S.3(2)(v) SC/ST Act Not Attracted In Absence Of Averment About Accused' Caste & His Awareness About Victim's Caste: Kerala High Court

2022 LiveLaw(Ker) 557

IN THE HIGH COURT OF KERALA AT ERNAKULAM
DR. JUSTICE KAUSER EDAPPAGATH; J.
CRL.REV.PET NO. 370 OF 2022; 2nd September, 2022
XXXXXXXXXX *versus* **STATE OF KERALA**

Against the Order in Crl.M.P.No. 412/2022 in SC 474/2021 of Special Court for the trial of offences under the protection of children from sexual offences act, 2012, kattappana

Revision Petitioner / De Facto Complainant: by Advs. A.K. Preetha, M.R. Rajesh, C. Anil kumar, Jithin Varghese

Respondents / State & Sole Accused: by Advs. Sr Public Prosecutor T.V. Neema, S.K. Adhithyan for R2, Keerthi S. Jyothi

O R D E R

This criminal revision petition has been filed u/s 397 of Cr.P.C. challenging the order passed by the Special Court for the Trial of Offences Under the Protection of Children From Sexual Offences Act, Kattappana (for short, the court below) dismissing the petition filed by the father of the victim seeking alteration/addition of charge.

2. A crime was registered by the Vandiperiyar Police as Crime No.598/2021 against the 2nd respondent herein alleging offences punishable under Sections 449, 302, 376(2)(m) and 377 of IPC and under S.4(2) r/w 3(a) S.6 r/w 5(l)(m) and S.10 r/w S.9(i) (l) & (m) of the Protection of Children from Sexual Offences Act, (for short, the POCSO Act). The revision petitioner is the father of the victim, a 5 year old child. The prosecution allegation is that the 2nd respondent/accused trespassed into the house of the victim, committed rape on her, thereafter murdered her and thereby committed the offence. After investigation, the investigating agency filed final report against the 2nd respondent alleging the offences mentioned above.

3. Admittedly, the victim is a member of Scheduled Caste community. The caste of the 2nd respondent is in dispute. According to the petitioner, the 2nd respondent is a Christian, whereas according to the 2nd respondent, he belongs to Hindu Parayan Community. The petitioner alleged that since the 2nd respondent is a Christian and the victim belongs to Scheduled Caste, the offence under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, the SC/ST(PoA) Act) is attracted. Alleging inaction on the part of the investigating officer in incorporating the offence u/s 3(2)(v) of the SC/ST(PoA) Act in the final report, the petitioner approached this court by filing WP(Crl) No.111/2022. This Bench as per the judgment dated 7th March, 2022 dismissed the said writ petition. In appeal, the Division Bench (WA No.502/2022) set aside the judgment of the Single Bench vacating all the observations in the judgment and granting liberty to the petitioner to move the court below with appropriate petition seeking amendment of the charge. Thereafter, the petitioner moved the court below and filed Annexure 1 petition seeking alteration of charge and to add the offence u/s 3(2)(v) of the SC/ST(PoA) Act as well. The court below after hearing both sides dismissed Annexure 1 petition as per the impugned order which is challenged in this revision petition.

4. I have heard Sri.M.R.Rajesh, the learned counsel for the revision petitioner, Sri.S.K.Adhithyan, the learned counsel for the 2nd respondent and Smt.T.V.Neema, the learned Senior Public Prosecutor.

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5. The controversy centers around the caste of the accused/2nd respondent. The petitioner admits that the father of the 2nd respondent belonged to Hindu Parayan community. However, according to him, the father of the 2nd respondent got converted to Christianity from Hindu Parayan community and thereafter married to the mother of the 2nd respondent on 30/3/1998 as per Christian rites as recorded in the Church Register. As the 2nd respondent was born to Christian parents, he is Christian by birth, it was contended. The petitioner along with Annexure 1 petition submitted a report dated 24/2/2022 of Tahsildar, Peerumedu addressed to the Kerala State Scheduled Castes and Scheduled Tribes Commission. The said report was heavily relied on by the petitioner. In the report, it is stated that the Tahsildar after enquiry found that the 2nd respondent is a Christian by birth. However, the court below did not rely upon the said document on the ground that the court cannot frame a charge or alter a charge on the basis of any material provided by a party other than an investigating officer. It was further found that there is no material before the court to alter the charge to include the offence under the SC/ST(PoA) Act.

6. Relying on the decision of the Apex Court in ***Anant Prakash Sinha @ Anant Sinha v. State of Haryana and Another*** [(2016) 6 SCC 105] as well as ***Jagjeet Singh and Others v. Ashish Mishra @ Monu and Another*** [2022 (3) KLT 327 (SC)], the learned counsel for the revision petitioner submitted that the documents produced by the victim can be considered by the trial court for altering/adding the charges. The counsel further submitted that it is apparent from the records produced that the 2nd respondent is a Christian and by dismissing Annexure 1 petition filed by the revision petitioner without taking into account those records, the court below has committed gross illegality, which could be set at right in the revision. The learned counsel for the 2nd respondent Sri.Adhithyan submitted that the 2nd respondent is a Hindu Parayan by birth and Annexure R2 series of documents produced would substantiate the said contention. The counsel further submitted that the document now relied on by the petitioner has been issued by the Tahsildar under the pressure of the petitioner without conducting any local investigation or verification of any other documents and without hearing the 2nd respondent. The counsel also submitted that, at any rate, the petitioner does not have a case in the FIS that the accused was not a scheduled caste and he committed the crime knowing that victim is a scheduled caste and hence the offence u/s 3(2)(v) of the SC/ST(PoA) Act will not be attracted. The learned Public Prosecutor Smt.Neema submitted that a petition for alteration of charge u/s 216 of Cr.P.C cannot be entertained at the instance of either the prosecutor or the accused or the defacto complainant and is strictly in the domain of the court. She relied on the decision of the Apex Court in ***P.Kartikalakshmi v. Sri Ganesh and Another*** [(2017) 3 SCC 347] in support of her argument. The learned Public Prosecutor further submitted that the investigation conducted by the investigating agency revealed that the 2nd respondent was born and brought up as a person belonging to Scheduled Caste community and hence the offence under S.3(2)(v) of the SC/ST Act(PoA) will never be attracted.

7. S.216 of Cr.P.C confers jurisdiction on all courts to alter or add to any charge framed earlier, at any time before the judgment is pronounced and sub-sections (2) to (5) prescribe the procedure which has to be followed after that addition or alteration. Placing reliance on the two Bench decision of the Apex Court in ***P.Kartikalakshmi*** (supra), the learned Senior Public Prosecutor Smt.Neema submitted that power under S.216 of Cr.P.C for altering or adding to any charge already framed cannot be exercised on an application made by any of the parties, but is available to be exercised only suo motu by the trial court. The Apex Court held that the power vested u/s 216(1) is exclusive to the court and there is no right in any party, to seek for addition or alteration of charge by filing an application as a matter of fact. It was further held that S.216(1) is an enabling provision for the court to exercise its power under certain contingencies which come to its notice or brought to its notice. It was made clear in that decision that neither the de facto complainant nor the accused or the prosecution has any vested right to seek any addition or alteration of charge. Per contra, the learned counsel

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for the petitioner brought to my attention a subsequent decision of the co-equal bench of the Apex Court in ***Anant Prakash Sinha*** (supra). It was held that even an informant/victim can seek alteration or addition of charge invoking S.216(1) of Cr.P.C. Thus, two conflicting views were expressed by the Apex Court on the issue as to whether power under S.216 of Cr.P.C can be invoked by an application of any of the rival parties in ***P.Kartikalakshmi*** (supra) and the ***Anant Prakash Sinha*** (supra). Both these decisions are of Benches of the same strength.

8. The learned Senior Public Prosecutor submitted that in ***Anant Prakash Sinha*** (supra), the Apex Court did not consider ***P.Kartikalakshmi*** (supra) and hence, the decision in ***Anant Prakash Sinha*** (supra) is *per incuriam* and need not be followed. I cannot subscribe to the said argument. The Full Bench of this court in ***Raman Gopi v. Kunju Raman Uthaman*** [2011 (4) KLT 458 (FB)], on reference considered the question, where conflicting views are taken in the decisions of two benches of equal strength of the Apex Court, which one is to be followed by the High Court and the subordinate courts. It was held that in case of conflicting decisions taken in the two Benches of equal strength of the Apex Court, the decision later in point of time, will prevail over the earlier one. It was further held that a decision of the Apex Court on a declaration of law is binding on all High Courts and Subordinate courts in the light of Article 141 of the Constitution of India and that it may not be proper for the High Courts or Subordinate Courts to criticise and characterise a decision of the Apex Court which has laid down a point of law as *per incuriam*. That apart, recently the Apex Court in ***Jagjeet Singh*** (supra) has held that the right of a victim under the amended Cr.P.C are substantive, enforceable and are another facet of human rights and that a 'victim' within the meaning of Cr.P.C cannot be asked to await the commencement of trial for asserting his/her right to participate in the proceedings. He/She has a legally vested right to be heard at every step post the occurrence of an offence. Such a 'victim' has an unbridled participatory rights from the stage of investigation till the culmination of the proceedings in an appeal or revision. Thus, in view of the authoritative pronouncement of the Apex Court in ***Anant Prakash Sinha*** (supra) and ***Jagjeet Singh*** (supra), I am of the view that Annexure 1 petition filed by the petitioner seeking alteration/addition of charge is perfectly maintainable.

9. The petitioner heavily relied on the report of the Tahsildar, Peerumedu dated 24/02/2022 which is in the form of letter issued by Tahsildar to the Registrar, Kerala State Scheduled Castes and Scheduled Tribes Commission. The report would show that the Tahsildar called for a report from the Village Officer, Periyar who conducted enquiry and reported that the 2nd respondent is not a member of a Scheduled Caste, but a Christian. This document was not produced when WP(Crl) No.111/2022 was considered by this court. The counsel for the petitioner vehemently argued that this is a material brought on record and as such, the trial court ought to have taken into consideration the said document while considering the application for alteration of charge. The learned counsel for the 2nd respondent as well as the learned Public Prosecutor submitted that the trial court cannot look into document produced by the de facto complainant subsequent to taking cognizance of offence to decide whether the charge framed is to be altered or additional charge is to be framed. The learned Public Prosecutor has cited a decision of the Single Bench of this court in ***Satheesh N.V (Dr.) and Others v. State of Kerala and Others*** (2009 KHC 840) in support of her contention. The court below also found that the court cannot frame a charge or alter a charge on the basis of any material provided by a party other than the investigating officer.

10. The Single Bench of this Court in ***Satheesh*** (supra) took the view that when recording of evidence is yet to begin, the Magistrate u/s 216 of Cr.P.C can alter the charge, only if the materials produced along with the final report warrants an alteration of addition to the charge already framed. It was held that no document produced by the prosecutor or the de facto complainant before the Magistrate, subsequent to taking cognizance of the offence, could be looked into to decide whether the charge framed is to be altered or additional charge is to be

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framed. However, the Apex Court in ***Anant Prakash Sinha*** (supra) has categorically held that the court can change or alter the charge if there is defect or something is left out on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial. The Apex Court again in ***Dr.Nallapareddy Sridhar Reddy v. State of Andhra Pradesh and Others*** [(2020) 12 SCC 467] held that S.216 of Cr.P.C enables the alteration or addition of a charge based on materials brought on record during the course of the trial. In ***Jagjeet Singh*** (supra), it was held that the victim has a legally vested right to be heard at every step post the occurrence of an offence. It was observed that if the victims themselves have come forward to participate in the criminal proceedings, they must be accorded with an opportunity of a fair and effective hearing. It was further observed that the victims cannot be expected to be sitting on the fence and watching the proceedings from afar, especially when they may have legitimate grievances. Based on the dictum laid down by the Apex Court in the above three decisions, I am of the view that the report of the Tahsildar as well as the other documents produced by the petitioner along with Annexure 1 petition could be treated as materials on record and hence, the same can be relied on for altering/adding the charge.

11. As stated already, the petitioner has mainly relied on the report of the Tahsildar dated 24/2/2022 mentioned above to contend that 2nd respondent is a Christian. He has also produced and relied on the baptism certificate of the father of the 2nd respondent to contend that he was converted to Christianity before the birth of the 2nd respondent. On the other hand, the 2nd respondent has relied on Annexure R2 series documents to contend that he is a Christian. Annexure R2(a) is the copy of the SSLC Transfer Certificate of the father of the 2nd respondent. Annexure R2(b) is the copy of the extract of the school admission register of the mother of the 2nd respondent. Annexure R2(c) is the school leaving certificate of the 2nd respondent. Annexure R2(d) is the SSLC certificate of the sister of the 2nd respondent. Annexure R2(e) is the transfer certificate of the 2nd respondent. Annexure R2(f) is the caste certificate of the 2nd respondent issued by the Tahsildar, Peerumedu. Annexure R2(g) is the community certificate of the 2nd respondent issued to the 2nd respondent by Tahsildar, Peerumedu, Annexure R2(h) and R2(i) are community certificates issued to the 2nd respondent and the father of the 2nd respondent respectively by the Tahsildar, Peerumedu. Annexure R2(j) is the transfer certificate issued by the Principal, Government Polytechnic, Vandiperiyar to the 2nd respondent. In all these documents, the caste of the 2nd respondent has been shown as Hindu Parayan. After filing WP(Crl) No.111/2022, the investigating officer conducted a detailed enquiry and taking into consideration the documents mentioned above as well as the documents relied on by the petitioner, he came to the conclusion that the 2nd respondent is a member of the Scheduled Caste community. The report of the Tahsildar dated 24/2/2022 would show that it was prepared without hearing the 2nd respondent. The crucial question that arises for consideration is, even if the report of the Tahsildar is accepted and assumed that the 2nd respondent is not a member of Scheduled Caste or Scheduled Tribe Community, still, is there any scope for alteration/adding the charge u/s 3(2)(v) of SC/ST(PoA) Act taking into account the facts of the case.

12. A reading of S.3(2)(v) makes it clear that merely because a person who does not belong to a member of a Scheduled Caste/Scheduled Tribe commits any offence under the Indian Penal Code punishable with imprisonment for a term of 10 years or more against a person belonging to a Scheduled Caste/Scheduled Tribe, the offence u/s 3(2)(v) would not get attracted. S.3(2)(v) was amended by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2016 which came into effect on 26th January, 2016. The words "............on the ground that" u/s 3(2)(v) have been substituted with "............knowing that such person is a member of a Scheduled Caste/Scheduled Tribe". Thus, subsequent to the amendment s*ine qua non* for application of S.3(2)(v) is that offence must be committed by a person who does not belong to a member of a Scheduled Caste/Scheduled

Tribe against a person belonging to Scheduled Caste/Scheduled Tribe with the knowledge that such person is a member of Scheduled Caste/Scheduled Tribe. In the absence of averment to that effect, the offence u/s 3(2)(v) would not get attracted.

13. Section 8 which deals with presumption as to offences was also amended and inserted clause (c), which provides that if the accused was acquainted with the victim/family, the court shall presume that the accused was aware of the caste or tribal identity of the victim, unless proved otherwise. However, in order to give rise to presumption u/s 8 of the SC/ST(PoA) Act, there should be an allegation that the victim belongs to SC/ST community and then accused is not a member of SC/ST community and he committed the offence with the knowledge that the victim is a member of SC/ST community. It is only when these foundational facts are disclosed, the presumption u/s 8 could be drawn.

14. Coming to the facts of the case, there is absolutely no case either in the FIS or in the statement of the petitioner given u/s 164 Cr.P.C that the 2nd respondent is not a member of Scheduled Caste/Scheduled Tribe and he committed the offence knowing that the petitioner is a member of Scheduled Caste/Scheduled Tribe. Absolutely there is no such allegation in the final report. Annexure R2(l) is the copy of the deposition of the petitioner who was examined as PW7 on 20/5/2022 before the court below. Even in his evidence, the petitioner has no case that the 2nd respondent is a Christian and he committed the offence with the knowledge that the petitioner is a member of a Scheduled Caste. The word found in the provision being "knowingly", an allegation about the assailant's knowledge or awareness that the victim is a member of Scheduled Caste/Scheduled Tribe at the time of the commission of the atrocity described under the provision must be there. Without the element of knowledge being incorporated in the allegations, the offence is unlikely to be attracted. (*vide* ***Sandeep Saju v. State of Kerala*** 2020 (1) KHC 100). The alteration/addition of a charge may be done, if in the opinion of the court, there was an omission in the framing of charge or if upon *prima facie* examination of the material brought on record, it leads the court to form a presumptive opinion, as to the existence of the factual ingredients constituting the alleged offence [vide ***Dr. Nallapareddy Sridhar Reddy*** (supra)]. Since the petitioner does not have a case at all either in the FI statement, in his statement recorded u/s 164 Cr.P.C or in his evidence given before the court that the 2nd respondent is not a member of a Scheduled Caste/Scheduled Tribe, and he committed the offence with the knowledge that the petitioner is a member of a Scheduled Caste/Scheduled Tribe, factual ingredients constituting the offence u/s 3(2)(v) are not attracted. Hence, the alteration of charge sought for by the petitioner cannot be allowed.

The criminal revision petition fails and it is accordingly dismissed.

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