

23.08.2022.

11.

Ct.No.28

as/PA

(Rejected)

C.R.M. (DB) 2220 of 2022

In Re:- An application for bail under Section 439 of the Code of Criminal Procedure in connection with Harwood Point Coastal P.S. Case No.379 of 2021 dated 07.11.2021 under Section 8 of the POCSO Act and charge sheet submitted under Section 8 of the POCSO Act.

In the matter of : Soumen Biswas @ Litan Biswas.
....Petitioner.

Mr. Ayan Basu,
Mr. Sandip Kr. Mondal,
Mr. Sumit Routh.

...for the Petitioner.

Mr. Neguive Ahmed, Id. A.P.P.,
Ms. Amita Gaur.

...for the State.

Heard the learned Advocates appearing for the parties.

It is submitted on behalf of the petitioner minor victim has not supported the prosecution case. She came out with a different version of the incident in course of cross-examination. Accordingly, petitioner prays for bail.

Learned Additional Public Prosecutor opposes the prayer for bail. He submits the minor had explicitly narrated the incident during her examination-in-chief. Prayer was made for adjournment to cross-examine her. Prayer was mechanically allowed. After a fortnight, on the adjourned day she came out with a different version. Under such circumstances, Public Prosecutor made an application for recall of the witness to put questions to

her to test her veracity which, however, was disallowed. Relations of the victim are yet to be examined. Hence, prayer for bail may be rejected.

In reply, Mr. Basu submits that the minor did not appear in Court earlier on a number of occasions and had been brought to the Court pursuant to a bailable warrant.

We have considered the materials on record. Victim is a 13 year old girl. During her examination-in-chief, she stated that the petitioner used to show her obscene pictures and put his hand in her private parts. During cross-examination, she referred to a dispute between the petitioner and her mother over payment of dues. She, however, denied the suggestion that the petitioner had sexually violated her.

Evidence of a witness is to be taken as a whole. Her evidence during examination-in-chief clearly supports the prosecution case. Other witnesses particularly the mother and relations of the minor are yet to be examined. Release of the petitioner on bail at this stage may adversely affect the case and have impact on other witnesses. Hence, we are not inclined to grant bail to the petitioner.

Accordingly, the prayer for bail of the petitioner is rejected.

This Court is constrained to observe the manner of examination of the minor victim is not in accordance with the procedure laid down in Section 33 of POCSO Act. The aforesaid provision, inter alia, provides for a child friendly atmosphere for examination of a minor. Such examination is to be conducted in

presence of her guardian, a friend or relation. The Court is also required to see that the minor is not intimidated through aggressive or embarrassing questions which may affect the dignity of the child. Sub-section (5) of Section 33 of the POCSO Act puts a duty upon the Court to ensure that the child is not called repeatedly to testify in Court.

The aforesaid requirement was wholly lost sight of by the trial Court who on the mere bidding of the defence, adjourned the cross-examination of the minor to another date. On the adjourned day, the minor appears to have come out with a different version of the incident. This gives rise to an inference during the interregnum the victim had been won over. The Apex Court in a catena of decisions¹ discouraged the practice of long adjournments in course of examination of a witness which leads to witness turning hostile or being won over. The present case is a glowing example of such endemic malady. A fortnight's adjournment resulted in a clear change of stance by the minor. Instead of insisting on completion of the examination of the minor on the same day the Special Court mechanically gave an adjournment for a fortnight on the mere asking of the defence.

We do not appreciate such course of action. We are of the view Special Courts while conducting examination of a minor must bear in mind the safeguards engrafted in Section 33 of the POCSO Act particularly Sub-section (5) thereof which interdicts calling of the minor witness repeatedly to Court. Whenever a

¹ Vinod Kumar vs. State of Punjab, (2015) 3 SCC 220 (see para57)
Rajesh Yadav And Another vs. State of U.P., 2022 SCC OnLine SC 150 (see para 23)

minor victim is brought to the Court, it should be the endeavour of the Judge to see she/he is examined in full on that day itself. Apart from the fear of winning over the witness due to long adjournments, it must be borne in mind the exercise of repeatedly bringing a minor to Court to depose about an incident of sexual predation by itself amounts to secondary victimisation. Repeated summoning of the minor for giving evidence would create trauma and undue stress on her and degenerate the process of adjudication to an ordeal of pain and harassment. This is to be avoided at all costs and a balance must be struck between the right of the victim to friendly and conducive access to justice on one hand and the due process rights of the accused on the other.

We also note the lackadaisical approach in the present case on the part of the investigating agency. No effort to protect the minor and counsel her and her family to participate in the trial had been undertaken. On the other hand, she had been left to the wiles of the accused whose pernicious impact manifested during cross-examination which was held after a fortnight's adjournment.

In ***Sampurna Behura***² and ***Nipun Saxena***³ the Apex Court issued a slew of directions to ensure effective implementation of the safeguards engrafted in POCSO Act particularly section 33 regarding examination of minor victim in a child friendly atmosphere without disclosing her identity or impairing her dignity.

² Sampurna Behura vs. Union of India And Others, (2018) 4 SCC 433

³ Nipun Saxena And Another vs. Union of India And Others, (2019) 2 SCC 703

Further in ***Alarming Rise In The Number Of Reported Child Rape Incidents, In Re***⁴ and ***Alakh Alok Srivastava vs. Union of India And Others***⁵ the Apex Court issued various directions for setting up of exclusive Special Courts in districts, appointments of Special Public Prosecutors and effective functioning of forensic laboratories for speedy disposal of cases. Direction was also issued upon the Chief Justices of the High Courts to constitute a monitoring committee of Judges to monitor progress of trial. ***In Re Children In Street Situations***⁶ the Apex Court set out a Standard Operating Procedure for Courts to follow during video conferencing of child witnesses. These directions seek to create a child friendly atmosphere to minimize inconvenience or discomfort to a minor who may be required to depose in a criminal trial relating to sexual offences.

In this backdrop, we propose to issue the following practice directions to the Special Courts to ensure a smooth, prompt and seamless examination of the minor victim in sexual offences:-

- a) Upon commencement of trial minor victim shall be examined first bearing in mind the mandate under Sub-section (1) of Section 35 of the POCSO Act;
- b) No adjournment shall be given to either of the parties when a minor victim is brought to the Court for giving evidence. Her examination is to be concluded as far as practicable on the day itself. All stakeholders including

⁴ (2020) 7 SCC 87, (2020) 7 SCC 112 and (2020) 7 SCC 130

⁵ (2018) 17 SCC 291

⁶ 2022 SCC OnLine SC 189

the Special Public Prosecutor and defence counsels shall co-operate with the Court in that regard;

- c) Apart from circumstances pertaining to the minor viz. her state of health or due to circumstances beyond the control of the Court, no adjournment shall be granted;
- d) We hasten to add cessation of work owing to lawyer's strike shall not be a ground to postpone the examination of a minor, if she is present in Court;
- e) Apex Court has held bar resolutions to abstain from work/ lawyer's strike are illegal and amount to contempt of Court⁷. Hence, refusal to examine and/or cross-examine the minor victim who is present in Court on such ground would not only amount to 'professional misconduct' on the part of the lawyer concerned but shall also be construed as obstruction to administration of justice making him liable for 'criminal contempt' under section 2(c) of the Contempt of Courts Act;
- f) In the event, an adjournment is given owing to circumstances pertaining to the minor or beyond the control of the Court, reason for adjournment must be explicitly stated in the order sheet and such adjournment shall be for a very short period not more than 2-3 days subject, however, to the convenience of the minor;
- g) Sub-section (5) of Section 33 of POCSO Act is a provision engrafted in a special law enacted for the protection of

⁷ Krishnakant Tamrakar vs. State of Madhya Pradesh, (2018) 17 SCC 27 (see para 50 and 51.4)

minor victims of sexual offences. The said provision shall override the provisions under the general law, e.g. Code of Criminal Procedure and the Evidence Act including the provision for deferment of cross-examination under Sub-section (2) of Section 231 of the Code of Criminal Procedure. Hence, no deferment of cross-examination under section 231(2) Cr.P.C. be permitted if the same is not conducive to the interest of the child;

- h) Necessary witness protection measures including support, compensation, counselling shall be provided by the investigating agency and the District Legal Services Authority (DLSA) concerned to the minor victim and her family before, during and even after the trial, if necessary;
- (i) In the event the minor resides is at far off place or due to inconvenience is unable to come to Court, her/his evidence shall be recorded through video-conferencing following the 'Standard Operating Procedure' prescribed by the Apex Court in ***In Re Children In Street Situations*** (supra).

In the present case, we direct the trial court to conclude the trial at an early date preferably within three months from the next date fixed for recording evidence without granting unnecessary adjournments to either of the parties.

Registrar General is directed to circulate a copy of this order to the Special Courts in the State of West Bengal for due compliance. Copy of this order be also sent to the Directorate of

Prosecution for circulation amongst the Special Public Prosecutors manning the Special Courts under POCSO Act in the State of West Bengal as well as upon the Bar Council of India and Bar Council of West Bengal for circulation amongst its members.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)