sixteen years of age

Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

376 (DB) Punishment for gang rape on woman under twelve years of age

Where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

14. None can have any doubt that offenses under the POCSO Act are heinous in nature and are more often than not committed by depraved persons.
15. The benefit of Article 21 of the constitution is not only available to the accused but also to the victims and their families of any criminal offence. For an orderly society to exist it is but required that the victims of criminal offences more

particularly heinous offences have a say in the criminal prosecution of the accused.

16. Though the prosecution of such offences rests with the State, who is to act impartially, the prosecution system is overburdened, many a time prosecutors not having been appointed, leading to inordinate delay. If a victim or complainant wants to and can effectively assist the prosecution, the same is required to be permitted, albeit with the caveat that the prosecutor would always be in charge of the prosecution and would be the deciding authority as regards the mode and manner of conducting of the prosecution. For this to happen it is essential that the complainant/Victim is aware of the proceedings in court.

17. We have perused the Judgment of the High Court of Judicature at Bombay in PIL No.5/2021 (**Arjun Kishanrao Malge -v- State of Maharashtra and Others** dated 08.04.2021), as also the

judgement of the Hon'ble Delhi High Court in ***Reena Jha v- Union of India (W.P. (C) 5011/2017***). The Division Bench of the Hon'ble High Court of Judicature at Bombay as also the Single Judge of the Hon'ble High Court of Delhi have extensively dealt with this matter and issued directions which in our opinion could also be issued by this Court. Hence, we issue the following directions:

17.1. The Investigation officer or the SJPU shall inform the Victim's parents/caregiver/guardian as also the legal counsel if appointed, about any application for bail or any other application having been filed by the accused or the prosecution in the said proceedings.

17.2. The public prosecutor shall serve a copy of any application or objections to be filed in the said proceedings on the Victim's parents/caregiver/guardian as also the legal

counsel if appointed and issue notice of hearing of such application on them, along with all relevant documents and records necessary for their effective participation in the proceedings, in this regard the prosecutor is entitled to take the assistance of the Investigating Officer or the SJPU and file necessary proof of service of copies and notice of hearing. In the unlikely event of service not being effected it shall be the duty of the Prosecutor to inform the reasons in writing to the relevant court.

17.3. The Accused or the counsel for the accused shall serve a copy of any application or objections to be filed in the said proceedings on the Victim's parents/caregiver/guardian as also the legal counsel if appointed and issue notice of hearing of such application on them, along with all relevant documents and records necessary for their effective participation in the proceedings. The

Accused or the Counsel for the Accused to file necessary proof of service of copies and notice of hearing. In the unlikely event of service not being effected it shall be the duty of the Accused or Counsel for the Accused to inform the reasons in writing to the relevant court.

17.4. In the event of the accused being a close family member or an acquaintance of the family, in addition to the above a copy of any application or objections to be filed in the said proceedings shall be served on the jurisdictional Child Welfare Committee (CWC) and issue notice of hearing of such application on CEC, along with all relevant documents and records necessary for their effective participation in the proceedings;

17.5. The concerned 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 or though issued has not been served, 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 Victim's parents/caregiver/guardian or legal counsel.

17.6. Despite service of the above notice, if none were to appear, the Court may proceed further or issue a fresh notice, as the Court may deem fit and proper, considering the interest of justice.

17.7. When the proceedings under the POCSO Act also involve offences under 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).

17.8. Whenever an accused who is charged under Sections 376(3), 376-AB, 376-DA or 376 DB of the IPC or the provisions of the POCSO Act, moves an application for bail be it regular, interim, transit or any other classification, notice shall be issued by the Accused to the Investigating officer, SJPU, Public Prosecutor as also any counsel on record for the victim/complainant/informant;

17.9. The victim/complainant/informant who appears before the Court may be represented by own counsel or by a counsel appointed by the Karnataka State Legal Service Authority or the concerned District Legal Services Authority/Taluka Legal Services Authority.

17.10. The state Government to provide for sufficient funds in order to make payments to the counsel so appointed.

17.11. On service of notice on the Victim's parents/caregiver/guardian as also the legal counsel, they are to be informed about the protection available under Witness Protection Scheme, 2018 and enquire if they require any such protection, if there is a request made for police protection, the same shall be considered and granted in terms of the Witness Protection Scheme 2018. In the event of information being provided by a whistleblower necessary protection to be provided in terms of The Whistle Blowers Protection Act, 2014.

18. The Registrar General is directed to forward a copy of this order

18.1. to all Sessions Judges and Special Court Judges (POCSO Court) in the State of Karnataka for due compliance.

18.2.to the Director Karnataka Judicial Academy,
to incorporate the above directions in the
concerned training programs.

18.3.to the Director-General of Police, State of
Karnataka, who in turn is directed to
forward it to all Station House officers,
Special Juvenile Police Units and all
concerned with offences under the POCSO
Act in the Police Department. The Director
General of Police, State of Karnataka is also
directed to get conducted necessary
programs to sensitize the police personnel
and train them to comply with the above
directions. The Director-General of Police,
State of Karnataka is also directed to set up
a suitable system for monitoring and
reporting on the compliance of the above by
the concerned police personnel.

18.4.to the Director of Prosecution, State of
Karnataka, who is in turn directed to

forward the same to all prosecutors in the state with a direction to them to comply with this order.

18.5.to the Member Secretary, Karnataka State Legal Services Authority who in turn is directed to forward it to all District Legal Services Authority Officers and Taluka Legal Services Authority Officers within the State of Karnataka with a further direction to make available legal aid whenever requested, free of cost.

19. Writ Petition stands disposed with above directions

**Sd/-
CHIEF JUSTICE**

**Sd/-
JUDGE**

In