

Arjun Kishanrao Malge Vs State Of Maharashtra And Others

Court: Bombay High Court

Date of Decision: April 8, 2021

Acts Referred: Constitution Of India, 1950 " Article 14, 15, 21, 39, 39A
Protection Of Children From Sexual Offences Rule, 2012 " Rule 4, 4(13), 4(14), 4(15)
Protection Of Children From Sexual Offences Act, 2012 " Section 19(1), 40
Code Of Criminal Procedure, 1973 " Section 301, 437(3), 439, 439(1A)
Indian Penal Code, 1860 " Section 376(3), 376AB, 376DA, 376DB

Hon'ble Judges: Dipankar Datta, CJ; G. S. Kulkarni, J

Bench: Division Bench

Advocate: Somasekhar Sundaresan, Saziya Mukadam, Kanchi Trivedi, Deepak Thakre, P.P.Shinde, Wesley Menezes, Waqar Nasir Pathan, Rajdeep Lahri

Final Decision: Disposed Of

Judgement

G.S.Kulkarni, J

1. The petitioner who is a social worker, working with child victims of sexual abuse and their families, across Mumbai and who is also performing the

role as a support person in child sexual abuse cases in cases before the Child Welfare Committee, is before the Court pro bono publico, raising issues

in regard to the rights of the children to participate in the trial of offences under the Protection of Children from Sexual Offences Act (for short "POCSO Act").

POCSO Act. The petitioner raises a concern in regard to the implementation and compliance of Prashant Rane Judgment is corrected as per

speaking to the minutes of the Section 40 of the POCSO Act read with Rule 4 of the Protection of Children from Sexual Offences Rule, 2012 (for

short "POCSO Rules").

2. The petitioner's case is : That he has come across several cases under the POCSO Act, in which 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. The petitioner also raises a concern of

the obliquity and non-recognition of the provisions of Section 439(1-A) of the Code of Criminal Procedure (for short "Cr.P.C.") as inserted by the

Act 22 of 2018 with effect from 21 April 2019 in cases under the POCSO Act.

3. It is contended that POCSO Act is a special law enacted inter alia for protection of children, from offences of sexual assault, sexual harassment etc.

and for trial of such offences. It is in such context considering the special circumstances which arise to protect the interest of the victim and the social

interest, the legislature has framed Section 40 which postulates the rights of a child, to take assistance of a legal practitioner. Such provision stipulates

that subject to the proviso to section 301 of the Cr.P.C., the family or guardian of the child shall be entitled to the assistance of a legal counsel of their

choice for any offence committed under the POCSO Act. The proviso below Section 40 mandates that if the family or the guardian of the child are

unable to afford a legal counsel, the "Legal Services Authority" shall provide a lawyer to them. According to the petitioner, relevant to Section 40

is the provision of Rule 4 of the POCSO Rules which provides for a procedure for care and protection of the child, which according to the petitioner,

is required to be considered and given effect to, in letter and spirit, and more particularly qua the implementation of Rule 4(13) and 4(15). These sub-

rules inter alia provide for an obligation inter alia on the Special Juvenile Police Unit (SJPU), or the local police to keep the child and child's parents

or guardian to be informed about the developments, including the arrest of the accused, applications filed and other Court proceedings, and the nature

of the information to be provided. The object of such provision being to ensure participation of the victim in the administration of justice, in POCSO

cases.

4. The petitioner also refers to the Criminal Law (Amendment) Act, 2018, whereby Section 439 of the Cr.P.C. which deals with the "Special power

of the High Courts or Court of Session regarding bail", being amended, incorporating sub-section (1A) with effect from 21 April 2019, to provide that

the presence of the informant or any person authorised by him, shall be obligatory at the time of hearing of an application for bail of a person accused

of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code.

These are offences under the Indian Penal Code in relation to the children. The petitioner contends that considering the mandate of Section 40 of the

POCSO Act read with Rule 4 of the POCSO Rules, the amendment to the provisions of sub-section (1A) of Section 439 of the Cr.P.C. are required

to be applied mutatis mutandis to the offences under the POCSO Act. Such application of these provisions, would ensure a fair representation to the

victims of child sexual assault, their families and the public in general. More particularly, as Rule 4 of the POCSO is not restricted to informing the

victims/complainants about the bail applications moved by the accused, but is also applicable to any/ all the applications moved by the accused before

the trial Court.

5. The petitioner has contended that although Rule 4 of the POCSO Rules is ingrained in the Rule book since 2012, the same has been neglected and

ignored in practice. It is his contention that the amendment to Section 439 of the Cr.P.C. by incorporating sub-section (1A) has also been overlooked

by the police and the trial Courts as appropriate steps, to inform the victims/complainants of the bail applications moved by the accused, which are

falling within the purview of the POCSO Act, the offences in relation to children as specified in sub-section (1A) of Section 439 of the Cr.P.C., are

not taken. It is contended that the said amendment to Section 439 cannot be interpreted to be directory when its purport is mandatory. In supporting

the contention that these provisions are overlooked and/or not implemented, the petitioner has placed on record orders which are passed by the

different Sessions Court, which clearly show that neither the victims or the complainants at any point of time were informed of the proceedings nor

any notice was served in compliance of Section 40 read with Rule 4 of the POCSO Act and Rules, or the mandate of Section 439(1-A) of the Cr.P.C

followed.

6. The petitioner has contended that there are several such cases where the victims, victim's parents, complainants, support persons are not being

informed about applications being moved by the accused persons despite the fact that the POCSO Act and Rules clearly mandate the right of the

victim and/or parents, complainants, support persons to participate in the proceedings and be afforded a fair representation in the same. The petitioner

would urge that such concern was addressed also by the Delhi High Court when it issued "Practice directions" dated 24 September 2019. Being

intrigued with the non-compliance of such practice directions, a learned Single Judge of the Delhi High Court in Jeena Jha Vs. Union of India, (Writ

Petition (C) no.5011 of 2017) passed orders directing that a strict compliance of the Practice Directions dated 24 September 2019 be ensured. The

said order also requires District Judges to file a report in the High Court as to whether the "practice directions" are being followed and if not, the

reasons for such omission. The High Court also observed that these practice directions were to mutatis mutandis apply to the offences under the

POCSO Act. The petitioner has also referred to similar directions of the Delhi High Court in Criminal M.C.No.1474 of 2020.

7. On the above conspectus, the primary grievance as raised by the petitioner in these proceedings is in regard to the non-compliance of the provisions

of Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules and of the procedure under Section 439(1-A) of the Cr.P.C by the police and

the Courts. It is contended that non-observance of these provisions infringes the fundamental rights of such children guaranteed under Articles 14 and

21 of the Constitution. The petitioner has accordingly prayed for the following reliefs:

i. Issue directions to all the criminal courts to exercise jurisdiction to secure efficient and effective participation of child victims through their legal

representatives at all stages of the judicial process;

ii. Frame Guidelines / issue directions to the Respondent No.1, 2 and 3 to ensure strict compliance of Section 40 of the POCSO Act read with Rule 4

of the POCSO Rules so that the Child Victims of sexual abuse / assault are necessarily protected and their interests safeguarded;

iii. Declare that Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules mandates that the Child Victim, Parents, or Guardian as the

case may be, have to be informed regarding any Application for Bail preferred by a suspected offender / accused person;

iv. Declare Section 40 of the POCSO Act read with Rule 4 of the POCSO Rules necessarily require that the Legal Representative of the Child

Victim, Parents, or Guardians as the case may be, is heard before releasing the suspected offender on Bail;

v. Frame Guidelines / issue directions to the Respondent No.1, 2 and 3 to ensure strict compliance of Section 439 (1-A) of the Cr.P.C. and declare

that the provisions/practices to be followed under Section 439 (1-A) of the Cr.P.C. are also made mutatis mutandis applicable to offences under the

POCSO Act with respect to the bail applications moved by the Accused/ Offender in such cases;

vi. Direct Respondent No.5 to develop a mechanism to monitor compliance of Section 40 of the POCSO Act read with Rule 4 of the POCSO

Rules.

8. A reply affidavit is filed on behalf of the State of Mr.Manoj Naval Patil, Superintendent of Police. Referring to the provisions of Section 40 of the

POCSO Act and Rule 4(13) and 4(15) of the POCSO Rules as also the provisions of Section 439 of the Cr.P.C., it is stated that to sensitize all the

Unit Commanders of the said provisions, instructions have been issued to all the Unit Commanders vide Circular dated 6 October 2020. It is contended

that in this view of the matter the petition ought to be disposed of, as adequate steps are being taken on behalf of the State Government.

9. A reply affidavit has been filed on behalf of respondent no.3/Maharashtra State Commission for Protection of Child Rights, of Smt.Rohini

Madhukar Lade, Assistant Administrative Officer, to contend that respondent no.3 would concur with the petitioner that the entitlement to a legal

counsel of the choice of the family or the guardian of the child as conferred by Section 40 of the POCSO Act depicts the statutory mandate that the

child is entitled to be legally represented, at all stages of the legal proceedings under the POCSO Act. It is contended that the said provision is

coherent and consistent with the wider scheme of the legislation. It is contended that Article 39A of the Constitution of India casts an obligation upon

the State to provide free legal aid, thereby clearly bolstering the need for legal representation of the victim at all stages of the proceedings. It is also

contended that the guidelines issued by the Government of India, Ministry of Women and Child Development, also inter alia recognizes the rights,

namely, of the child to be informed; right to be heard and to express views and concerns; right to effective assistance, right to be protected from

hardship during the justice process; right to compensation. In short, the affidavit of respondent no.3 supports the contentions as urged by the petitioner.

Discussion and conclusion

10. We have heard Mr.Somasekhar Sundaresan, learned Counsel for the petitioner and Mr.Deepak Thakre, learned Government Pleader alongwith

Smt.Shinde, learned APP for the State, and Mr.Wesley Menezes, learned Counsel for the respondent no.3.

11. Before we embark upon the discussion, it would be imperative for us to note the provisions of Section 40 of the POCSO Act, the provisions of

Rule 4(13), 4(14) and 4(15) of the POCSO Rules, as also the provisions of Section 439(1-A) of the Cr.P.C. Such provisions read thus:-

POSCO Act

“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;

Provide 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.

POSCO Rules, 2020

“4. Procedure regarding care and protection of child. - (1) Where any Special Juvenile Police Unit (hereafter referred to as “SJPU”) or 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.

CODE OF CRIMINAL PROCEDURE

439. Special powers of High Court or Court of Session regarding bail

(1) A High Court or Court of Session may direct

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub-Section (3) of section

437, may impose any condition which it considers necessary for the purposes mentioned in that Sub-Section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified;

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively

by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public

Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under sub-

section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code, give notice of the application for bail to the

Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.

(1A) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person

under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to

custody.

12. The POCSO Act is a special legislation enacted by the Parliament with an object to provide a statutory shield to protect children from the offences

of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences. The scheme of this

legislation is clear from the different Chapters and its contents. Chapter II deals with sexual offences against children which are differently

categorized and for punishment of such offences. Chapter III provides for using child for pornographic purposes and punishment therefor. Chapter IV

deals with abetment and attempt to commit an offence. Chapter V provides for the procedure for reporting of cases. Chapter VI contains the

provisions in relation to procedures for recording statement of the child. Chapter VII provides for Special Courts to be designated for providing speedy

trial for offences falling under such legislation; provisions on presumption as to certain offences; presumption of culpable mental state, as also

application of the Cr.P.C. to the proceedings before a Special Court. Chapter VIII provides for the procedure and powers of Special Courts and

recording of evidence. Chapter IX provides for miscellaneous provisions as to guidelines for child to take assistance of experts etc. (Section 39); right

to child to take assistance of legal practitioner (Section 40).

13. On a perusal of the scheme of the said legislation, it is clear that a robust mechanism recognizing the need to protect children from the offences

falling within the purview of this legislation and the method and manner to deal judicially such offences, is prescribed as a part of the administration of

criminal justice.

14. Section 40 of the POSCO Act, falling under Chapter IX titled "Miscellaneous Provisions", confers a right upon a child to take assistance of a

legal practitioner. It provides that 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, and as per the proviso, if the family or the guardian of the child are unable to afford a legal counsel "the Legal Services

Authority shall provide a lawyer to them. From a bare reading of Section 40, it is limpid that it mandates entitlement inter alia conferred on the family

or the guardian of the child of the assistance of legal Counsel of their choice in regard to any offences under the Act, and if the family or the guardian

of the child are unable to afford a legal counsel of their choice, it is mandatory and an obligation of the Legal Service Authority, to provide a

lawyer to them from its panel. Such mandate of Section 40 is made procedurally effective by framing of Rule 4(13), 4(14) and 4(15) of the POSCO

Rules. Sub-rule (13) provides that it shall be the responsibility of the SJPU, or the local police to keep the child and child's parent or guardian etc.,

informed about the developments, including the arrest of the accused, applications filed and other court proceedings. Sub-rule (14) provides that

information in relation to the services available to them under the Act or any other law for time being in force as per Form-A, be provided for, as also

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

the Child Welfare Committee. Sub-rule (15) of Rule 4 postulates information to be provided by the SJPU, local police, or support person inter alia to the

child and child's parents or guardians and which includes information as described under Clause (i) to (x) which speaks of the variety of

information inter alia of availability of public and private emergency and crisis service; the procedural steps involved in a criminal prosecution; the

availability of victim's compensation benefits; the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to

the extent not interfering with the investigation; the arrest of a suspected offender; the filing of charges against a suspected offender; the schedule of

court proceedings that the child is either required to attend or is entitled to attend; the bail, release or detention status of an offender or suspected

offender; rendering of a verdict after trial; and the sentence imposed on an offender.

15. On a conjoint reading of Section 40 of the POCSO Act read with Rule 4 of the POSCO Rules the legislative mandate is that of complete

information to be made available, of all the proceedings and its progress in relation to the offences under the said Act, to the parent or the guardian of

the child, with the sole object to safeguard the interest and well being of the child at every stage of the judicial process, to give effect to the mandate

of Articles 15 and 39 of the Constitution. On behalf of the petitioner, we have been shown several orders passed by the Courts trying such offences.

We see from such orders, that the concerned Courts have completely overlooked the mandate of Section 40 of the POCSO Act read with Rule 4 of

the POCSO Rules.

16. Considering the avowed legislative intent of such provisions, it thus cannot be countenanced, that when it comes to the administration of criminal

justice, the stakeholders who are concerned with the investigation of such offences, as also the Special Courts dealing with the proceedings under Act,

overlook and/or not recognize and/or implement the mandate of such solemn provisions.

17. In our opinion, the petitioner is correct in his contention, also referring to the provisions of Section 439 of the Cr.P.C and the amendment made

thereto by incorporation of Sub-section (1A) [(by Act 22 of 2018) with effect from 21 April 2019] stipulating that
“the presence of the informant or

any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of section 376 or

section 376AB or section 376DA or section 376DB of the Indian Penal Code.” It needs to be noted that such provisions of the Indian Penal Code

referring to sub-section (1A) of Section 439 of the Cr.P.C. are in relation to the offences under sub-section (3) of Section 376 or Section 376AB or

Section 376DA or Section 376DB of the IPC which relate to children. We thus find ourselves in agreement with the contention of the petitioner that

akin to the offences which fall under the Indian Penal Code as set out in sub-section (1A) of Section 439 of Cr.P.C., with respect to applications for

bail under the POCSO Act, the presence of the informant or any person authorised by him shall be made obligatory at the time of hearing of the

application for bail. This would certainly be in consonance with the object of Section 40 of the POCSO Act read with Rule 4(13) and 4(15) of the

POCSO Rules. To such extent, we also find ourselves, in agreement with the directions of the Delhi High Court in its orders as noted above.

18. It would be apposite to refer to the decision of the Supreme Court in Eera Through Dr.Manjula Krippendorf Vs. State (NCT of Delhi) and Anr.

{(2017)15 SCC 133} in which the Supreme Court observes that the purpose of bringing such legislation, is to secure the best interest of the child

pertaining to the offences against the children. It is held that the interest of the child both as victim as well as witness need to be protected and the

stress of the legislation is providing a child friendly procedure, and that the dignity of the child is of immense emphasis, in the scheme of the legislation.

19. The importance of this legislation in the context of the directions which were issued in regard to the speedy disposal of such cases and the

sensitivity required in the adjudication of such cases can also be seen from the following observations as made by the Supreme Court in Alakh Alok

Srivastava Vs. Union of India & Ors. {(2018)17 SCC 291}:-

“20. Speaking about the child, a three-Judge Bench in M.C.Mehta V. State of T.N. (1996)6 SCC 756, opined that: (SCC p.759, para 1)

“1. A child is the father of man. To enable fathering of a valiant and vibrant man, the child must be groomed well in the formative years of

his life. He must receive education, acquire knowledge of man and materials and blossom in such an atmosphere that on reaching age, he is found to

be a man with a mission, a man who matters so far as the society is concerned.”

21. The Supreme Court Women Lawyers Assn. Vs. Union of India, (2016) 3 SCC 680, this Court has observed: (SCC p.685, para 9)

“9. In the case at hand, we are concerned with the rape committed on a girl child. As has been urged before us that such crimes are rampant for

unfathomable reasons and it is the obligation of the law and law-makers to cultivate respect for the children and especially the girl children who are

treated with such barbarity and savageness as indicated earlier. The learned Senior Counsel appearing for the petitioner has emphasised on the

obtaining horrendous and repulsive situation.”

22. Alice Miller, a Swiss psychologist, speaking about child abuse has said:

“Child abuse damages a person for life and that damage is in no way diminished by the ignorance of the perpetrator. It is only with the uncovering

of the complete truth as it affects all those involved that a genuinely viable solution can be found to the dangers of child abuse.”

23. Keeping in view the protection of the children and the statutory scheme conceived under the POCSO Act, it is necessary to issue certain

directions so that the legislative intent and the purpose are actually fructified at the ground level and it becomes possible to bridge the gap between the

legislation remaining a mere parchment or blueprint of social change and its practice or implementation in true essence and spirit is achieved.”

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 the 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, 376-DA or 376-DB 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. A copy of this order be forwarded to the Director General of Police, the Director of Prosecution, State of Maharashtra, and the Superintendent of

Police of each of the districts in the State of Maharashtra, so that all the concerned police personnel dealing with such offences are apprised of the

directions for effective implementation of the POCSO Act and the Rules as noted above. It be also forwarded to the Member Secretary, Maharashtra

State Legal Services Authority, who shall forward the same to the Secretary of each District Legal Services Authority within the State.

22. Disposed of in the aforesaid terms. No costs.