

Neutral Citation No. - 2023:AHC-LKO:35780

AFR

Reserved on: 1.5.2023

Delivered on:23.5.2023

Court No. - 13

Case :- APPLICATION U/S 482 No. - 3922 of 2023

Applicant :- Mohd. Aarif Alias Aarif

Opposite Party :- State Of U.P. Thru. Prin. Secy. Home, Lko. And Another

Counsel for Applicant :- Manoj Kumar Singh

Counsel for Opposite Party :- G.A.,Abhishek Srivastava

Hon'ble Suresh Kumar Gupta,J.

1. Heard Sri Manoj Kumar Singh, learned counsel for the applicant, Sri Abhishek Srivastava, learned counsel for the opposite party no.2 and Shri Vijai Prakash Dwivedi, learned AGA for the State as well as perused the material available on record.

2. The present application under Section 482 Cr.P.C. has been preferred against the impugned summoning order dated 31.5.2022 passed by/pending in the court of learned Additional Sessions Judge/Special Judge (POCSO Act) Bahraich in Complaint Case No. 97 of 2021 in Re:- Smt. Karima Vs. Aarif under Sections 452, 376 (AB), 323, 504, 506 I.P.C. and Section 5 (m)/6 of the Protection of Children from Sexual Offences Act (in short " the POCSO Act"), Police Station- Hardi, District- Bahraich as well as application under Section 156 (3) Cr.P.C. dated 26.8.2021 vide complaint no. 97 of 2021 and further proceedings of the case in pursuance thereof.

3. Brief facts of the case is that the opposite party no 2 filed an application under Section 156 (3) Cr.P.C. on 26.8.2021 in the court of learned Additional Sessions Judge/Special Judge (POCSO Act) Bahraich. The application under Section 156 (3) Cr.P.C. has been moved alleging that the opposite party no. 2 and the petitioner are relatives. Petitioner and his family members used to come at house of the opposite party no. 2. On 6.8.2021 at about 1:00 p.m. minor

daughter of the opposite party no. 2, aged about 11 years was alone at the house. Petitioner entered into the house and started outraging modesty of her daughter, on objection, petitioner pushed her on earth, undressed her, and forcefully committed rape against her wishes and extended abuses and threat of life in case she told about the same to anywhere. When the opposite party no. 2 reached her house, then her daughter told the whole story to the opposite party no.2. Immediately, the opposite party no. 2 gave information at Police Station-Hardi on the same day but when no action was taken then on 11.8.2021 she gave an application to the Superintendent of Police, Bahraich through registered post, but till date no action has been taken. Then, the application under Section 156 (3) Cr.P.C. has been moved then the trial court treated the application under Section 156 (3) Cr.P.C. as a complaint case.

4. In the aforesaid complaint case, the statement of the complainant was recorded under Section 200 Cr.P.C. on 22.10.2021 (annexed as Annexure No. 4). The statement of the witnesses, namely, P.W.-1-Jakir and P.W.-2-Aarif were also got recorded under the provisions of Section 202 Cr.P.C. on 23.11.2021 and 17.12.2021 respectively. The statement of the P.W.-3 victim was also recorded under Section 202 Cr.P.C. on 5.4.2022. On the basis of the statement recorded under Section 200 and 202 Cr.P.C., the trial court passed the summoning order under Section 204 Cr.P.C. as aforesaid on 31.5.2022

5. Learned counsel for the applicant raises the preliminary objection that the POCSO Court has no jurisdiction to entertain the application under Section 156 (3) Cr.P.C. as a complaint case under Section 190 (1) (a) Cr.P.C., because the only option is available to the POCSO Court to direct the concerning police station to register and investigate the matter. He further submitted that the POCSO Court may pass the cognizance order and summoning order only on the basis of the investigation done by the Investigating Officer and the report submitted under Section 173 (2) Cr.P.C. He further submitted that in this regard in POCSO Act special procedure has also been

mentioned under Section 19 of the POCSO Act. The procedure of Section 19 of the POCSO Act reads as under:-

"(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

(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)."

6. To give the strengthen to his submissions for the procedure under Section 19 of the POCSO Act, learned counsel for the applicant drew the attention of the Court to the procedure of Section 21 (1) of the POCSO Act. The provision of Section 21 (1) of the POCSO Act reads as under :-

" 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."

7. In support of his submission he relied upon a judgment and order dated 7.4.2022 of this Court passed in Application under Section **482 Cr.P.C. No. 12864 of 2021 (Soni Vs. State of U.P. and 10 others)** in which this Court is of the view that in the case related to the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act (in short " the S.C./S.T. Act"), if an application under Section 156 (3) Cr.P.C. is moved by the aggrieved party then it is bounden duty of the trial court to pass the order for register the case and to direct the police authority to investigate the matter, as apart from this the trial court has no other option. He further submitted that the POCSO Act is also an special Act and the provision of POCSO Act is also analogous to the S.C./S.T. Act. So, the trial court has no power to treat the application under Section 156 (3) Cr.P.C. as complaint case.

8. In support of his submission he also relied upon a **judgment dated 19.5.2022** passed in *Application under Section 482 Cr.P.C.*

No. 2804 of 2022 (Anand Vs. State of U.P. and another). The relevant paragraph of the said judgment is extracted below:-

"Learned counsel for the applicant has further submitted that as per the prosecution case, victim was doing the course of B.Pharm. She was a prudent girl and was in relation with the applicant on her own, and some dispute arose in between them, then the applicant was challaned under Sections 151/107/116 Cr.P.C. on 23.09.2020. He further submitted that the application of the prosecutrix under Section 156(3) Cr.P.C. was treated as a complaint case and after recording the statement under Sections 200 & 202 Cr.P.C., summoning order was passed by the learned court below. He also drew attention of the court on the provision of Sections 19 & 21 of Chapter- V of the POCSO Act and submitted that Section 19 of the POCSO Act provides that in case any offence related to the provision of POCSO Act is reported to the local police, then the same shall be registered and Section 21 of the POCSO Act also provides that in case, complaint is not registered, then officer concerned shall be prosecuted meaning thereby that if any offence is alleged under the provision of POCSO Act, then registration of the F.I.R. is mandatory and no such case can be treated as a complaint case, as done by the learned court below. Therefore, the learned court below has committed error in treating the application of the prosecutrix as a complaint case. In such circumstances, kind indulgence of this Court is necessary."

9. In support of his submission, learned counsel for the applicant also relied upon a judgment dated 11.10.2022 of this court passed in Criminal Revision No. 1052 of 2022 (Ram Karan Vs. State of U.P. and 4 others). He submitted that in that revision the grievance of the revisionist was same as raised by the present applicant and in that revision, proceedings against the revisionist was stayed on the basis of the law laid down by this Court in **Soni Vs. State of U.P. and 10 others (Supra)** and **Anand Vs. State of U.P. and another (Supra)** and it was also observed that POCSO Court cannot take cognizance on the basis of complaint.

10. Lastly, learned counsel for the applicant submitted that only F.I.R. can be lodged against the applicant and complaint case cannot be lodged, therefore, only on this account the summoning order against the applicant may be quashed.

11. Learned A.G.A. and learned counsel for the respondent no. 2 in support of his submission relied upon the procedure of Section 33 (1) of the POCSO Act. As per Section 33 (1) of the POCSO Act 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.** Learned counsel for the respondent no. 2 relied upon the procedure of Section 33 (1) of the POCSO Act submitted that POCSO court exercising its power of complaint case can pass appropriate order. In support of his submission, learned counsel for the respondent no.2 relied upon the judgment of this Court passed in the case of *Naresh Kumar Valmiki Vs. State of U.P. and others (2023) 241 AIC 946* in which this Court has held that that the submission that an application under Section 156(3) Cr.P.C. cannot be treated as a complaint case is incorrect. The court concerned while exercising its judicial discretion can treat the said application as a complaint case also and can pass appropriate order.

12. So far as question of lodging of the F.I.R. or filing of an application under Section 156 (3) Cr.P.C. in the case of sexual harassment/POCSO Act is concerned, I am of the view that specially in the case of sexual harassment and violence it is bounden duty of the police officer to lodge F.I.R. because in the case of sexual assault, the victim faces social stigma and she has already been traumatized, therefore, the court concerned should not be give further burden upon the complainant/victim and the court concerned/special court should direct the police authority concerned to investigate the matter fairly. The court should pass the order for investigation, because the documentary and other evidence are generally in the physical possession of the accused or other individual and on the basis of those

evidences, the police should investigate the matter and retrieve its power under the Code of Criminal Procedure.

13. Under Section 154 Cr.P.C. the Police Officer cannot exercise any discretion when they receive a complaint which discloses the commission of cognizable offence- whether or not offence complained is made out is to be determined at the stage of investigation and/or trial. After conducting the investigation the police found that no offence is made out then they may submit final report under Section under Section 173 (2) Cr.P.C., however, it is not open to them to decline to register an F.I.R.

14. Considering the entire facts and circumstances of the case and considering the fact that although it is duty of the Magistrate as well as police officer concerned to pass the order for registration of F.I.R. but if it is not done so then it cannot be said that allegation against the applicant/accused is not maintainable, therefore, I am of the view that cognizance/summoning order may be passed against the applicant in complaint case.

15. So far as regards the contention of the learned counsel for the applicant is concerned that only to harass the applicant the present case has been lodged by the mother of the victim is concerned, I am of the view that it cannot be said that such type of offence cannot be committed by the applicant, therefore, such type of every defence cannot be entertained necessarily. Concludingly, I am of the view that the trial court has ample power to treat the application under Section 156 (3) Cr.P.C. as a complaint case, therefore, in the POCSO Act proceedings of complaint case can be launched, as in this regard a statutory provisions under Section 33 of the POCSO Act already exists. As per Section 33 of the POCSO Act, 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.** Thus, on the perusal of the entire provisions of POCSO Act it appears that there is no bar for prosecution and cognizance in the matter related to complaint under Section 190 (1) (a) Cr.P.C. Ultimately, I am of the

view that the previous view of the courts that in POCSO Act cognizance cannot be taken is not a good law, as this question has already been settled that there is no bar for treating the application under Section 156 (3) Cr.P.C. as a complaint case under Section 190 (1) (a) Cr.P.C. Thus, the preliminary objection of the learned counsel for the applicant that in the POCSO Act proceedings of complaint case is not maintainable has no substance.

16. Before arguing the case on merits, learned counsel for the petitioners while pressing the present petition submits that the trial court while summoning the petitioner has materially erred and did not follow the dictum of law as propounded by the Hon'ble Supreme Court in various cases that summoning in criminal case is a serious matter and the trial court without dwelling into material and visualizing the case on the touch stone of probability should not summon accused person to face criminal trial. It is further submitted that the trial court has not taken into consideration the material placed before the trial court and, therefore, the trial court has materially erred in summoning the petitioner.

17. So far as quashing of entire proceedings is concerned, from the perusal of the material on record and looking into the facts of the case at this stage, it cannot be said that no offence is made out against the petitioners. All the submission made relates to the disputed question of fact, which cannot be adjudicated upon by this Court. At this stage, only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of *R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866*, *State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426*, *State of Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192* and lastly *Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283*. The disputed defence of the accused cannot be considered at this stage. Moreover, the petitioners have got a right of discharge according to the provisions prescribed in Cr.P.C., as the case may be, through a proper application for the said purpose and he is free to take all the submissions in the said discharge application before the trial court.

18. So far as the summoning order passed by the learned trial court is concerned, at the stage of taking cognizance, trial court can simply form an opinion as to whether the case is fit for taking and committing the matter for trial or not. In the present case, learned trial court clearly expressed his opinion that he perused all the record and clearly indicated that the material placed before him is sufficient to proceed the case. Thus, the cognizance order is not a proforma order. Every aspect is touched by learned trial court and petitioner failed to adduce any evidence which caused prejudiced to him. So, the cognizance and summoning order is perfectly valid and there is no occasion to quash the same.

19. The prayer for quashing the impugned summoning order as well as impugned proceedings is refused.

20. However, considering the facts and circumstances of the case, it is provided that if the applicant/petitioner appear before the trial court and apply for bail, then bail application shall be considered and decided in accordance with law propounded by the Apex Court in *Satender Kumar Antil Vs. Central Bureau of Investigation and another (Special Leave to Appeal (Crl.) No.5191 of 2021, decided on 07.10.2021*. In this case Hon'ble the Apex Court has already laid down guidelines for grant of bail, without fettering the discretion of the courts concerned and the statutory provisions governing consideration in grant of bail, no specific directions need be issued by this Court as it is expected that the court concerned will take into consideration the necessary guidelines already issued by the Apex Court.

21. Accordingly, the application under Section 482 Cr.P.C. is disposed of.

Order D ate :- 23.5.2023
Anuj Singh