

LAWCHAKRA.IN

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

1.

CRM-M-36154-2023
2024:PHHC: 023004

SURJEET KHANNA

.... PETITIONER

Vs.

STATE OF HARYANA AND ANOTHER

.... RESPONDENTS

2.

CRM-M-44425-2023 (O&M)
2024:PHHC: 023005

Axx

.... PETITIONER

Vs.

STATE OF HARYANA AND ANOTHER

.... RESPONDENTS

Reserved on: 06.02.2024
Pronounced on: 19.02.2024

CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

Argued by:- Mr.Rajesh Lamba, Advocate,
for the petitioner (in CRM-M-36154-2023) and
for respondent No.2 (in CRM-M-44425-2023)

Ms. Indira Jai Singh, Sr. Advocate
(through Video Conferencing) with
Mr. Ganesh Sharma, Mr. Rohin Bhatt,
Mr. Abhijeet Sharma, Advocates,
for the petitioners (CRM-M-44425-2023) and
for respondent No.2 (in CRM-M-36154-2023)

Mr. Randhir Singh, Addl. AG, Haryana,
for respondent No.1.

Mr. ADS Sukhija, Advocate (*Amicus Curiae*)

DEEPAK GUPTA, J.

This order shall dispose of two petitions titled above, as both
of them have arisen out of the same proceedings, pending in the Court of

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

Ld. Additional Sessions Judge (Fast Track Court), Faridabad [Special Court constituted to dispose of the matters pertaining to the Protection of Children From Sexual Offences Act, 2012] (for short 'the POCSO Act').

2.1 The matter pertains to a very unfortunate incident. 'A', a minor child aged about 16 years, student of 10th class in Delhi Public School, Greater Faridabad, Sector 81, Faridabad committed suicide on 24.02.2022, leaving behind a suicide note blaming the school authorities for taking the extreme step. 'Axx' (*Petitioner in CRM-M-44425-2023 & Respondent No.2 in CRM-M-36154-2023*) is the unfortunate mother of the deceased child; whereas, Smt. Surjeet Khanna (*Petitioner in CRM-M-36154-2023 and Respondent No.2 in CRM-M-44425-2023*) is the Principal of the aforementioned School.

2.2 The mother of the child i.e. Axx lodged FIR No. 64 dated 25.02.2022 at Police Station, BPTP, District Faridabad, under Section 306 IPC besides Sections 6, 8, 18 & 21 of the POCSO Act. It was alleged by the mother that around one year prior to the incident of suicide, boys in the school used to tease the deceased child by calling him gay and used to misbehave with him. A complaint was made to the school management, but no action was taken, due to which the child 'A' was suffering from depression. Further, on 23.02.2022, the child had to write a science examination, but since he was suffering from dyslexia, he was unable to solve numerical questions. When he sought help from the Head Mistress Mamta Gupta, she started scolding him, due to which the child was very depressed and ultimately, committed suicide on 24.02.2022, leaving behind a suicide note. The mother 'Axx' prayed for taking action against the Delhi Public School management. FIR was accordingly lodged.

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

2.3 The Principal of the school i.e. Mrs. Surjeet Khanna, approached this court and prayed for quashing of the FIR in question by filing CRM-M-4079 of 2023, but the same was dismissed on 14.07.2023.

2.4 On 18.07.2023 i.e. four days after the dismissal of the above quashing petition, the matter was fixed before the Special Court for charge consideration. On that day, the Principal of the School i.e., Mrs. Surjeet Khanna moved an application (Annexure P3) for taking cognizance against 'Axx' i.e. mother of the deceased child under Section 21 of the POCSO Act. It was contended that the applicant i.e. the Principal was made an accused under Section 21 of the POCSO Act only on the ground that she had failed to report the commission of the offence to the Police, despite the fact that an email had been sent to her on 23.09.2021 by the mother of the deceased child. The applicant submitted that much prior to bringing to the notice of the school management, mother 'Axx' herself was aware about the commission of offences under the POCSO Act against the child and hence, she is equally responsible for not reporting the matter to the police, as required under Section 19 of the POCSO Act punishable under Section 21 of the POCSO Act. Thus, it was prayed that the mother 'Axx' be also summoned as an accused to face trial under Section 21 of the POCSO Act. The accused Principal also referred to the various emails right from 11.07.2018 to 18.12.2021 showing the communication between the complainant i.e. mother 'Axx' of the child and the school authorities.

2.5 On receiving the aforesaid application on 18.07.2023 (Annexure P3), Ld. Special Court, on the same day, passed the following order: -

“Present: Sh. Pratap Singh, learned SPP for State assisted by complainant

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

*in person along with Sh. Tejasva Mehra, Advocate for complainant.
Accused Mamta Gupta and Surjeet Khanna are on bail being represented by Sh. Deepak Gera, Adv.*

Today, the case was fixed for framing of charge against the accused. However, application has been filed for taking cognizance against the complainant. Learned counsel for accused contended that no notice of the said application can be given and the complainant/the proposed accused cannot be heard on the said application. The proposed accused in the present application is the complainant who is represented through counsel. I do not find any merit in the contentions of the learned counsel for accused. By way of the present application, the accused wants that the complainant herself, who is the mother of the victim be tried as an accused. In these circumstances, this Court is of the considered opinion that the complainant/proposed accused has a right to be heard. Even otherwise under Section 40 of the POCSO Act the family of the victim is entitled to legal counsel of their choice for any offence under this Act.

Now to come up on 26.07.2023 for filing reply and consideration on the application. Arguments on charge would also be heard on the date fixed.

*Date of Order: 18.07.2023
Parveen Lakhina*

*(Hem Raj Mittal)
Addl. Sessions Judge,
Fast Track Court,
Faridabad.
UID No.HR0204”*

Both the parties feel aggrieved by the aforesaid order and have approached this Court by filing the present two petitions.

2.6 The mother ‘Axx’ of the child has filed CRM-M-44425-2023 praying to quash the application itself, as moved by the Principal on 18.07.2023 for summing of the Petitioner-Axx; whereas, the Principal of the school i.e. Mrs. Surjeet Khanna has filed CRM-M-36154-2023 to quash the order dated 18.07.2023, whereby notice has been issued to the proposed accused i.e. mother ‘Axx’.

3. Ms. Indira Jai Singh, Id. Senior Advocate appearing for the mother-Axx contends that the application by the Principal has been moved

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

with a *mala fide* intention, immediately after the dismissal of CRM-M-4079-2023 on 14.07.2023 by this Court. It is contended further that in fact the mother-Axx, who is proposed to be summoned as an accused, is herself the victim and thus her summoning cannot be sought. Ld. senior counsel further contends that mother-Axx was also a teacher in the same school and that as per the Child Protection Policy of School, she had sent a communication through email dated 23.09.2021 to the school authorities including the Principal, detailing all the crimes which were being committed against the child, including harassment, bullying, torture etc. It was contended that once the school authorities were duly informed as per the guidelines under the Child Protection Policy of School, it was for the school authorities to inform the police as per Section 21 of the POCSO Act.

4.1 On the other hand, Mr. Amitabh Tewari, appearing on behalf of the Principal of the School contends that Section 21 of the POCSO Act is applicable to any person who fails to report the commission of an offence. As per the ld. counsel, it is irrespective of the fact that the person who has knowledge of the commission of offence is the mother of the victim or anybody else. Ld. counsel further submits that dismissal of the quashing petition bearing CRM-M-4079-2023 does not bar the Petitioner from exercising her legal right available under law, and since the Principal is being prosecuted for not reporting the matter to the police despite knowledge of the alleged offences, the mother is equally responsible for the same.

4.2 In reply to the petition filed by the mother-Axx, ld. counsel contends that the petition is premature, in as much as no order has been passed on the application dated 18.07.2023. Ld. counsel further contends

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

that the impugned order dated 18.07.2023 passed by Ld. Special Court is bad in law as no notice was required to be served to the proposed accused, as there is no such requirement under the law.

5. I have considered the submissions of both the sides and appraised the record.

6. The POCSO Act, 2012 was enacted in order to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. Chapter II of the POCSO Act containing Sections 3 to 12 provides punishment for various kinds of sexual offences against children including penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual assault and sexual harassment. Chapter III of the POCSO Act containing Sections 13 to 15 provides punishment for using a child for pornographic purposes or for storage of pornographic material involving a child. Chapter IV of the POCSO Act containing Sections 16 to 18 provides for punishment for abetment of and attempt to commit an offence under the Act. Chapter V of the POCSO Act containing Sections 19 to 23, not only provides the procedure for reporting the cases, but also the punishment for failure to report or record a case.

7. Sections 19 and 21 of the POCSO Act are relevant for the purpose of the present case. These read as under: -

“19. Reporting of offences - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,--

(a) the Special Juvenile Police Unit; or

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

(b) the local police.

(2) Every report given under sub-section (1) shall be--

(a) ascribed an entry number and recorded in writing;

(b) be read over to the informant;

(c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under subsection (2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection including admitting the child into shelter home or to the nearest hospital within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).”

Section 21. Punishment for failure to report or record a case - (1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions of sub-section (1) shall not apply to a child under this Act.

8. As is evident from the abovesaid provisions, any person,

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

having apprehension that an offence under this Act is likely to be committed; or has knowledge that such an offence has been committed, is obliged to inform about the said offence either to Special Juvenile Police Unit or the local police. The use of the word '*shall*' in Section 19(1) of the POCSO Act makes the intention of the legislature quite clear that it is mandatory for any person having knowledge of the offence to inform the Special Juvenile Police Unit [SJPU] or the local police. It is irrespective of the fact as to whether the concerned person having knowledge of the offence is part of some institution or the parent of the child or a friend etc. Section 21 of the POCSO Act provides punishment for failure to report or record a case.

9. In this case, the email dated 23.09.2021 (*Annexure R-2/7 in CRM-M-44425 of 2023*), on which the mother-Axx has relied so as to contend that she had informed the school authorities about the bullying/sexual harassment etc. of the deceased child, would make it clear that the mother-Axx had knowledge about the commission of offences covered under POCSO Act, much prior to when the information was given to the school authorities. As such, *prima facie*, the mother was mandatorily required to inform the local police or the SJPU about the same as per Section 19 of the POCSO Act.

10. The contention of ld. senior counsel for the mother-Axx to the effect that the mother performed her duty by informing the school authorities by way of email dated 23.9.2021 as per the Child Protection Policy of School, does not appear to contain merit at this stage, having regard to the fact that statutory provision would override and will have precedence over the guidelines provided under the Child Protection Policy

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

of School. In these circumstances, the petition moved by the mother-‘Axx’ so as to quash the application itself, does not contain merit.

11. Besides the above, the petition moved by the mother is clearly premature, having regard to the fact that no order on the application moved by accused-Principal Surjeet Khanna on 18.07.2023 has been passed by Id. Special Judge so far.

12. Having regard to the provisions of Section 19 to be read with Section 21 of the POCSO Act, though it cannot be said that the application moved by the Principal itself is bad, it will be for the Court concerned to apply its judicious mind on the application to decide whether to summon the mother as a proposed accused or not, considering the fact that application can neither be considered to have been moved under Section 319 CrPC nor under Section 190 to be read with Section 193 CrPC. At the most, the application may be treated to be under Section 33 of the POCSO Act, there being clear distinction in the scope of Sections 319 & 193 of the CrPC and Section 33 of the POCSO Act.

13. Section 193 CrPC reads as under:

“193. Cognizance of offences by Courts of Session.—Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.”

14. Section 319 CrPC reads as under:

“319. Power to proceed against other persons appearing to be guilty of offence.—(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) to (4) xxxxxxxxxx [not relevant].”

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

15. Section 33 of the POCSO Act reads as under: -

‘33. Procedure and powers of Special Court.

1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts’.

(2) to (9) xxxxxxxxxx [not relevant]

16. Bare perusal of Section 193 CrPC would reveal that Court of Session can take cognizance only after the case is committed by the Magistrate. In ***Kishun Singh and others Vs. State of Bihar (1993) 2 SCC 16; 1993 (1) Crimes 495***, it was held by the Hon’ble Supreme Court that a Court of Session, to which a case is committed for trial by Magistrate can, without recording evidence itself, summon a person not named in the Police Report under Section 173 Cr.P.C (though named in F.I.R.) to stand trial along with those already named therein, as such power is under Section 193 of the Code and not under Section 319 of the Code.

17. There was conflicting opinion regarding the scope of power of the Court of Session under Section 193 Cr.P.C in different decisions of Hon’ble Supreme Court. The matter was ultimately considered by the Constitutional Bench in ***Dharam Pal & Ors. Vs. State of Haryana and another (2014) 3 SCC 306; (Crl. Appeal No.148 of 2003)*** decided by a five Judge Bench of Hon’ble Supreme Court on 18.07.2013. After referring to various precedents including **Kishun Singh’s case (supra)**, Hon’ble Supreme Court held as under :

“In that view of the matter, we have no hesitation in agreeing with the views expressed in Kishun Singh’s case (supra) that the Session Courts has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

committal under Section 209, the Sessions Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein.”

18. The same view was also taken by another Constitutional Bench of Hon'ble Supreme Court in ***Hardeep Singh Vs. State of Punjab & Ors., (2014) 3 SCC 92; 2014 (1) R.C.R.(Criminal) 623.***

19. In view of the authoritative pronouncements of Hon'ble Supreme Court as mentioned above, legal position is clear that the Court of Session has power under Section 193 Cr.P.C to summon a person as accused to stand trial, even if he has not been challaned by the police but who was named in the FIR and whose complicity in the crime appears from the evidence available on record.

20. The issue regarding the scope and extent of power of the court to arraign any person as an accused during the course of inquiry or trial in exercise of the power under section 319 Cr.P.C. has been set at rest by a Constitutional Bench of Hon'ble Supreme Court in ***Hardeep Singh's case (supra)*** followed by another pronouncement in ***Babubhai Bhimabhai Bokhiria Vs. State of Gujarat and others, (2014) 5 SCC 568; 2014 (2) RCR (Criminal) (SC) 915.***

21. After reviewing various precedents, Hon'ble Apex Court summarized the legal position in ***Hardeep Singh's case (supra)*** in the following words:

"Power under Section 319 Cr.P.C. is a discretionary and an extra-ordinary power. it is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C."

22. After referring to the aforesaid authority of Constitutional Bench, Hon'ble Supreme Court held in ***Babubhai Bhimabhai Bokhiria's case (supra)*** as under:

"Section 319 of the Code confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under Section 319 of the Code, this Court observed that though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319 of the Code is much higher."

23. From the legal position as above, it follows that Section 193 CrPC would be applicable when the Sessions Court concerned, to whom a case has been committed, is required to consider whether to take cognizance or not, against such an accused, who though named in the FIR, but has not been challaned by the police, despite there being sufficient material against him in the evidence as collected during investigation by the Investigating Agency. Section 319 of the Code of Criminal Procedure (CrPC) becomes applicable when, during the trial after the filing of the challan and framing of the charge-sheet, evidence is presented indicating

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

the involvement of a person, who was not initially charged by the police. In such cases, if the evidence establishes the person's complicity, the court may proceed to include them in the proceedings. To apply Section 319 CrPC, evidence led should be such that it shows more than a *prima facie* case as is exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction.

24. On the other hand, Section 33 of the POCSO Act would reveal the following -

- (i) *Special Court may take cognizance of any offence, without the accused being committed to it for trial;*
- (ii) *the cognizance can be taken in the following circumstances-*
 - (a) *Upon receiving a complaint of facts constituting the offence;*
 - (b) *Upon a police report on such facts.*

25. In the present case, whether the final report under Section 173 CrPC as submitted by the police to prosecute the challaned accused (*including the Principal Mrs. Surjeet Khanna*) contains such material or not against the proposed accused i.e. the mother 'Axx', so as to prosecute her in the same trial, is to be considered by the Special Court concerned. Further, whether various emails showing the communication between the mother and the school authorities, which have been referred by the Principal in the application moved on 18.07.2023, form part of the final report under Section 173 CrPC or not; and whether the summoning is to be ordered on the basis of that material, is again to be considered by the Special Court concerned.

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

26. In the aforesaid circumstances, this Court finds the petition **CRM-M-44425-2023** moved by the mother 'Axx' to be premature and hence, the same is hereby dismissed.

27. Coming to the petition **CRM-M-36154-2023** filed by the petitioner-Surjeet Khanna, the main contention of the ld. counsel is that there is no procedure so as to serve notice upon the proposed accused either under Section 319 CrPC or under Section 193 CrPC or under Section 33 of the POCSO Act and thus, the impugned order dated 18.7.2023 to that extent is illegal.

28. This Court does not find merit in the aforesaid contention. Every case has its own facts and circumstances, which may compel the Court concerned to adopt a procedure, not barred by law, as per the facts and circumstances. No doubt, it is true that Section 33 of the POCSO Act or Section 193 CrPC do not provide for serving a notice to the proposed accused, but at the same time, there is no such bar to serve a notice in the facts and circumstances of a particular case. Usually, a Court is not required to serve any such notice, but in the present case, the proposed accused i.e., mother Axx is the complainant of the FIR. She is also the victim, being the mother of deceased child. As is evident from the impugned order dated 18.07.2023 of the Special Court, the proposed accused i.e. mother-Axx, in her capacity as complainant of the FIR/victim was present in the Court along with her counsel at the time when application was moved.

29. In the above facts and circumstances, if the Special Court was of the view that the mother being the victim of the case, should be heard before deciding the application, this Court does not find it to be an illegality or irregularity. As has already been noticed that so far, no decision has been

CRM-M-36154-2023
CRM-M-44425-2023

2024:PHHC: 023004
2024:PHHC: 023005

taken by the Court concerned on the application and only the notice of the application was served upon the proposed accused i.e. the mother ‘Axx’ - complainant of the FIR. The Court still has to decide the application by applying its judicious mind in accordance with law. Consequently, this Court does not find any merit in the petition **CRM-M-36154-2023** filed by the principal Mrs. Surjeet Khanna.

Accordingly, both the petitions are dismissed.

A photocopy of this order be placed on the file of the other connected case.

19.02.2024
Vivek

(DEEPAK GUPTA)
JUDGE

- | | |
|-------------------------------|-----|
| 1. Whether speaking/reasoned? | Yes |
| 2. Whether reportable? | Yes |