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

CRL.M.C. 6530/2018 and CRL.M.As. 50336/2018, 14161/2021

Reserved on : 17.09.2021
Date of Decision : 12.11.2021

IN THE MATTER OF:

HARI DEV ACHARYA @ PRANAVANAND & ORS. ..... Petitioners

Through: Mr. R.N. Mittal, Sr. Advocate with Mr. Rishi Bharadwaj and Mr. Abhiesumat Gupta, Advocates.

versus

STATE ..... Respondent

Through: Mr. Panna Lal Sharma, APP for State.
Mr. Sowjhanya Shankaran, Mr. Siddharth Satija and Ms. Priya Watwani, Advocates for Complainant.

AND

CRL.M.C. 1521/2019 and CRL.M.As. 6039/2019, 14160/2021

YOGESH KUMAR ..... Petitioner

Through: Mr. R.N. Mittal, Sr. Advocate with Mr. Rishi Bharadwaj and Mr. Abhiesumat Gupta, Advocates.

versus

STATE ..... Respondent

Through: Mr. Panna Lal Sharma, APP for State.
Mr. Sowjhanya Shankaran, Mr. Siddharth Satija and Ms. Priya

Watwani, Advocates for Complainant.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. The above-noted petitions have been filed under Section 482 Cr.P.C. on behalf of the petitioners assailing the summoning order dated 22.11.2018 passed by the learned ASJ-01/Special Court (POCSO), South District, Saket Court, New Delhi in CIS/SC No. 220/18 as well as the supplementary charge sheets filed on 22.05.2018 and 22.08.2018 in the aforesaid case.

2. Briefly stated the facts involved in the present case are that on a complaint lodged by the child victim/complainant on 04.09.2017, FIR No. 304/2017 came to be registered under Section 377 IPC and Section 10 of the POCSO Act against one *Nikhil Arya* and others. In this complaint, the child victim had alleged that during his stay at the stated *Gurukul*, he was harassed for the last one and half month. It was further stated that on the intervening night of 04/05.08.2017 at about 12:50 in the night, *Nikhil Arya*, after awakening him, took him to the teacher's room and sexually exploited him. The child victim immediately informed the same to one *Raman* and thereafter went to Police Station Hauz Khas. His mother was called to the police station at about 2:30 in the night and to avoid any insult, they entered into a compromise under the pressure of *Rampal*, *Subhash*, *Pradeep*, *Bhupesh* and *Yogesh*. It was stated that *Raman*, who had supported the complainant, was rusticated from the *Gurukul*. It was further stated that thereafter in presence of entire class,

the child victim was physically beaten with kicks, fist and punches. It was also stated that on 02.09.2017 between 11 a.m.-12 p.m. when he visited the washroom, *Nikhil* was already present there. After gagging the complainant's mouth, *Nikhil* committed the offence of sodomy. The complainant ran away from there and thereafter, *Swami Pranavanand* levelled allegations against him of stealing dry fruits and rusticated him from *Gurukul*. After going home, the child victim narrated the entire incident to his mother and the present FIR came be lodged.

3. After completion of investigation, a common charge sheet came to be filed on 12.04.2018 against *Nikhil Arya* under Section 377 IPC and Section 6 of the POCSO Act. The names of *Yogesh Kumar, Bhupesh Kumar, Pradeep Kumar, Rampal and Pranavanand* were kept in Column No. 12. The statements of the child victim under Sections 161 Cr.P.C. and 164 Cr.P.C. were recorded, wherein he stated that he was forced to enter into the compromise dated 05.08.2017 with the accused persons in the Police Station. On the aspect of compromise, statement of *ASI Hakam Singh* was also recorded. Consequently, a supplementary charge sheet was filed on 22.05.2018 and the five accused persons kept in Column No. 12 of the initial charge sheet were transposed to Column No. 11 for the offence punishable under Section 21 of the POCSO Act. However, the name of accused *Subhash Chander* being inadvertently left out, another supplementary challan came to be filed on 22.08.2018 thereby transposing him from Column No. 12 in the initial charge sheet to Column No. 11. In furtherance of the material placed on record, the Trial Court summoned the present petitioners along with co-accused *Nikhil*. Subsequently, the Investigating Officer seized the CCTV footage from the cameras installed in the *Gurukul*. On receipt of the FSL Report

with respect to the CCTV footage, a third supplementary charge sheet was filed on 11.04.2019 mentioning that as per the CCTV footage, the child victim had entered the washroom on 02.09.2017 at 11:30 a.m. and left the same at 11:46 p.m. It was also mentioned that *Nikhil Arya* could not be seen going to the washroom at this time on 02.09.2017. Instead, he was seen present in the *Verandah* at the relevant time and after that entering the office situated at a considerable distance from the washroom. It was further mentioned that he entered the office at 10:55:18 a.m. and left at about 11:47:37 a.m. It was also mentioned that the presence of the accused *Nikhil Arya* could not be established from 11:30 a.m. to 11:46 p.m. in the washroom when the child victim is stated to have used it.

4. Based on the above factual matrix, Mr. R.N. Mittal, learned Senior Counsel for the petitioners, has primarily raised the following contentions:

i) the petitioners could not have been summoned as the complaint was filed by clubbing two incidents dated 04.08.2017 and 02.09.2017. The petitioners had no role in the second incident dated 02.09.2017 which being distinct and separated from the first incident by a period of one month could not have been clubbed with it. Additionally, the prosecution ought to have first established the main offence stated to have been committed by *Nikhil Arya* before proceeding against the present petitioners. In other words, it was contended that there cannot be a joint trial.

ii) for the incident dated 04.08.2017, both the basic ingredients required to be proved for establishing an offence punishable under

Section 21 of the POCSO Act, i.e., *'commission of the offence'* and its *'knowledge',* are missing. The document dated 05.08.2017, written by the child victim's sister, and signed not only by the child victim but also by his sister and his mother, mentioned that there was rather a misunderstanding between the parties. As neither the child victim nor his sister/mother had alleged commission of any offence under the POCSO Act, the petitioners could not be attributed with the requisite '*knowledge*'. Further, while transposing the petitioners' names from Column No. 12 to Column No. 11 at the time of filing of the first supplementary challan, the only material cited was the statement of *ASI Hakam Singh* who was present in the concerned police station on the night of 04.08.2017, but his statement does not incriminate the petitioners in any manner.

iii) the petitioners could not have been summoned as the allegations are *prima facie* false. The first incident dated 04.08.2017 was not reported till 04.09.2017 and it was also not investigated. The second incident stands falsified by the FSL Report on the footage seized from the CCTV cameras of the *Gurukul*.

iv) the summoning order is cryptic and shows non-application of mind. Further, it was passed prior to filing of the second and third supplementary charge sheet; and at that time the Trial Court did not have the benefit of the FSL report.

v) the petitioner *Hari Dev Acharya @ Pranavanand* was not even present in India at the time of first incident and he returned only on 15.08.2017.

vi) the present FIR was filed with *malafide* intentions as the child victim was caught stealing dry fruits and the same was captured by the CCTV cameras of the *Gurukul.*

5. In support of his contentions, learned Senior Counsel has primarily placed reliance on the following cases:-

(i) Neeraj Verma *v.* State, **CRL.M.C. 3770/2005**,

(ii) Sr. Terry Jose and Others *v.* State of Kerala reported as **(2018) 18 SCC 292**,

(iii) Kamal Prasad Patade *v.* State of Chhattisgarh reported as **2016 SCC OnLine Chh 719**

6. Per contra, learned APP for the State, duly assisted by learned counsel for the complainant, has supported the summoning order. It is submitted that in respect of the incident of 04.08.2017, the complainant had approached the concerned Police Station and while being in the police station itself, he and his family were forced to enter into a compromise with the active connivance of the police personnel, a copy of which has been placed on record at page 95 of the petition i.e. CRL.M.C. 6530/2018. It is further submitted that the medical examination report of the child victim supports his allegations. It is also submitted that the reliability and admissibility of the CCTV footage relied upon by the petitioners shall be tested and determined during the trial.

7. Before proceeding to analyse the facts and appreciating the submissions within the scope and power of Section 482 Cr.P.C., I deem it apposite to extract Sections 19 and 21 of the POCSO Act:

"19. Reporting of offences.-*(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974), any person (including the child), who has apprehension that in offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,-*

(a) the Special Juvenile Police Unit; or

(b) the local police.

(2) Every report given under sub-section (1) shall be-

(a) ascribed an entry number and recorded in writing;

(b) be read over to the informant;

(c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents, are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four

hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1)."

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21. Punishment for failure to report or record a case.-*(1) Any person, who fails to report the commission of an offence under sub-section (1) of Section 19 or Section 20 or who fails to record such offence under sub-section (2) of Section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.*

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of Section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions of sub-section (1) shall not apply to a child under this Act."

8. A plain reading of Section 19 POCSO Act would show that the following ingredients are required to be proved for establishing the commission by a person of an offence thereunder:

i) that an offence under the POCSO Act was committed or was likely to be committed,

ii) that the person had knowledge of the commission of such offence or the likelihood of the offence being committed, as the case may be, and

iii) that the person failed to inform the authorities mentioned therein in spite of such knowledge

9. From the above, it is apparent that one of the basic ingredients to fasten criminal liability on an accused for the offence punishable under the aforementioned Section is his having had '*knowledge*' of the commission of an offence under the POCSO Act, or the likelihood thereof. The word '*knowledge'* came to be interpreted by the Supreme Court in A.S. Krishnan and Others *v.* State of Kerala reported as **(2004) 11 SCC 576,** where '*knowledge*' was distinguished from '*reason to believe'* in the following manner:

> *"9. Under IPC, guilt in respect of almost all the offences is fastened either on the ground of "intention" or "knowledge" or "reason to believe". We are now concerned with the expressions "knowledge" and "reason to believe". "Knowledge" is an awareness on the part of the person concerned indicating his state of mind. "Reason to believe" is another fact of the state of mind. "Reason to believe" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing. "Reason to believe" is a higher level of state of mind. Likewise "knowledge" will be slightly on a higher plane than "reason to believe". A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26 IPC explains the meaning of the words "reason to believe" thus:*

> *"26. 'Reason to believe'.-A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise."*

> *10. In substance what it means is that a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such as creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing. These two requirements i.e. "knowledge" and "reason to believe" have to be deduced from various circumstances in the case. (See Joti Parshad v. State of Haryana.)"*

(emphasis added)

10. The word *'knowledge'* again came up for interpretation before the Supreme Court in Sr. Tessy Jose and Others *v.* State of Kerala reported as **(2018) 18 SCC 292,** in which case it was held that:

> *"9. ...The provisions of Section 19(1), reproduced above, put a legal obligation on a person to inform the relevant authorities, inter alia, when he/she has knowledge that an offence under the Act had been committed. The expression used is "knowledge" which means that some information received by such a person gives him/her knowledge about the commission of the crime. There is no obligation on this person to investigate and gather knowledge."*

11. In the present case, on the alleged date of incidents, i.e., on 04.08.2017 and 02.09.2017, the fact that the child victim was a resident student of the *Gurukul* and was less than 18 years of age, is not disputed.

It is also not in dispute that on the night of 04.08.2017, the child victim had visited Police Station Hauz Khas with a complaint. The mother and the sister of the child victim were also called at the police station. A compromise document dated 05.08.2017, stated to be written by the child victim's sister, was entered into and the same was signed by the child victim and his family as well as petitioner/*Rampal*. The factum of presence of the child victim, his mother and the persons from *Gurukul* at the police station is also corroborated by the statement of *ASI Hakam Singh*.

12. On 04.08.2017, even though no written complaint of the incident was given by the child victim, a letter dated 08.08.2017 was sent to the Prime Minister's Office which forms part of the documents filed along with the main charge sheet. The said letter mentioned the offence allegedly committed by co-accused *Nikhil Arya* and also the manner in which the child victim was coerced not to press his complaint and rather forced to enter into a compromise.

13. In the complaint filed on 04.09.2017, not only the facts surrounding the first and the second incident were mentioned in detail, but also the circumstances under which the compromise was forced upon the child victim by accused persons, namely *Rampal*, *Subhash Kumar*, *Pradeep, Bhupesh and Yogesh*, were elaborated.

14. On that day itself, besides the statement of the child victim, the statements of his sister and his mother were also recorded. All of them stated about the pressure exerted by the aforesaid accused persons as well as by *Swami Pranavanand* for entering into the compromise. The child

victim further stated that he was publicly beaten in front of the class and later rusticated from the *Gurukul* on false allegations.

15. It is noted that the child victim was medically examined at *AIIMS* on 04.09.2017, and the concerned Doctor stated that after thorough medical examination of the child victim, he was of the considered opinion that *"...insertion of penis or penis like object cannot be ruled out."*

16. On 05.09.2017, the statement of the child victim was also recorded under Section 164 Cr.P.C., wherein he reiterated what was earlier stated in his complaint and also stated that on 04.08.2017, he had opened the gate for *'Swamiji'* at about 12:30 a.m.

17. In this backdrop, let me proceed to analyse the contentions raised on behalf of the petitioners. The first contention relates to the legality of clubbing the two incidents in one FIR. According to the learned Senior Counsel, the petitioners are not accused of the second incident and their liability is alleged to be arising from the first incident only. In this regard, it bears mention that the POCSO Act is silent on the aspect as to whether two separate offences can be clubbed in one FIR. The answer to the petitioners' contention would require reference to Section 31 of the POCSO Act, which reads as under:

> *"**31. Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court**.-Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person*

conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor."

18. The aforementioned provision stipulates that save as otherwise provided in the POCSO Act, the provisions of the Cr.P.C. would apply to the proceedings before the Special Court meaning thereby that in the present fact-situation, as the POCSO Act is silent on the issue raised, resort can be had to the provisions of the Cr.P.C. Accordingly, Section 223 Cr.P.C. becomes relevant, which reads as under:

*"**223. What persons may be charged jointly**.-The following persons may be charged and tried together, namely:*

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) persons accused of more than one offence of the same kind, within the meaning of Section 219 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;

(f) persons accused of offences under Sections 411 and 414 of the Indian Penal Code (45 of 1860) or either of those sections in

respect of stolen property the possession of which has been transferred by one offence;

(g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate or [Court of Session] may, if such persons by an application in writing, so desire, and if he [or it] is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together."

19. A plain reading of clause (d) of Section 223 Cr.P.C. indicates that when different offences are committed by different persons during the course of *'same transaction'*, they can be charged and tried together. In the present case, while the accused *Nikhil Arya* is alleged to have committed an offence under Section 377 IPC and Section 10 of the POCSO Act, the present petitioners are accused of not informing the concerned authorities about the said offence in spite of having knowledge about it and thus being guilty of committing the offence punishable under Section 21 read with Section 19 of the POCSO Act.

20. The issue whether *Nikhil Arya* and the present petitioners can be tried jointly in the same FIR and also whether the two offences can be clubbed would depend on the meaning of the expression *'same transaction'* as occurring in clause (d) of Section 223 Cr.P.C.

21. Whether a transaction can be regarded as the same would necessarily depend upon the particular facts of each case. Though the Legislature has left undefined the said expression, the same can be inferred as applying to cases where there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts. However, it may not be necessary that each one of these elements should co-exist for a transaction to be regarded as the same [Refer: State of Andhra Pradesh *v.* Cheemalapati Ganeswara Rao and Another reported as **(1964) 3 SCR 297].**

22. The test to be applied is whether the several offences are so related to one another in point of purpose or of cause and effect, or as principal or subsidiary, so as to result in one continuous action. Thus, where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences "*committed in the course of the same transaction*". [Refer: Anju Chaudhary *v.* State of Uttar Pradesh and Another reported as **(2013) 6 SCC 384**].

23. It is deemed expedient to take note of the decision in Shankar Kisanrao Khade *v.* State of Maharashtra reported as **(2013) 5 SCC 546**, where the Supreme Court held as under:

> *"72. I may also point out that, in large numbers of cases, children are abused by persons known to them or who have influence over them. Criminal courts in this country are galore with cases where children are abused by adults addicted to alcohol, drugs, depression, marital discord, etc. Preventive aspects have seldom been given importance or taken care of. Penal laws focus more on situations after commission of offences like violence, abuse, exploitation of the children.*

Witnesses of many such heinous crimes often keep mum taking shelter on factors like social stigma, community pressure, and difficulties of navigating the criminal justice system, total dependency on the perpetrator emotionally and economically and so on. Some adult members of family including parents choose not to report such crimes to the police on the plea that it was for the sake of protecting the child from social stigma and it would also do more harm to the victim. Further, they also take shelter pointing out that in such situations some of the close family members having known such incidents would not extend medical help to the child to keep the same confidential and so on, least bothered about the emotional, psychological and physical harm done to the child. Sexual abuse can be in any form like sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted or encouraging, inducing or forcing the child to be used for the sexual gratification of another person, using a child or deliberately exposing a child to sexual activities or pornography or procuring or allowing a child to be procured for commercial exploitation and so on.

73. In my view, whenever we deal with an issue of child abuse, we must apply the best interest of child standard, since best interest of the child is paramount and not the interest of perpetrator of the crime. Our approach must be child-centric. Complaints received from any quarter, of course, have to be kept confidential without casting any stigma on the child and the family members. But, if the tormentor is the family member himself, he shall not go scot-free. Proper and sufficient safeguards also have to be given to the persons who come forward to report such incidents to the police or to the Juvenile Justice Board.

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77. In my opinion, the case in hand calls for issuing the following directions to various stakeholders for due compliance:

77.1 The persons in charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails etc. or wherever children are housed, if they come across instances of sexual abuse or assault on a minor child which they believe to have been committed or come to know that they are being sexually molested or assaulted are directed to report those facts keeping upmost secrecy to the nearest Special Juvenile Police Unit (SJPU) or local police, and they, depending upon the gravity of the complaint and its genuineness, take appropriate follow-up action casting no stigma to the child or to the family members.

77.2 Media personnel, persons in charge of hotels, lodges, hospitals, clubs, studios and photograph facilities have to duly comply with the provision of Section 20 of Act 32 of 2012 and provide information to the SJPU, or local police. Media has to strictly comply with Section 23 of the Act as well.

77.3 Children with intellectual disability are more vulnerable to physical, sexual and emotional abuse. Institutions which house them or persons in care and protection, if come across any act of sexual abuse, have a duty to bring to the notice of the Juvenile Justice Board/SJPU or local police and they in turn be in touch with the competent authority and take appropriate action.

77.4 Further, it is made clear that if the perpetrator of the crime is a family member himself, then utmost care be taken and further action be taken in consultation with the mother or other female members of the family of the child, bearing in

mind the fact that best interest of the child is of paramount consideration.

77.5 If hospitals, whether government or privately-owned or medical institutions where children are being treated come to know that children admitted are subjected to sexual abuse, the same will immediately be reported to the nearest Juvenile Justice Board/SJPU and the Juvenile Justice Board, in consultation with SJPU, should take appropriate steps in accordance with the law safeguarding the interest of the child.

77.6 The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening the offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.

77.7 Complaints, if any, received by NCPCR, SCPCR Child Welfare Committee (CWC) and Child Helpline, NGOs or women's organisations, etc., they may take further follow-up action in consultation with the nearest Juvenile Justice Board, SJPU or local police in accordance with law.

77.8 The Central Government and the State Governments are directed to constitute SJPUs in all the districts, if not already constituted and they have to take prompt and effective action in consultation with the Juvenile Justice Board to take care of the child and protect the child and also take appropriate steps against the perpetrator of the crime.

77.9 The Central Government and every State Government should take all measures as provided under Section 43 of Act 32 of 2012 to give wide publicity of the provisions of the Act through media including television, radio and print media, at regular intervals, to make the general public, children as well

as their parents and guardians, aware of the provisions of the Act."

(emphasis added)

24. Recently, the Supreme Court formulated the principles for joint trial after analysing the entire conspectus of law in Nasib Singh *v.* State of Punjab and Another reported as **2021 SCC OnLine 924**, wherein it was held as under:

"48. From the decisions of this Court on joint trial and separate trials, the following principles can be formulated:

(i) Section 218 provides that separate trials shall be conducted for distinct offences alleged to be committed by a person. Sections 219 - 221 provide exceptions to this general rule. If a person falls under these exceptions, then a joint trial for the offences which a person is charged with may be conducted. Similarly, under Section 223, a joint trial may be held for persons charged with different offences if any of the clauses in the provision are separately or on a combination satisfied;

(ii) While applying the principles enunciated in Sections 218 - 223 on conducting joint and separate trials, the trial court should apply a two-pronged test, namely, (i) whether conducting a joint/separate trial will prejudice the defence of the accused; and/or (ii) whether conducting a joint/separate trial would cause judicial delay.

(iii) The possibility of conducting a joint trial will have to be determined at the beginning of the trial and not after the trial based on the result of the trial. The Appellate Court may determine the validity of the argument that there ought to have been a separate/joint trial only based on whether the trial had prejudiced the right of accused or the prosecutrix;

(iv) Since the provisions which engraft an exception use the phrase 'may' with reference to conducting a joint trial, a separate trial is usually not contrary to law even if a joint trial could be conducted, unless proven to cause a miscarriage of justice; and

(v) A conviction or acquittal of the accused cannot be set aside on the mere ground that there was a possibility of a joint or a separate trial. To set aside the order of conviction or acquittal, it must be proved that the rights of the parties were prejudiced because of the joint or separate trial, as the case may be."

(emphasis added)

25. In view of the above referred exposition of law, the petitioners have failed to satisfy this Court as to how a joint trial would prejudice their defence and/or delay the trial. As noted hereinabove, the offence under Section 377 IPC and Section 6 POCSO Act was committed twice by accused *Nikhil Arya* on the child victim within a span of one month. Insofar as mentioning of two incidents in one FIR is concerned, it suffices to note that on both occasions, it was accused *Nikhil Arya* who committed the offence against the child victim within a span of one month, which is punishable under Section 6 POCSO Act and Section 377 IPC. In other words, the child victim and the accused are common in both the incidents. In fact, both the incidents were committed at the same place i.e., the *Gurukul*. Section 219 Cr.P.C. provides that a person who has committed three offences of same kind within the space of twelve months could be tried in one trial. Both the offences are punishable with the same amount of punishment under the same Sections of IPC and the POCSO Act. In this view, both the offences form the same transaction.

26. The present petitioners are accused of their failure to not inform the Special Police Juvenile Unit or the local police after coming to know of the offence committed by accused *Nikhil Arya* on the child victim and have been charge-sheeted for committing an offence punishable under Section 21 POCSO Act. Section 223(d) Cr.P.C further provides that the persons accused of different offences committed in the course of same transaction can be charged and tried together. As such, the offence committed by the Petitioners are part of the same transaction. Thus, the contention raised by learned Senior Counsel for the petitioners, as outlined above, is meritless and is rejected.

27. This Court is of the opinion that the offences committed by *Nikhil Arya* and the present petitioners have been committed in the course of '*same transaction*' and a joint trial is permissible. The reliance placed by learned Senior Counsel on the decision in Kamal Prasad Patade (Supra) is entirely misplaced as the said decision was passed in the facts of that case and the import of clause (d) of Section 223 Cr.P.C. was not considered therein. For the aforesaid reasons, the contention that firstly, the prosecution had to prove the main offence and only then the petitioners could be proceeded with, is untenable. Similar view was also taken by the Bombay High Court in Balasaheb @ Suryakant Yashwantrao Mane *v.* The State of Maharashtra reported as **2017 SCC OnLine Bom 1772,** wherein it was rightly held that such a view would not only defeat the object of the POCSO Act but also violate the provision contained in Section 33(5) of the POCSO Act as a child victim ought not be called repeatedly to the Court for his testimony.

28. The reliance placed by learned Senior Counsel on the decision in Neeraj Verma (Supra) is also misplaced as the fact situation in that case was completely different.

29. During the course of arguments, learned Senior Counsel for the petitioners also made an oral submission that the petitioner *Hari Dev Acharya @ Pranavanand* was not present in India at the time of the first incident, however, no material in this regard has been placed on record. Moreover, the child victim, in his statement recorded under Section 164 Cr.P.C. has stated that on 04.08.2017, he had opened the gate for '*Swamiji'*.

30. It is also noted that the CCTV footage, relied upon by the learned Senior Counsel for the petitioners to prove the allegation of theft against the complainant, has been seized during investigation. However, it is not an evidence of unimpeachable character, leaving no scope for a doubt. Even otherwise, the same only shows two persons carrying small cloth bundles and does not *prima facie* establish alleged theft of dry fruits. The defence taken by the petitioners needs to be tested only in the trial.

31. The parameters of scrutiny to be done by this Court while exercising its powers under Section 482 Cr.P.C. have been time and again defined by the Supreme Court. It is settled law that at this stage, this Court will neither embark upon an enquiry as to whether the material placed on the record is reliable or not, nor would it go into disputed questions of facts. [Refer: R.P. Kapur *v.* State of Punjab reported as **(1960) 3 SCR 388**, Zandu Pharmaceutical Works Ltd. and Ors. *v.* Mohd. Sharaful Haque and Another reported as **(2005) 1 SCC 122** and Tilly

Gifford *v.* Michael Floyd Eshwar and Another reported as **(2018) 11 SCC 205**].

32. The child victim has unequivocally stated that the offence under the POCSO Act was committed on both the dates by accused *Nikhil Arya*. The truth or falsity of it was the subject matter of investigation by the police. Further, the child victim, his mother and his sister have mentioned the names of the petitioners in their statement and stated that a compromise was forced by the petitioners' exerting pressure on the child victim and his family, which points to the petitioners' knowledge of the offence committed by accused *Nikhil Arya*.

33. On a careful analysis of the FIR, the statements of the mother and the sister of the child victim, and the material filed along with the charge sheet, *prima facie*, it cannot be said that ingredients of offence alleged to have been committed are not made out or that any other ground for quashing of the FIR including delay or *malafides*, is made out.

34. Lastly, it is noted that at the stage of summoning, the Trial Court is not required to pass a detailed order but is required to apply its judicial mind which must be discernible from the order itself. In the present case, while summoning the petitioners, the Trial Court noted that initially the petitioners' names were kept in Column No. 12. It also noted that besides the main charge sheet, two supplementary charge sheets have been filed. The order therefore indicates that the Trial Court has gone through the charge sheet, the supplementary charge sheets as well as the material filed along with it.

35. Consequently, the summoning order is upheld and the present petitions are dismissed being devoid of any merits. Miscellaneous applications are disposed of as infructuous.

36. A copy of this judgment be communicated electronically to the concerned Trial Court, which shall proceed with the matter while keeping in view the object of the POCSO Act as enshrined in Section 35 of the same.

(MANOJ KUMAR OHRI)
JUDGE

NOVEMBER 12, 2020
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