

(2020) 03 DEL CK 0184

In the Delhi High Court

Case No : Criminal Revision Petition No. 302 Of 2017, Criminal Miscellaneous Application No. 6672 Of 2017

Wsi Sharmila

APPELLANT

Vs

State, Gnt Of Delhi & Anr

RESPONDENT

Date of Decision : 19-03-2020

Acts Referred:

Protection Of Children From Sexual Offences Act, 2012 — Section 6, 8, 10
Indian Penal Code, 1860 — Section 218, 354, 376, 376(2), 376(2)(f), 376(2)(j),
376(2)(i), 506
Code Of Criminal Procedure, 1973 — Section 154, 156(3), 161, 164

Citation : (2020) 268 DLT 8

Hon'ble Judges : Sanjeev Sachdeva, J

Bench : Single Bench

Advocate : Prashant Manchanda, Meenakshi Dahiya, Kavita Jha

Final Decision : Allowed

Judgement

Sanjeev Sachdeva, J

1. Petitioner impugns order dated 17.04.2017 whereby the Trial Court has directed registration of FIR against the petitioner under section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act) and under section 218 Indian Penal Code (IPC for short) and to get the matter investigated through a senior officer, not below the rank of Inspector.

2. Petitioner was the investigation officer in the case bearing FIR Nos. 827/2016 under sections 354/506 IPC and Section 10/8 POCSO Act Police Station: Aman Vihar against the class teacher of the child victim and case bearing FIR No. 179/2017 under sections 376(2)/376(2)(j)/376(2)(i) IPC and Section 6 POCSO Act Police Station: Aman Vihar against the father of the child victim.

3. As per the case of the Prosecution, on 09.08.2016 father of the child victim gave a written complaint in Police Station Aman Vihar against one teacher in the

school of the child victim, wherein he alleged that his daughter aged about 13 years studying in class 5th, on 06.08.2016, had told her mother that her class teacher had taken her to a lonely/empty class room and touched her whole body with bad intentions.

4. On the above complaint, Case FIR No. 827/16 under sections 354/506 IPC read with section 10 POCSO Act, was registered against the class teacher at Police Station Aman Vihar. For investigation the case was assigned to W/SI Manisha Sharma.

5. On 17.08.2016, during the investigation, the Investigating Officer W/SI Manisha Sharma examined two friends/classmates of the child victim and their statements were also recorded under section 164 Criminal Procedure Code.

6. Both the friends/classmates of the child victim disclosed in their statements under section 164 Cr. P.C. that the child victim had told them that her father used to rape her at her house in the absence of her mother. They further stated that they had informed about the entire incident to their class teacher.

7. During investigation, on 01.09.2016, the class teacher produced a document (Mafinama/apology letter) allegedly prepared on 08.08.2016, in the presence of the school Principal and several other teachers of the school in the office of the Principal.

8. It was contended that, on 08.08.2016 the class teacher had called the parents of child victim to the school, after being informed about the conduct of the father of child victim by her classmates.

9. The parents of child victim came to the school and the father of the child victim admitted his guilt in front of several other teachers of the school. Subsequent to this a document in the form of "Mafinama"/apology letter was prepared in which the father agreed not to repeat his wrongdoings. The "Mafinama"/apology letter also bears the signature of five teachers of the same school as witnesses. Besides the teachers the "Mafinama"/apology letter allegedly bears the thumb impression of the parents of the child victim.

10. The opinion of the FSL Rohini is that the document is genuine, to the extent that the questioned document bears the signatures of the teachers and also bears the thumb impression of the mother of the child victim.

11. In her statement recorded under section 164 Cr.P.C., the child victim leveled allegations against the teacher and he was arrested on 10.03.2017.

12. On 15.02.2017, a case vide FIR No. 179/17 dated 15.02.2017 under sections 376 (2)(f)/376(2)(j)/376(2)(i) I.P.C. read with Section 6 POCSO Act was registered, on the statement of the classmates of the child victim, against the father of the child.

13. The classmates had alleged in their statement that the child victim used to tell them that "her father is a bad person. He used to rape (Galat Kaam) the child

victim in the absence of her mother". Father of the child victim was arrested on 17.02.2017.

14. On 17.02.2017, the victim child was medically examined through W/SI Nishu, P.S Aman Vihar at Sanjay Gandhi Memorial Hospital vide MLC No. 43A in which the victim child had alleged that her class teacher had molested her in the school. Internal examination was not conducted by the doctor at the time of preparation of the MLC as her parents had not given the consent for the same.

15. On 20.2.2017 statement under section 164 Cr. P.C. of the child victim was recorded in case FIR No. 179/17 dated 15.09.2017 under section 376 (2) (f)/376(2)(j)/376(2)(i) IPC read with section 6 POCSO Act. In her statement the child victim stated that "My master and my father are not guilty". She exonerated both her father as well as the teacher.

16. On 04.03.2017, investigation of both the cases i.e. FIR No. 827/16, dated 09.08.2016, under section 354/506 IPC read with Section 10 POCSO Act, P.S. Aman Vihar against the class teacher and FIR No. 179/17 dated 15.09.2017 under section 376 (2)(f)/376(2)(j)/376(2)(i) IPC read with section 6 POCSO Act against the father were transferred to District Investigating Unit/Outer District and the investigation of both the cases were marked to the petitioner - W/SI Sharmila of District Investigating Unit /Outer District.

17. As per the petitioner - W/SI Sharmila, on 29.03.2017, after taking the consent of the mother of child victim on a piece of paper, the child victim was medically examined vide MLC No. 88 at Sanjay Gandhi Memorial Hospital at 5.45 p.m.

18. The doctor mentioned in the MLC "brought by SI Sharmila with reference to previous MLC No.43A done on 17.2.2017. She is A/H/O sexual assault by her father from many months which she told to her classmates friends and class teacher. Her father accepted this crime but later on her father accused that teacher, that he is sexually assaulting her daughter and filed FIR against him. Presently victim is not giving any history regarding anybody. She seems to be very scared and under pressure." The Doctor opined in the MLC "Hymen Torn". "No External injuries seen".

19. Later on that very day i.e. 29.03.2017, a complaint was lodged at P.S Aman Vihar vide DD No. 29A signed by the child victim against the Investigating Officer - petitioner - W/SI Sharmila, alleging that she had inserted her finger in the private parts of the victim and forced her to go for medical examination and there also internal examination was carried out without her consent.

20. A complaint was filed against the Investigating Officer - petitioner - W/SI Sharmila on behalf of the child victim before the Trial Court on 13.04.2017. On 15.04.2017, the Trial Court called for a report from the SHO, PS Aman Vihar and DCP, Outer District as to what action had been taken on the complaint.

21. Status Reports were was filed on 17.04.2017. Status Report of the DCP Outer

District was that ACP/PG Cell Outer District has been directed to conduct an inquiry and time was sought to complete the inquiry and report. Status Report of the ACP Sultanpuri was that the complaint of the child victim containing allegations against the IO was referred to ACP-PG Cell, Outer District for inquiry.

22. On 17.04.2017 by the impugned order the Trial Court in the FIR No. 827/16 against the class teacher held that the complaint dated 29.03.2017 of the child victim showed that the offences complained of against the petitioner I.O. W/SI Sharmila were cognizable and accordingly directed the SHO, P.S. Mangol Puri to register an FIR against the Petitioner I.O. W/SI Sharmila under Section 6 of POCSO Act read with Section 218 IPC and get the matter investigated through a senior officer, not below the rank of Inspector.

23. Pursuant to directions of this court, Status Report has been filed by the Assistant Commissioner of Police that an enquiry was conducted against W/SI Sharmila by Inspector Savita CAW Cell / Outer District and ACP CAW Cell/ Outer District. During enquiry the statement of Child victim was recorded on 28.04.2017 and statement of W/SI Sharmila was recorded on 08.05.2017.

24. Status Report indicates that during enquiry statements of the doctor who conducted the Medical Examination and the nurse of Sanjay Gandhi Memorial Hospital, who assisted have been recorded on 16.05.2017 & 23.05.2017 respectively.

25. The doctor in her statement has stated that on 29.03.2017 she was on duty from 4 p.m. to 9 a.m. as CMO, Casualty Gynea at Sanjay Gandhi Memorial Hospital, Mangol Puri, Delhi. In the evening the petitioner W/SI Sharmila came to Gynea department along with the child victim and her mother with her younger brother. Petitioner gave a letter with the request to conduct the Gynea medical examination of the child victim.

26. The doctor stated that as per the directions, she informed the procedure of Gynea medical examination to the child victim and her mother. She called the Nurse for assistance to prepare the MLC of the child victim. She took the consent as well as thumb impression of child victim and her mother on the MLC and then she prepared the MLC No.88A of the child victim on 29.03.2017.

27. Both the doctor as well as the Nurse stated that they had conducted the Gynea medical of child victim according to the procedure and during Gynea medical examination they had not inserted finger or any other medical tool in the vagina of the child victim. They stated that W/SI Sharmila and the mother of the child victim were behind the curtain during the medical examination of the child victim.

28. Further, the doctor in her statement has stated that before or during the medical examination of child victim, neither her mother nor the child victim had told them that petitioner - W/SI Sharmila had committed any penetrative assault on the child victim or had beaten her. She has further stated that all the

allegations are false and baseless.

29. Status Report further states that during enquiry the nurse was also examined and she has also stated same facts as narrated by the doctor in her statement. Both the doctor and the nurse have stated that they have no personal enmity with the child victim or relationship/friendship with the petitioner - W/SI Sharmila and that they had performed their duty and conducted the Gynea medical examination of child victim as per procedure. They have stated that allegation of beating the child victim is totally false.

30. The report further states that during enquiry a site plan was also prepared where Gynea medical examination of child victim was conducted. The spot remained full of ladies and hospital staff as the spot is situated at Labour/OBS Room of Sanjay Gandhi Hospital. Said place is not as lonely as the child victim had alleged.

31. The report further states that the allegations leveled by the child victim could not be substantiated and it seems that the complainant was under influence of her father as she was living with him under the same roof.

32. Learned counsel for the petitioner submits that the allegations leveled in the complaint were demonstrably unsustainable maliciously instituted with an ulterior motive for wreaking vengeance against the investigating officer with a view to shield the father of the complainant in as much as the same was lodged at the instance and under the pressure of her father. It is submitted that the allegations have been leveled to prevent the investigating officer from carrying out her duties.

33. Learned counsel for the petitioner submits that petitioner has been falsely implicated. It is alleged that the complaint against the petitioner was instituted by the mother of the child victim with an ulterior motive to shield the father of the victim against whom FIR No.179/2017 was registered under section 376(2)(f)/376(2)(j)/376(2)(i) IPC and section 6 POCSO Act for sexually assaulting the child victim.

34. Per contra, Learned counsel for the respondent submitted that the child victim was not produced before the CWC before subjecting her to re-medical examination. Further, no statement of the child victim was recorded before re-medical examination.

35. Learned counsel for the petitioner submits that the child victim had turned hostile and her statement made under section 164 Cr.P.C did not corroborate the allegations in the FIR.

36. It is submitted that during investigation of FIR No.179/2017 re-medical examination of the prosecutrix was conducted wherein it was found that the hymen was torn and the petitioner had filed an application for shifting the prosecutrix to a children's home.

37. Reference may be had to the judgment of the Supreme Court in *Maksud Saiyed v. State of Gujarat*, (2008) 5 SCC 668 wherein the Supreme Court reiterated the principles laid down by it in *Pepsi Foods Ltd. v. Special Judicial Magistrate* (1998) 5 SCC 749 that "Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

38. The Supreme Court in *Priyanka Srivastava v. State of U.P.*, (2015) 6 SCC 287 has held that "power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the Code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same."

39. Further, in *Priyanka Srivastava* (supra) the Supreme Court has held that in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. Regard being had to the nature of allegations of the case.

40. In the present case, complaint was made on behalf of the child victim on 15.04.2017, when the Trial Court directed for filing of status report as to what action had been taken. On 17.04.2017 the status report filed by the DCP Outer District was that ACP/PG Cell Outer District has been directed to conduct an inquiry and time was sought to complete the inquiry and report.

41. The Trial Court, without waiting for the report or even conducting any further enquiry passed the impugned order directing registration of FIR against the Investigating Officer - Petitioner under section 6 of POCSO Act and section 218 IPC.

42. In the peculiar facts of the present case, the Trial Court should have proceeded with caution. The acceptance of the complaint, without any corroboration and material to support the allegations was completely

unwarranted and shows complete non application of mind to the facts of the case.

43. The Trial Court should have taken note of the fact that the Petitioner was the third investigating officer in line. She had set the investigative process into motion. The two friends of the child victim had already given their statements against the father and mother of the child victim based on which even an FIR was registered against the father of the child victim.

44. Petitioner - Investigating officer was merely investigating and taking steps to gather evidence for the prosecution. She had taken steps to distance the child from her parents so that she could be away from their control and influence and then give independent evidence.

45. Extra caution was required to be exercised by the Trial Court especially when the custody of the child was with the parents and there was already an FIR registered against the father based on the statement of the two friends of the child victim.

46. Statement of the friends of the Child victim had been recorded by the earlier IO under section 161 Cr.P.C. and same allegations were repeated by them before the magistrate under section 164 Cr.P.C.

47. Trial Court should have also kept in mind the medical report which states that hymen of the child victim was torn and there was no report of a fresh or external injury reported. Further, that the allegations levelled by the father of the child victim against the class teacher was only of touching her and not of penetrative assault, but, the allegations leveled against the father of the child victim, by the two friends of the child victim, even before the petitioner took over the investigation, was of penetrative sexual assault.

48. There was no plausible motive attributable to the petitioner for the alleged offence of inserting her finger in the private parts of the child victim.

49. Trial Court should not have overlooked the possibility of a false complaint being made against the Petitioner - Investigating Officer under the influence of the parents, especially when the father is an accused of sexually assaulting the child victim and she is continuing to reside with him.

50. The Trial Court instead of acting with caution and satisfying itself about the veracity of the allegations, has acted in a haste and without conducting any inquiry or waiting for the report of the inquiry being conducted by the Assistant Commissioner of Police as directed by the DCP, accepted the allegations on their face value and directed registration of the FIR against the Investigating Officer.

51. As noticed hereinabove, the status report filed by the Assistant Commissioner of Police, Special Investigating Unit Crime, Branch before this court states that the allegations levelled by the child victim could not be substantiated and it seems that the complainant is under influence of her father as she is living with him under the same roof.

52. In view of the above, the impugned order dated 17.04.2017 directing registration of the FIR against the petitioner under section 6 POCSO Act and under section 218 IPC is set aside.

53. However, it is open to the trial court to pass an appropriate order after conducting a preliminary inquiry and prima facie satisfying itself about the veracity of the allegations. It is clarified that nothing stated herein shall constitute an expression of opinion on the merits of the allegations.

54. Petition is allowed in the above terms.

55. Trial Court record be transmitted back to the trial court forthwith.

56. Order Dasti under signatures of the court master .