

## Asha Patil @ Asha Sagar Rathie Vs State Of Maharashtra

**Court:** Bombay High Court

**Date of Decision:** Sept. 18, 2019

**Acts Referred:** Protection Of Children From Sexual Offences Act, 2012 " Section 4, 10, 16, 17

**Hon'ble Judges:** A.M. Badar, J

**Bench:** Single Bench

**Advocate:** Vikas Singh, A.R. Kapadnis

**Final Decision:** Disposed Off

### Judgement

1. By this Appeal, appellant/accused No.2 Asha Patil @ Asha Sagar Rathie is challenging the Judgment and Order dated 23rd March 2015 in Sessions

Case No.306 of 2013 passed by the learned Additional Sessions Judge, Nashik thereby convicting her of the offence punishable under Section 17 of

the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act' for the sake of brevity) and sentencing her to

rigorous imprisonment for ten years apart from direction to pay fine of Rs.10,000/-, and in default of payment of fine to undergo further rigorous

imprisonment for two years.

2. Facts in brief leading to the prosecution and resultant conviction of appellant/accused No.2 Asha Patil @ Asha Sagar Rathie can be summarized thus

:

(a) Victim of the crime in question, at the relevant time, was a female child aged about five years. Appellant/accused No.2 Asha Patil @ Asha Sagar

Rathie is her biological mother. Accused No.1 Sagar Raju Rathie is her step-father. He was working as watchman whereas appellant/accused No.2

Asha Patil @ Asha Sagar Rathie was working as maid-servant. They all were residing at the outhouse of bungalow of Dr.Palve situated in Gopuram

Society of Nashik.

(b) P.W.No.2 Sunanda Pawar is the First Informant, who lodged report on 15/10/2013 with Sarkarwada Police Station, Nashik. This report has

resulted in registration of Crime No.3157 of 2013 against appellant/accused No.2 Asha Patil @ Asha Sagar Rathie and the co-accused. First

Informant/P.W.No.2 Sunanda Pawar used to reside in the neighbourhood of accused persons and the victim female child/P.W.No.1 used to visit her

house for playing with her daughter. When appellant/accused No.2 Asha Patil @ Asha Sagar Rathi became pregnant, she kept the victim female

child/P.W.No.1 at the house of First Informant/P.W.No.2 Sunanda Pawar for a period of about six to seven months. After delivery of

appellant/accused No.2 Asha Patil @ Asha Sagar Rathi, the victim female child/P.W.No.1 was taken back by her.

(c) At the time of Dashera festival, appellant/accused No.2 Asha Patil @ Asha Sagar Rathi accompanied by the victim female child/P.W.No.1 visited

house of First Informant/P.W.No.2 Sunanda Pawar, who noticed injuries on person of the victim female child/P.W.No.1. Appellant/accused No.2

Asha Patil @ Asha Sagar Rathi informed that injuries were caused because of a fall on the water tap. However, the victim female child/P.W.No.1

disclosed to First Informant/P.W.No.2 Sunanda Pawar that she was beaten by her step-father i.e. accused No.1 Sagar Raju Rathi.

Appellant/accused No.2 Asha Patil @ Asha Sagar Rathi, however, declined to accompany First Informant/P.W.No.2 Sunanda Pawar for lodging

report. That day, the victim female child/P.W.No.1 stayed at the house of First Informant/P.W.No.2 Sunanda Pawar. On the next day i.e. on

14/10/2013 while the victim female child/P.W.No.1 was being bathed by First Informant/P.W.No.2 Sunanda Pawar, she noticed injuries on person of

the victim female child/P.W.No.1. First Informant/P.W.No.2 Sunanda Pawar even noticed injuries on private part of the victim female

child/P.W.No.1. Upon inquiry, the victim female child/P.W.No.1 informed First Informant/P.W.No.2 Sunanda Pawar that her step-father i.e.

accused No.1 Sagar Raju Rathi inserted something in her vagina and also put chilly powder in her vagina. She disclosed that she is beaten by him after

tying her hands with wire of the mobile charger. First Informant/P.W.No.2 Sunanda Pawar then asked appellant/accused No.2 Asha Patil @ Asha

Sagar Rathi to accompany her for lodging report with police station. However, she refused and, therefore, on 15/10/2013, First Informant/P.W.No.2

Sunanda Pawar lodged report (Exhibit 25) with Police Station, Sarkarwada, Nashik.

(d) During the course of investigation, P.W.No.6 Anuja Rajguru, API inspected the spot and prepared spot panchanama in presence of P.W.No.4

Shivaji Ahire panch witness. Two mobile chargers were came to be seized. In presence of P.W.No.3 Yamuna Dagale, vide seizure panchanama

(Exhibit 30) pink slack of the victim female child/P.W.No.1 came to be seized. The victim female child/P.W.No.1 was got examined at the Civil

Hospital, Nashik. P.W.No.5 Dr.Pramod Chaudhari examined her. On completion of investigation, accused persons came to be charge-sheeted.

3. So far as appellant/accused No.2 Asha Patil @ Asha Sagar Rathie is concerned, the learned trial Court had framed the charge for the offence

punishable under Section 17 of the POCSO Act. She pleaded not guilty. Charge for the offences punishable under Sections 4 and 10 of the POCSO

Act was framed against accused No.1 Sagar Raju Rathie and he also pleaded not guilty. Both accused persons were accordingly tried.

4. In order to bring home the guilt to the accused persons, prosecution has examined in all six witnesses. Victim female child is examined as

P.W.No.1. First Informant Sunanda Pawar is examined as P.W.No.2 and the report lodged by her dated 15/10/2013 is at Exhibit 25. Panch witness

Yamuna Dagale is examined as P.W.No.3 and seizure panchanama of slack of the victim female child/P.W.No.1 is at Exhibit 30. Shivaji Ahire panch

witness to the spot panchanama is examined as P.W.No.4. The spot panchanama is at Exhibit 34. Dr.Pramod Chaudhari, Medical Officer working at

the Civil Hospital, Nashik is examined as P.W.No.5. Exhibit 39 is the report of medical examination of the victim female child/P.W.No.1 and papers

of Medico Legal Case are at Exhibit 40. Investigating Officer Anuja Rajguru, API, Sarkarwada Police Station is examined as P.W.No.6.

5. Defence of the appellant/accused No.2 Asha Patil @ Asha Sagar Rathie was that of total denial.

6. After hearing the parties, the learned trial Court came to the conclusion that the victim female child/P.W.No.1 informed her mother i.e.

appellant/accused No.2 Asha Patil @ Asha Sagar Rathie that she is assaulted by accused No.1 Sagar Raju Rathie, but appellant/accused No.2 Asha

Patil @ Asha Sagar Rathie ignored this fact. The learned trial Court further held that though First Informant/P.W.No.2 Sunanda Pawar had disclosed

appellant/accused No.2 Asha Patil @ Asha Sagar Rathie that her daughter is sexually assaulted by accused No.1 Sagar Raju Rathie, still

appellant/accused No.2 Asha Patil @ Asha Sagar Rathie maintained silence and not interfered with the act of accused No.1 Sagar Raju Rathie. This

amounted to 'abetment by illegal omission as well as intentional aid'. With this finding, the learned trial Court was pleased to convict appellant/accused

No.2 Asha Patil @ Asha Sagar Rathie for the offence punishable under Section 17 of the POSCO Act and accordingly she is sentenced as indicated in

the opening paragraph of this Judgment.

7. I heard Mr.Vikas Singh, the learned Advocate appointed to represent appellant/accused No.2 Asha Patil @ Asha Sagar Rathie at the cost of the

State. He vehemently argued that even if evidence of the prosecution is accepted in its entirety, no case for abetment is made out. It cannot be

inferred that appellant/accused No.2 Asha Patil @ Asha Sagar Rathie intentionally aided the co-accused or had abetted him to commit the act of

offence by illegal omission. Evidence of First Informant/P.W.No.2 Sunanda Pawar so far as alleged disclosure by the victim female child/P.W.No.1 to

her mother i.e. appellant/accused No.2 Asha Patil @ Asha Sagar Rathie is hearsay and, therefore, not admissible. The learned Advocate further

argued that even if it is assumed that the victim female child/P.W.No.1 has disclosed the incident to her mother, that would not amount to abetment by

illegal omission.

8. The learned Additional Public Prosecutor supported the impugned Judgment and Order of conviction and resultant sentence by arguing that by

evidence of the victim female child/P.W.No.1 and that of First Informant/P.W.No.2 Sunanda Pawar, the prosecution has brought home the guilt to

appellant/accused No.2 Asha Patil @ Asha Sagar Rathie

9. I have considered the submissions so advanced and also perused the Record and Proceedings including oral as well as documentary evidence.

10. At the outset, it is necessary to reproduce Section 16 of the POCSO Act, which defines the term 'abetment' of offence under the POCSO Act. It

reads thus :

“16. Abetment of an offence.- A person abets an offence, who -

First.- Instigates any person to do that offence; or

Secondly.- Engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place

in pursuance of that conspiracy, and in order to the doing of that offence; or

Thirdly.- Intentionally aids, by any act or illegal omission, the doing of that offence.

Explanation I.- A person who, by wilful misrepresentation, or by wilful concealment of a material fact, which he is bound to disclose, voluntarily

causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that offence.

Explanation II.- Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and

thereby facilitates the commission thereof, is said to aid the doing of that act.

Explanation III.-Whoever employs, harbours, receives or transports a child, by means of threat or use of force or other forms of coercion, abduction,

fraud, deception, abuse of power or of a position, vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person

having control over another person, for the purpose of any offence under this Act, is said to aid the doing of that act.

11. Case of the prosecution set out in the charge sheet is that of facilitating co-accused Sagar Raju Rathie by appellant/accused No.2 Asha Patil @

Asha Sagar Rathie to commit the offence by aiding him intentionally by her omission to report to the police the incident narrated to her by the victim

child and First Informant/P.W.No.2 Sunanda Pawar. The offence of abetment of an offence is made punishable under Section 17 of the POCSO

Act and the Abettor is made liable for punishment which is provided for the offence abetted. At this juncture, it becomes relevant to place on record

reasoning given by the trial Court for convicting the appellant/accused No.2 Asha Patil @ Asha Sagar Rathi for the offence punishable under Section

17 of the POCSO Act. The same can be found in paragraph 39 of the impugned Judgment and Order and it reads thus :

“39. Considering the evidence of PW 1 and PW 2, it appears that though PW 1 had informed accused no.2-her mother that she was assaulted by

accused no.1, still she has ignored the same. Thereafter she narrated the said incident to PW 2 and PW 2 had also disclosed to the accused no.2 that

her daughter is sexually assaulted by accused no.1 still she kept silent and not interfered with the act of the accused no.1. Said act of the accused no.2

covers under the “abetment” by illegal omission. The accused no.2 intentionally aided the commission of offence by her non interference. In

cases of abetment by illegal omission, it has to be proved that accused must be present at the time and place of occurrence and must fail to

interfere.

It is thus clear that the learned trial Court also held that case of the prosecution is covered by Clause Thirdly of Section 16 of the POCSO Act which

deals with intentional aid by any act or illegal omission. At the cost of repetition it needs to mention here that the learned trial Court was alive to the

legal position that in case of abetment by illegal omission, it is required to be proved by the prosecution that the accused was present at the time of

commission of an act and at place of occurrence, but had failed to interfere in it which amounts to illegal omission. Second explanation to Section 16 of

the POCSO Act deals with the situation as to what amounts to intentionally aiding the offender. For making an accused liable for abetment by

intentional aiding by an act or illegal omission, it is required to be established by the prosecution that either prior to or at the time of commission of act

of offence, such Abettor does anything in order to facilitate the commission of the act of offence and facilitate the commission of offence. Thus

presence of the Abettor either before commission of the offence for facilitating commission of the offence or at the time of commission of an act

constituting the offence is necessary; for making out the offence of abetment. Let us, therefore, examine whether appellant /accused No.2 Asha Patil

@ Asha Sagar Rathi intentionally aided co-accused No.1 Sagar Raju Rathi in commission of the act of offence by her illegal omission.

12. On this aspect, it is in evidence of the victim female child/P.W.No.1 that the co-accused No.1 Sagar Raju Rathi put chilly powder in her vagina

and assaulted her by means of wire of mobile charger after tying her hands. The victim female child/P.W.No.1 has stated that she narrated the

incident to her mother i.e. the appellant/convicted accused. Her cross-examination reveals that her mother used to go for work in the morning and

used to return in the afternoon. Plain reading of evidence of the victim female child/P.W.No.1, as such, makes it clear that appellant/accused No.2

Asha Patil @ Asha Sagar Rath, who happens to be her biological mother was not present either before or at the time of commission of act

constituting offence by co-accused Sagar Raju Rath.

13. So far as First Informant/P.W.No.2 Sunanda Pawar is concerned, her evidence is to the effect that at the time of Dashera festival

appellant/convicted accused No.2 Asha Patil @ Asha Sagar Rath along with her daughter i.e. the victim female child/P.W.No.1 came to her house.

This witness noticed injuries on person of the victim female child/P.W.No.1 and upon getting information from the victim female child/P.W.No.1 that

she is assaulted by her father, had asked appellant/accused No.2 Asha Patil @ Asha Sagar Rath to accompany her to the police station. First

Informant /P.W.No.2 Sunanda Pawar stated that when such request was made, appellant/accused No.2 Asha Patil @ Asha Sagar Rath refused to

oblige. First Informant/P.W.No.2 Sunanda Pawar further stated that on the next day also when she noticed injuries on body of the victim female

child/P.W.No.1, she asked appellant/ accused No.2 Asha Patil @ Asha Sagar Rath to report the matter to the police, but the appellant/accused No.2

Asha Patil @ Asha Sagar Rath was not ready to lodge the report. Thus, evidence of First Informant/P.W.No.2 Sunanda Pawar unerringly points out

that such request to accompany her to the police station was made after commission of the offence by co-accused No.1 Sagar Raju Rath.

14. Neither evidence of P.W.No.1 i.e. the victim female child nor that of First Informant/P.W.No.2 Sunanda Pawar, as such, shows that

appellant/accused No.2 Asha Patil @ Asha Sagar Rath had done an act of illegal omission prior to or at the time of commission of acts constituting

the offence by co-accused No.1 Sagar Raju Rath. Shri.Vikas Singh, the learned Advocate appointed to represent appellant/accused No.2 Asha Patil

@ Asha Sagar Rath has rightly relied on Judgment of the Nagpur High Court in the matter of Mt.Shevanti v. Emperor MAN U/NA/0118/1928. in

order to buttress his contention that subsequent acts of the accused charged with the offence of abetment cannot fall in Clause thirdly of Section 16 of

the POCSO Act. Clause Thirdly of Section 16 of the POCSO Act makes it clear that a person abets by aiding when by any act done either prior to or

at the time of commission of act he intends to facilitate and does in fact facilitate the commission thereof. The intention should be to aid the

commission of a crime. Mere giving of an aid will not make the act an abetment of an offence if the person who gives the aid did not know that the

offence was being committed or contemplated. In order to convict a person of abetment by illegal omission, it is necessary to show that the accused

intentionally aided the commission of offence by his non- $\tilde{A}$ interference and that the omission involved a breach of legal obligation. Abetment by

omission would only be punishable if the omission were an illegal omission i.e. breach of a legal obligation. In this view of the matter, subsequent

failure on the part of appellant/accused No.2 Asha Patil @ Asha Sagar Rathie in non- $\tilde{A}$ reporting the matter to police, as such, does not amount to

intentionally aiding the commission of offence by co- $\tilde{A}$ accused No.1 Sagar Raju Rathie. Mens rea is an essential element of the offence of abetment.

Her subsequent failure to take recourse to law by lodging the FIR does not aid the commission of the offence by accused Sagar Rathie though it might

aid the concealment of an offence already perpetrated. However, there is no such charge against the appellant/convicted accused. Mere negligence

or carelessness on the part of the accused cannot be termed as 'abetment'.

15. In this view of the matter, it cannot be said that appellant/accused No.2 Asha Patil @ Asha Sagar Rathie, who at the most, subsequently came to

know about the act of co- $\tilde{A}$ accused No.1 Sagar Raju Rathie, had abetted co- $\tilde{A}$ accused No.1 Sagar Raju Rathie in commission of the crime by

intentionally aiding him. The appeal, therefore, deserves to be allowed.

16. Before parting with the Judgment, I deem it proper to put on record the appreciation for the efforts taken by Mr. Vikas Singh, the learned

appointed Advocate in prosecuting this appeal and assisting the Court in coming to the correct conclusion.

17. Therefore, the Order :

ORDER

(i) The Appeal is allowed.

(ii) The impugned Judgment and Order, so far as it relates to appellant/accused No.2 Asha Patil @ Asha Sagar Rathie, in convicting her of the offence

punishable under Section 17 of the Protection of Children from Sexual Offences Act, 2012 and sentencing her to suffer rigorous imprisonment for ten

years apart from direction to pay fine of Rs.10,000/- $\tilde{A}$ and in default to undergo rigorous imprisonment for two years; is quashed and set aside.

(iii) Appellant/accused No.2 Asha Patil @ Asha Sagar Rathie is acquitted of the offence with which she is charged. She be set at liberty if not required

in any other case.

(iv) The fine amount, if any paid by her, be refunded to her.

(v) The Appeal is accordingly disposed of.