

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT NAGPUR, NAGPUR.

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CRIMINAL APPEAL (ST) NO. 8953/2023Rohit s/o Chandrakant Bhagat (in jail) .. Applicant**versus**

The State of Maharashtra

Th:PSO PS Hingna, Nagpur & another .. Respondents.....
Mr.N.S.Giripunje, Advocate for the ApplicantMr.Amit Chutke, APP for the Respondent no.1-State
.....CORAM: ANIL L. PANSARE, J.DATED : 10th November, 2023.**PC:**

Heard the learned counsel for respective parties at length.

2. The appellant herein has made the victim as party respondent no.2 in the Appeal as well as application seeking suspension of sentence, being APPA (St) No. 8955/2023. This practice is followed in all appeals where the accused/appellant is convicted for the offence punishable under the provisions of the Protection of Children from Sexual Offences Act, 2012 (for short, 'the POCSO Act').

3. On query as to why the victim has been made party-respondent no.2, Mr. N.S.Giripunje, the learned counsel for the appellant submits that the victim is made party in terms of the law laid down by the Division Bench of this Court, in the case of Arjun Kishanrao Malge vs. State of Maharashtra; MANU/MH/1024/2021.

4. With the assistance of the learned counsel appearing for the appellant and the learned APP I have minutely gone through the aforesaid judgment, and found that there is no such direction issued by the Division Bench.

5. The petitioner before the Division Bench was a social worker, working with the child victims of sexual abuse and their families across Mumbai. According to him, in several cases under the POCSO Act, the Courts and the Police have overlooked or failed to give effect to the mandate of Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules. He also raised a concern of the oblivion and non-recognition of the provisions of the provisions of Section 439(1A) of the Code of Criminal Procedure, 1973 (in short 'the Code').

6. The Division Bench considered these provisions. I will be referring to these provisions in context with the practice followed by the parties in making the victim as party- respondent in the appeal filed u/s. 374 of the Code against conviction as also the application filed u/s 389 of the Code seeking suspension of sentence.

7. Section 40 of the POCSO Act reads thus:

“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 Service Authority shall provide a lawyer to them.”

8. As could be seen the family or the guardian of the child is entitled to the assistance of legal counsel of their choice for any offence under this Act, but subject to the proviso to Section 301 of the Code. The provision also incorporates that if the family or the guardian of the child are unable to afford local counsel, the Legal Services Authority shall provide a lawyer to them. Thus, this Section provides for a right of child to take assistance of legal practitioner through the family or the guardian. The said right is subject to the proviso to Section 301 of the Code which provides that the Public Prosecutor or the Assistant Public Prosecutor, who shall be the in charge of a case, may appear and plead without any written authority before any Court in which the appeal is pending. It further provides that if in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or the Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or the Assistant Public Prosecutor and may with the permission of the Court submit written arguments after the evidence is closed in the case.

9. Thus, Section 40 provides that the family or the guardian of the child is entitled to assistance of a legal counsel of their choice. The word ‘entitled’ would only mean that if the family or the guardian of the child, chooses to appear before the Court, he/she will be entitled to have assistance of a legal counsel of their choice and if they are unable to afford the legal counsel, the Legal

Services Authority will provide a lawyer to them. The word 'entitled' does not mean that the family or guardian of the child should be made a party to the appeal or the application seeking suspension of sentence.

10. The Division Bench has also considered relevant rules of the POCSO Rules which includes, Rule 4 (i), 4(13), 4(14) and 4(15) of the POCSO Rules, which read thus;

“4. Procedure regarding care and protection of child – (1) Where any Special Juvenile Police Unit (hereinafter referred to as “SJPU”) of the local police receives any information under sub-section (1) of Section 19 of the Act from any person including the child, the SJPU or local police receiving the report of such information shall forthwith disclose to the person making the report, the following details:-

(i) his or her name and designation;

(ii) the address and telephone number ;

(iii) the name, designation and contact details of the officer who supervises the officer receiving the information.

.....

(13) It shall be the responsibility of the SJPU, or the local police to keep the child and child’s parent or guardian or other person in whom the child has trust and confidence, and where a support person has been assigned, such person, informed about the developments, including the arrest of the accused, applications filed and other court proceedings.

(14) SJPU or the local police shall also 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. It shall also complete the

Preliminary Assessment Report in Form B within 24 hours of the registration of the First Information Report and submit it to the CWC.

(15) The information to be provided by the SJPU, local police, or support person, to the child and child's parents or guardian or other person in whom the child has trust and confidence, includes but is not limited to the following:-

(i) the availability of public and private emergency and crisis services ;

(ii) the procedural steps involved in a criminal prosecution;

(iii) the availability of victim's compensation benefits;

(iv) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;

(v) the arrest of a suspected offender;

(vi) the filing of charges against a suspected offender;

(vii) the schedule of court proceedings that the child is either required to attend or is entitled to attend;

(viii) the bail, release or detention status of an offender or suspected offender;

(ix) the rendering of a verdict after trial; and

(x) the sentence imposed on an offender.”

11. Sub-rule (1) provides for disclosure of the details mentioned therein to the person including child who lodges report/information in terms of sub-section (1) of Section 19 of the Act. Sub-Rule 13 provides that SJPU or the local police shall be responsible to keep the child and child's parents or guardian etc. of being informed

about the developments, including the arrest of the accused, applications filed and other court proceedings. Sub-rule 14 provides that the SJPU or the local police shall inform the child and the child's parents or guardian etc. about their entitlements and services available to them under the Act or any other law for the time being applicable as per the Form-A. The sub-rule further provides that SJPU or the local police shall complete the preliminary assessment report in Form-B within 24 hours of the registration of the first information report and submit it to the CWC. Sub-Rule 15 provides that SJPU, local police or support person, to the child or child's parents or the guardian etc. shall provide them the information as regards availability of public and private emergency of and the crisis services, procedural steps involved in a criminal prosecution, the arrest of suspected offender, the status of investigation, filing of charge-sheet against the suspected offender, the schedule of court proceedings, the bail, release or detention status of an offender, rendering of a verdict after trial and the sentence imposed on an offender.

12. Thus, Rule (4) of the POCSO Rules deals with the protection of interests of the child and his family, as also to extend the benefits of welfare schemes available to the child who suffers from the trauma of the incident. It is in this context that the SJPU or the local police is required to inform the child the information and services available in Form-A, which reads thus:-

FORM AENTITLEMENT OF CHILDREN WHO HAVE SUFFERED SEXUAL ABUSE TO RECEIVE INFORMATION AND SERVICES

1. *To receive a copy of the FIR.*
2. *To receive adequate security and protection by Police.*
3. *To receive immediate and free medical examination by civil hospital/ PHC etc.*
4. *To receive Counselling and Consultation for mental and psychological well being.*
5. *For recording of statement of child by woman police officer at child's home or any other place convenient to child.*
6. *To be moved to a Child Care Institution where offence was at home or in a shared household, to the custody of a person whom child reposes faith.*
7. *For immediate aid and assistance on the recommendation of CWC.*
8. *For being kept away from accused at all times, during trial and otherwise.*
9. *To have an interpreter or translator, where needed.*
10. *To have special educator for the child or other specialised person where child is disabled.*
11. *For Free Legal Aid.*
12. *For Support person to be appointed by Child Welfare Committee.*
13. *To continue with education.*
14. *To privacy and confidentiality.*

Perusal of Form-A is indicative of the fact that the child is entitled to receive adequate security and protection by Police, in appropriate cases should receive immediate and free medical examination by civil hospital /PHC etc., to receive counselling and consultation for mental and psychological well being, to continue with education and so on. The preliminary assessment report as envisaged under sub-rule (14) of Rule 4 envisages the details in Form- B, which reads thus:

FORM -B

PRELIMINARY ASSESSMENT REPORT

PARAMETERS	COMMENT
1 Age of the victim	
2 Relationship of child to the offender	
3 Type of abuse and gravity of the offence	
4 Available details and severity of mental and physical harm /injury suffered by the child.	
5. Whether the child is disabled (physical, mental or intellectual).	
6. Details regarding economic status of victim's parents, total number of child's family members, occupation of child's parents and monthly family income.	
7. Whether the victim has undergone or is undergoing any medical treatment due to incident of the present case or needs medical treatment on account of offence.	
8. Whether there has been loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial or other reason?	

9. Whether the abuse was a single isolated incident or whether the abuse took place over a period of time?
10. Whether the parents of victim are undergoing any treatment or have any health issues?
11. Aadhar No. of the child, if available.

Date.....

Station House Officer

13. The Preliminary Assessment Report will be helpful to understand the sufferance of the child in order to take further action for his/her well being.

14. Perusal of Rule 4 will show that the SPJU or the local police has to discharge an extremely sensitive duty which, *inter alia*, includes apprising the child or child's parents or guardian etc. of the status of the proceedings pending against the accused as also scheme and measures that are available for the child in terms of Form "A". It is not known whether this information in Form "A" is supplied to the child/victim. As regards, the appraisal of the status of the case, what is provided under sub-rule 15 of Rule 4 is the status of the trial. The careful reading of Rule 4 of Rules of the POCSO Rules does not make the presence of the child and his family or the guardian etc. obligatory. What is obligatory is to apprise the child's family or the guardian etc. of child of the stage/status of the proceeding in order to facilitate the child, through family/ guardian etc. to appear before the Court if he/she desires to do so.

15. At this stage, the learned APP has invited my attention to the judgment delivered by the Full Bench of this Court, in the case of Maya Sanjay Khandare vs. State of Maharashtra: 2021(1) Mh.L.J.613. The Full Bench held that the word 'criminal proceedings' would not be limited to proceedings before trial Court but would include entire proceedings till its final culmination, giving it seal of finality.

16. This would only mean that the child's parent or guardian etc. would be entitled to be apprised of the stage/status of the proceedings, which would include Appeal. The Full Bench has not made child's presence obligatory at the appellate stage.

17. The next provision that was considered by the Full Bench in Arjun Malge's case is Section 439(1A) of the Code which stipulates that the presence of the informant or any person authorized by him shall be obligatory at the time of hearing of the application for bail under sub-section (3) of Section 376 or 376AB or Section 376DA or Section 376DB of the IPC. This provision under the IPC relates to the offence of rape against the children, aged below 12 years or 16 years, as the case may be.

18. As could be seen, Section 439(1A) provides that the presence of the informant or any person authorized by him, which may include child or child's family, shall be obligatory at the time of hearing of the application for bail in respect of the offences under the IPC. The presence of informant or any other person authorized

by him shall be, thus, obligatory only where the application has been filed under section 439 of the Code.

19. The Full Bench in Arjun Malge's case has considered the provisions of the POCSO Act *vis-a-vis* Section 439(1) of the Code to hold that, akin to the offences which fall under the IPC, as set out in the sub-section (3) of Section 439 of the Code, with respect to the offence under the provisions of the POCSO Act, the presence of the informant or any person authorized by him shall be also obligatory at the time of hearing of the application for bail. The Court found that this would be in consonance with the object of Section 40 of the POCSO Act read with Rules 4(13) and 4(15) of the POCSO Rules.

20. Thus, the Full Bench has held that presence of informant/ victim or any other person authorized by him/her will be obligatory, at the time of hearing of the application filed under section 439 of the Code in the matters involving the provisions of the POCSO Act. In fact, considering the above provision, the Full Bench has issued certain directions, which if read carefully, would only show that the presence of the child through child's parents or guardian etc. is not obligatory at any other stage, except at the time of hearing of an application seeking bail u/s 439 of the Code. What has been made mandatory by the Full Bench is only issuance of notice to the child's family or his/her guardian and such other person as mentioned in the directions. The purpose of issuance of the notice is to apprise the child's family or guardian, of the stage/ status of the proceedings, in order to facilitate the child's family or

the guardian to participate in proceedings, if so desired. The directions issued by the Full Bench finds place in paragraph 20 of the judgment, which read thus:

“20. We are thus of the clear opinion that the POCSO Act read with Rules 4 (13) and 4(15) of the POCSO Rules recognize a statutory entitlement to the assistance of and representation by legal counsel for the family or the guardian of the child and entitlement to be present and to participate in proceedings in accordance with the said provision. As a necessary corollary there is also an entitlement of such persons to be made aware of the filing of applications and the hearings scheduled on such applications at the various stages of the proceedings. We are accordingly inclined to dispose of the petition with the following directions :-

(i) Notwithstanding the duty of the SJPU to intimate the child’s family or guardian or the legal counsel under Rule 4 of the POCSO Rules:-

a. where an application is made before the Court on behalf of the prosecution, it shall be the duty of the office of the public prosecutor to issue notice of hearing of such application to the child’s family or as the case may be, the guardian, and where a legal counsel on behalf of the child is already on record, to such legal counsel, along with all relevant documents and record necessary for effective participation in the proceedings;

b. when an application is made before the Court on behalf of the accused, it shall be the duty of the accused to issue notice of hearing of such application to the child’s family or as the case may be, the guardian, and where a legal counsel on behalf of the child is already on record, to such legal counsel, along with all relevant documents and the record necessary for effective participation in the proceedings.

(ii) When an application is made on behalf of the prosecution, it shall be the duty of the Police officer to confirm to the relevant Court that service of such application along with all

relevant documents and the record necessary for effective participation in the proceedings, and the notice of hearing has been undertaken and completed along with proof of service.

(iii) In the event, it has not been possible to serve the child's family, guardian or legal counsel, it shall be the duty of the SJPU to inform the reasons in writing to the relevant court.

(iv) The appropriate 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, 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 child's family or guardian or legal counsel.

(v) in the event despite issuance of notice, the child's family, guardian or legal counsel, does not attend the hearing, the Court may proceed further without the presence of such noticee, or issue a fresh notice, as the Court may deem fit and proper, considering the interest of justice.

(vi) When the proceedings under the Act would also relate to an offence against Sections 376(3), 376-AB, 376DA and 376DB 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).

(vii) This order shall be brought to the notice of all the Sessions Judges and Special Court Judges in the State of Maharashtra."

21. Thus, what has been stipulated is that where an application is made before the Court on behalf of the prosecution, it shall be the duty of the office of the Public Prosecutor to issue notice of hearing of such application to the child's family or the guardian etc. as the case may be. Similar is the direction if the application is filed on behalf of the accused. It is further stipulated that in an

emergent circumstance, the Court may by recording reasoned order, deal with the application in the absence of the child's family or guardian or legal counsel. Further provision is made that in the event the court deems it proper considering the interest of justice, it may issue fresh notice to the child's family or the guardian etc. Thus, by issuing notice to the child's family or guardian etc. they are apprised of the stage/status of the proceedings in order to facilitate them to appear before the Court for hearing, if so desired. These directions cannot be construed to mean that the presence of the child through child's parents or guardian etc. is obligatory.

22. At this stage, Mr. Amit Chutke, the learned APP submits that the issue involved has been dealt with by the Calcutta High Court which has taken a view that the victim's right to be heard does not include obligation to be impleaded as a party-respondent in criminal appeal. The Division Bench of the Calcutta High Court in Criminal Appeal No.228/2020 with Criminal Appeal No.26/2021 has dealt with the question as to whether the victim is a necessary party to an appeal u/s. 374 of the Code. It has considered the relevant provisions of the Code, POCSO Act, Constitution of India; and held in para no.26 as under:-

“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 IPC or POCSO Act or any other penal provision which will apply in relation to offences affecting human body against any “woman” ad /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.”

23. Thus, the Division Bench of Calcutta High Court has held that the victim is not a necessary party to a Criminal Appeal from conviction for offences against woman or child, punishable under provisions of the IPC or the POCSO Act.

24. The learned APP has then invited my attention to the order dated 10.03.2022 passed by the coordinate Bench of this

Court in BA No.1355/2021 wherein the office of Registry has been directed to ensure that in all bail applications in which the provisions of the Protection of Children from Sexual Offences Act is applicable, the victim should be added as a party, in the manner indicated in para no.20 of the judgment rendered in Arjun Malge's case.

25. As is evident, this direction has been issued in terms of the order passed in Arjun Malge's case and it relates to the applications seeking release of the accused on bail. This direction cannot be construed so as to mean to be a direction, directing the Registry to ensure that the child/victim through child's parents or guardian etc. should be added as party respondent in an appeal or in an application seeking suspension of sentence.

26. It is thus, obvious that there is some obfuscation in the minds of the Advocates, investigating agency and the officials of the Registry that the presence of the child/victim through child's parents or guardian etc. is obligatory in an appeal u/s 374 of the Code or in an application filed u/s 389 of the Code. The confusion has resulted into further sufferance of hardship of agony to the child/victim and the child's parents or guardian. The child/victim of the crime is required to attend the High Court because in every appeal and the application seeking suspension of sentence the notice is being issued to the child/ victim under the misnomer that the victim's presence in the appeal and the application seeking suspension of sentence is mandatory. The experience shows that almost in all cases the child along with parents is brought to the Court. They are required to

travel from remote places to attend the Court and thus are put to financial loss as well. Most of them belong to economically weaker section because in almost all cases, they seek legal aid. None of them, in my tenure so far, have shown interest to participate in the proceedings. Thus, by converting their 'entitlement to participate' into 'obligation to participate' they have been put to further sufferance and hardship.

27. The rule/ participation of the child/victim must be understood in the context and stage of the proceedings. In the application relating to bail, the child/victim may assist the Court of his/her personal sufferance if the accused is released on bail, which may include facts which are within the exclusive knowledge of the child/victim *viz.* threats received by the child/ victim and the family or other witnesses. However, in the application filed u/s 389 of the Code, the child/victim will have no role to play because the judgment along with entire evidence is before the appellate Court. The presence of the Prosecutor is sufficient to decide the application. In such circumstances, the appraisal of the status of the proceedings to the child/victim through child's family or guardian etc. should serve the purpose and their presence should be left to their wisdom.

28. Put all together, a careful reading of the judgments of the Division Bench of Bombay High Court in *Arjun Malge's* case, as also of Calcutta High Court will clearly show that the child and child's parents or guardian etc. is not a necessary party to criminal appeal from conviction for offences under the provisions of the IPC or the POCSO Act. The child or child's parents or guardian etc. are,

however, entitled to be apprised of the status of the proceedings which includes appeal. The SJPU or local police is therefore duty-bound to apprise the child or child's parents or guardian etc. of the status of the proceedings in terms of the provisions of the POCSO Act and Rules as also the information in Form "A" referred above.

29. The child through child's parents or guardian etc, however, should be added as party respondent in an application filed u/s 439 of the Code relating to the provisions of the POCSO Act, as also Sections 376(3), 376AB, 376-DA and 376-DB of the Indian Penal Code, in terms of the directions issued by the coordinate Bench of this Court in B.A. No.1355/2021. The presence of child's parents and not of child is obligatory in terms of directions issued in Arjun Malge's case. The SJPU or local police shall, therefore, ensure that child should be not instructed to attend the Court.

30. As regards the application u/s. 389 of the Code, the notice will have to be issued to the child's parents or guardian etc. in terms of the directions issued by the Division Bench of this Court in the case of Arjun Malge, for the purpose of apprising them of the status of the case but without insisting for their presence in the Court.

31. The Registry of this Court shall accordingly process the application u/ss. 439 and 389 of the Code as also the Criminal Appeals filed under section 374 of the Code against conviction under the provisions of the POCSO Act, as also the above- quoted

provisions of the IPC.

32. The copy of order be served upon the Director General of Police, State of Maharashtra who shall, by way of circular/ notification, issue necessary directions to all concerned, sensitizing them of importance of handling the case relating to child victims. Special emphasis be given to ensure that child/victim is not produced before the High Court unless expressly directed.

33. The appellant herein shall delete the name of the victim in the appeal as also in the application.

34. The instant appeal is **admitted**.

35. Call R & P

(ANIL L. PANSARE, J.)