

THE HON'BLE CHIEF JUSTICE THOTTATHIL B. RADHAKRISHNAN
AND
THE HON'BLE JUSTICE ANIRUDDHA ROY

WITH

For the Appellant in CRA : 228 of 2020	Mr. Avik Ghatak Mr. Saibal Krishna Dasgupta ... Advocates.
For the Appellant in CRA : 26 of 2020	Mr. Kushal Kumar Mukherjee, Ms. Rajnandini Das
For the State :	Mr. Rana Mukherjee..... Ld. APP
For the Legal Services Authority :	Mr. Shiv Shankar Banerjee Ms. Sanchita Barman Roy....Advocates
Ld. Amicus Curiae :	Mr. Sourav Chatterjee.....Advocate
Heard on :	09.03.2021
Judgment on :	06.04.2021

Thottathil B. Radhakrishnan, C.J. :

Is the victim a necessary party to an appeal, under Section 374 of Cr.P.C., from

conviction? Would such an appeal be defective in the absence of impleadment of the victim? If the answers to these two questions are in the negative, what is the procedure to be adopted?

2. CRA No. 228 of 2020 is an appeal against conviction and sentence.

The appellant was held guilty and convicted for offence punishable under Section 376(3) of the Indian Penal Code; hereinafter referred to as "I.P.C."; and Section 6 of the Protection of Children from Sexual Offences Act, 2012; for short, "POCSO Act". He was sentenced to undergo rigorous imprisonment for 20 years and to pay fine of Rs. 10,000/- and in default to undergo rigorous imprisonment for one year for the offence punishable under Section 376(3) of I.P.C. It was directed that the victim is entitled to get the said fine amount of Rs. 10,000/- if realized, in view of the second proviso to Section 357 of the Code of Criminal Procedure; for short, "Cr.P.C.". The department has noted that this appeal is defective as the victim has not been made party in this application (appeal).

3. CRA No. 26 of 2021 is also an appeal against conviction and sentence. The appellant was held guilty and convicted for offence punishable under Section 6 of the POCSO Act and was sentenced to undergo imprisonment for 10 years and to pay fine of Rs. 1 lac and in default to undergo simple imprisonment for 1 year. The Court below had directed that if the fine is realized, the said amount be paid to the victim in terms of Section 357 of Cr.P.C. In this appeal, the appellant has arrayed, among the respondents, a person described by name and disclosing that person's identity as the victim. On 08.03.2021, this Court recorded an order, inter alia, "One private person is impleaded as respondent no. 2. We are of the view that the impleadment of such person as respondent needs to be considered, on the point, whether it is to be permitted".
4. We heard the learned Advocates for the appellants in the two appeals, Advocate Sourav Chatterjee who assisted this Court as Amicus Curiae, Advocate Shiv Shankar Banerjee assisting from the West Bengal State Legal Services Authority and the learned Additional Public Prosecutor Mr. Rana Mukherjee. We also had the privilege to hear learned Senior Advocate Shekhar Basu, by way of advisory and assisting intervention.

5. We keep aside the provision made in the impugned judgment in CRA 228 of 2020 for payment of compensation under Section 357A of Cr.P.C. since payment of compensation under the Victim Compensation Scheme cannot be subjected to an appeal by the accused, be that person a convict or not.
6. Advocate Sourav Chatterjee referred to the provisions of Section 23, 24(5) and 33(7) of the POCSO Act to point out that there is an overwhelming legislative thrust to ensure protection of the victims. He also referred to the decision of the Hon'ble Supreme Court of India in *Nipun Saxena & Anr. Vs. Union of India & Ors.* reported as (2019) 2 SCC 703; in particular, paragraph 50.4 and 50.6. thereof; and to the decision of the Apex Court reported as (2020) 7 SCC 142 (*In Re:-Alarming Rise in the number of Reported Child Rape Incidents*). Reference was also made to the decisions of the Hon'ble Supreme Court in *Bhupinder Sharma Vs. State of Himachal Pradesh* reported as 2003 (8) SCC 551, *State of Punjab Vs. Ramdev Singh* reported as 2004 (1) SCC 421, *Lalit Yadav Vs. State of Chattisgarh* reported as 2018 (7) SCC 499, *Ravishankar Vs. State of Madhya Pradesh* reported as 2019 (9) SCC 689, *Sangitaben Shaileshbhai*

Datanta Vs. State of Gujarat reported as **2019 (14) SCC 522** and the decision of this Court in **Bijoy Vs. State of West Bengal** reported as **2017 SCC Online Cal 417**. We will deal with those precedents as we proceed.

7. The decision of the Apex Court in **Vishaka Vs. State of Rajasthan** reported as **1997 (6) SCC 241** and in **National Legal Services Authority Vs. Union of India** reported as **2014 (5) SCC 438** were cited by Advocate Sourav Chatterjee to state that the contents of international conventions and norms are significant for the interpretation of constitutional guarantees in absence of domestic law occupying the field and that Article 51 of the Constitution has to be read along with Article 253 of the Constitution and that in the absence of a contrary legislation, municipal courts in India would respect the Rules of International Law.
8. Advocate Shiv Shankar Banerjee made reference to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015; for short, "JJ Act, 2015"; in particular Section 3(xi) of that Act. He further submitted that the Schemes framed by National Legal Services Authority; for short, "NALSA", and the State

Government, provides for compensation and those Schemes have delineated the modes of protection for the victims.

9. Learned Senior Advocate Mr. Sekhar Basu drew our attention to Article 39(f) amongst the Directive Principle of State Policy, apart from Article 21 of the Constitution of India.

10. Section 372 of Cr.P.C. provides that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by the Code or by any other law for the time being in force. The proviso introduced to that Section with effect from 31.12.2009 conferring right of appeal on the victim as regards such matters as are stated in that proviso is of no consequence in so far as these appeals are concerned. Section 374 of Cr.P.C. provides for the appeals from convictions. Section 385 Cr.P.C. prescribes the steps to be taken for the purpose of hearing of the appeals which are not dismissed summarily. The contents of Section 374 and Section 385 of the Cr.P.C. taken together will show that issuance of notice of the hearing of the appeal to the victim is not prescribed, though notice to the complainant is prescribed if the appeal is from a judgment of conviction in a case instituted upon complaint. Since the appeals in hand are not from a judgment of

conviction in a case instituted upon complaint, Clause (iii) of Section 385 (1) does not apply to these appeals. Clause (iv) of Section 385 (1) does not apply because these appeals are not under either under Section 377 or Section 378 of the Cr.P.C.

11. Trial, conviction and sentence are matters primarily between the accused person and the State. The statutory provisions for institution of the appeal and the hearing thereof do not, in their terms, enjoin impleadment of the victim in these appeals.
12. The POCSO Act came into force on 14.11.2012. The amendments made thereto as per the provision of Protection of Children from Sexual Offences (Amendment) Act, 2009 came into force on 06.08.2019.
13. Section 228A was inserted in the I.P.C. with effect from 25.12.1983. That provision makes disclosure of the identity of the victim of certain offences punishable. Printing or publishing the name or any matter which may make known the identity of any person against whom an offence under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB, 376E of I.P.C. is alleged or found to have been committed is punishable. The Apex Court in **Bhupinder Sharma (supra)** followed by **Ramdev Singh (supra)** laid

down that while it is true that such restrictions do not relate to printing or publication of judgment by the High Court or the Supreme Court; keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228A of I.P.C. has been enacted, the name of the victim should not be indicated in the judgments of the courts including the superior courts. Relying on **Ramdev Singh (supra)**, the Apex Court reiterated in **Lalit Yadav (supra)** that mentioning the name of the victim in such cases is not consistent with Section 228A of I.P.C.; and, though the Explanation to that Section makes an exception in favour of the judgments of the superior courts, efforts should be made by all the courts not to disclose the identity of the victim. Following **Bhupinder Sharma (supra)**, a three Judge Bench of the Hon'ble Supreme Court stated in **Ravishankar Vs. State of Madhya Pradesh** reported as 2019 (9) **SCC 689** that the mandate against disclosure of the identities of the victim of sexual offences ought to be observed in spirit even by the Apex Court.

14. Reiterating the contents of Section 228A of I.P.C. and referring to the law laid down in **Ramdev Singh (supra)** the Apex Court, in

Sangitaben Shaileshbhai Datanta (supra), referred also to Section 33(7) of POCSO Act which casts a duty on the Special Court to ensure that identity of the victim is not disclosed at any time during the course of investigation or trial. Section 23 of the POCSO Act which imposes restrictions on any form of media from disclosing the identity of the victim which tends to lower her reputation or infringes upon her privacy, was also taken specific note of.

15. Through the order in **Bijoy (supra)**, this Court issued directives to the investigating agencies, prosecutors and Special Courts in relation to the protection of the child victims' fundamental right to dignity. Guiding support was drawn from the decision of the Apex Court in **Sakshi Vs. Union of India, (2004) 5 SCC 518**. The directives issued by this Court in **Bijoy** includes the specific command that the investigating agencies shall not disclose the identity of the victim in any media and shall ensure that such identity is not disclosed in any manner whatsoever except with the express permission of the Special Court, in the interest of justice. It was further directed that the identity of the victim, particularly his/her name, parentage, address or any other

particulars that may reveal such identity, shall not be disclosed in the judgment delivered by the Special Court unless such disclosure of identity is in the interest of the child. That order of this Court stands approved by the Apex Court through the judgment in **Nipun Saxena (supra)** to which the directions issued by this Court in **Bijoy (supra)** stand annexed. The directions issued by the Apex Court in **Nipun Saxena (supra)** include the following:-

"50.1. No person can print or publish in print, electronic, social media, etc. the name of the victim or even in a remote manner disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large.

50.2. In cases where the victim is dead or of unsound mind the name of the victim or her identity should not be disclosed even under the authorisation of the next of kin, unless circumstances justifying the disclosure of her identity exist, which shall be decided by the competent authority, which at present is the Sessions Judge.

50.3. FIRs relating to offences under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E I.P.C. and the offences under POCSO shall not be put in the public domain.

50.4. In case a victim files and appeal under Section 372 Cr.P.C., it is not necessary for the victim to disclose his/her identity and the appeal shall be dealt with in the manner laid down by law.

50.5. The police officials should keep all the documents in which the name of the victim is disclosed, as far as possible, in a sealed cover and replace these documents by identical documents in which the name of the victim is removed in all records which may be scrutinised in the public domain.

50.6. All the authorities to which the name of the victim is disclosed by the investigating agency or the Court are also duty-bound to keep the name and identity of the victim secret and not disclose it in any manner except in the report which should only be sent in a sealed cover to the investigating agency or the Court.

50.7. An application by the next of kin to authorise disclosure of identity of a dead victim or of a victim of unsound mind under Section 228A (2) (c) I.P.C. should be made only to the Sessions Judge concerned until the Government acts under Section 228A (1) (c) and lays down criteria as per our directions for identifying such social welfare institutions or organizations.

50.8. In case of minor victims under POCSO Act, disclosure of their identity can only be permitted by the Special Court, if such disclosure is in the interest of the child."

16. Sikkim High Court in **Subhas Chandra Rai Vs. State of Sikkim**, 2018 Cri LJ 3146 = (SCC OnLine Sikk 29), quoted with approval by the Hon'ble Supreme Court in **Nipun Saxena (supra)**, stated that in view of the mandate of Section 74 of the JJ Act, the Police and Media as well as the Judiciary are required to be equally

sensitive in such matters and to ensure that such mandate of law is complied with. We are in agreement with that view. Be it a child in conflict with law, or one in need of care and protection, or a child victim, or witness of a crime involved in matter; the name, identity of the parents, siblings and near relatives, other family details, address, school, or other particulars which could lead to such child being tracked, found and identified shall not be disclosed, unless for the reasons given in the proviso to Section 74 of the JJ Act.

17. The directions in paragraph 50.4 in **Nipun Saxena** (*supra*) enjoins that in case a victim files an appeal under Section 372 of Cr.P.C., it is not necessary for the victim to disclose his/her identity and the appeal shall be dealt with in the manner laid down by law. The need is to follow protective governance as far as the privacy of the victims are concerned. That has to be ensured in letter and spirit by cohesive and comprehensive effectuation of the seminal twin doctrines of privacy and dignity which are inexcusable components of the fundamental right to life guaranteed under Article 21 of Constitution of India.

18. Running with the aforesaid is Article 39 (f) of the Constitution which enjoins that the State shall direct its policies towards

securing that 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 principles enumerated in the different clauses of Article 39 are among the Directive Principle of State Policy; for short "DPSP", in Part IV of the Constitution. Article 38(1) in Part IV enjoins that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Investigation, prosecution and adjudication are carried out through institutions which are essentially institutions of national life. Judiciary is an institution of national life. Therefore, the protective canopy over the children against exploitation and the constitutional vision, value and command to ensure their freedom and dignity, including privacy, are among the principles which ought to guide the judicial institutions as well.

19. On 11.12.1992, India ratified the United Nations Convention on the Rights of the Children; 'UNCRC' for short. That Convention requires all State Parties to undertake all appropriate measures to secure the best interest of the child, even when it is alleged as, or accused of, violating any penal law. Such measures require the treatment of the child in a manner consistent with the promotion of the child's sense of dignity and worth, reinforcing the child's respect for the human rights and fundamental freedoms of others and taking into account the child's age and desirability of promoting the child's reintegration and the child's assuming a constructive role in society. The thrust in those principles were to ensure proper care, protection, development, treatment and social reintegration of every child in difficult circumstances, by adopting a child-friendly approach keeping in mind the best interest of the child. In terms of Article 253 of the Constitution, the Parliament has the overriding exclusive legislative competence and power to make laws for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. All these provisions taken together, obliges the State to put in place

requisite provisions to reach at the goals sought to be achieved through a meaningful collective operation of the provisions of the UNCRC and the Constitution of India.

20. In the aforesaid conspectus, the 2015 JJ Act emerged out of the need to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000 to make comprehensive provisions for children alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards prescribed in the UNCRC, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993) and other related international instruments. It was therefore that the 2015 JJ Act was brought into being as an Act to consolidate and amend the laws relating to children alleged or found to be in conflict with law and children in need of care and protection, by catering to their basic needs through proper care, protection, development, treatment, social

reintegration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies to be established under the 2015 JJ Act.

21. Article 39A of the Constitution enjoins provision of free legal aid by suitable legislation or schemes, or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The National Legal Services Authority, the State Legal Services Authorities, the District Legal Services Authorities, the Taluk Legal Services Committees and the High Court Legal Services Committee; for short, "NALSA", "SLSA", "DLSA", "TLSC" and "HCLSC", respectively, are constituted under the provisions of the Legal Services Authority Act, 1987; for short "LSA Act". Section 13 of the LSA Act, 1987 provides that a person who satisfy all or any of the criteria specified in Section 12 shall be entitled to receive legal services provided that the concerned authority is satisfied that such person has a prima facie case to prosecute or defend.

Section 12 of the LSA Act enumerates the classes of persons who will be entitled to Legal Services while filing or defending a case. It includes **"a woman or a child"** at clause (c) of Section 12. While the LSA Act does not defines "child", the **POCSO Act** defines 'child' to mean **any person below the age of eighteen years** and the **2015 JJ Act** defines 'child' to mean **a person who has not completed eighteen years of age**- See Section 2(d) of the POCSO Act, and Section 2(12) of the 2015 JJ Act.

22. Learned Amicus Curiae Sourav Chatterjee pointed out that in exercise of the power conferred by Section 45 of the POCSO Act and upon repealing the Protection of Children from Sexual Offences Rules, 2012, the Protection of Children from Sexual Offences Rules, 2020 were made. Those rules came into force on their publication in the Gazette of India on 9th March, 2020. Rule 7 among those rules provided that the Child Welfare Committee; for short, **"CWC"**, **shall make** a recommendation to the DLSA for legal aid and assistance. **Legal aid and assistance** shall be provided to the child in accordance with the provisions of the LSA Act, 1987. The Special Juvenile Police Unit; for short, **"SJPU"**, or the local

police shall 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.**, which is made part of those rules. What are enumerated as entitlement of children who have suffered sexual abuse are, inter alia, for being kept away from accused at all times, during trial and otherwise; **for Free Legal Aid**; and, to privacy and confidentiality.

23. A victim filing an appeal in terms of the proviso to Section 372 of Cr.P.C. can seek legal services in terms of Section 13 of the LSA Act if that victim is a woman or a child or for any other reason entitled to legal services having regard to the contents of Section 12 of the LSA Act. It is among the directions in **Nipun Saxena (supra)**, that in case a victim of offences of the types in these cases, files an appeal under Section 372 of Cr.P.C., and the proviso thereto it is not necessary for the victim to disclose his/her identity and the appeal shall dealt with in the manner laid down by law.

24. The legal rights, eligibility and interest of a victim, in the course of an appeal against conviction, would stand satisfied if the State carries out diligently and vigilantly its role in criminal cases and the Public Prosecutors discharging their duties and responsibilities due from them in terms of the provisions of Cr.P.C and other governing laws. The eligibility of a victim even in cases where a component of compensation is ordered by the convicting Court under Section 357 of Cr.P.C., ought to be protected by the State and Public Prosecutor.

25. In so far as victims of sexual offences falling either under Indian Penal Code or POCSO Act are concerned, they would be entitled to have their cause defended in appeals arising from judgements of the Criminal Courts resulting in the conviction and resultant sentencing of the wrong doer/ accused person. While it is definitely the duty of the State and the Public Prosecutor to comprehensively deal with all aspects of a criminal appeal against conviction; in particular cases, on the basis of situation and need, the Legal Services Authority concerned can also represent and protect the interest of the victim even without the impleadment of the victim in the array of parties, thereby synchronizing the

opportunity to contest and the need to preserve the privacy. The right to be extended such legal services as may be required for such purpose ought to necessarily flow through the Legal Services Authorities constituted under the LSA Act.

26. For the aforesaid reasons, we hold that:

- i) The victim is not a necessary party to a Criminal Appeal from conviction for offences against woman or child, punishable under provisions of the I.P.C. or POCSO Act or any other penal provision which will apply in relation to offences affecting human body against any "woman" and/or "child", both those expressions being understood in the context of the respective legislation which deals with such offences.
- ii) No such appeal would be defective in the absence of impleadment of the victim.
- iii) The procedure to be adopted in all such appeals would be to deal with those appeals without insisting on the impleadment of the victim. In cases where, over and above the assistance of the Public Prosecutor representing the

State, the appellate court deems it necessary to provide further assistance to secure the interest of the victim through legal aid, the HCLSC or the DLSA concerned may be required to provide assistance through an empanelled or other advocate as may be decided by the HCLSC or the DLSA concerned. However, even in such cases, it shall be insisted by the Court that the principles relating to protection of dignity and privacy and modality of ensuring those values, as delineated above, are scrupulously adhered to.

iv) As a necessary corollary, we deem it situationally appropriate to state that the appeals by victims would be governed by the directions in **Nipun Saxena (supra)**; however, that there need not be any doubt as to how the victim would be described. It would suffice that the cause-title of such an appeal would show that the appellant is the victim in the criminal case identified by its number, the court below and/or the police station. This will insulate the

victim from being subjected to disclosure of identity of that person.

27. Before parting, we place on record our appreciation for the in depth preparation and able assistance rendered by Mr. Sourav Chatterjee who on the request of this Court assisted as amicus curiae. We also record our appreciation for the manner in which broad spectrum of law was dilated upon and presented before us by Mr. Shiv Shankar Banerjee assisting from the West Bengal State Legal Services Authority. We appreciate the guidance extended by Senior Advocate Shekhar Basu with his advisory intervention.

28. Resultantly, it is held and ordered that:

- a. CRA No. 228 of 2020 is not defective.
- b. The name and description of the person arrayed as a respondent, other than the State, in CRA No. 26 of 2021 shall be struck off the record.

(Aniruddha Roy, J.)

(Thottathil B. Radhakrishnan, C.J.)