

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Criminal Miscellaneous Bail Application No. 8128/2021

Suresh S/o Late Shri Pema Ji, Aged About 28 Years, R/o Gram Lasani Ps Beawar Sadar Dist. Ajmer (Presently Accused Confined In Central Jail Ajmer)

-----Petitioner

Versus

State Of Rajasthan, Through Pp

-----Respondent

For Petitioner(s) : Mr. R.S. Tanwar.

For Respondent(s) : Mr. M.S. Saini, PP.

HON'BLE MR. JUSTICE FARJAND ALI
Order

REPORTABLE

DATE OF RESERVED : **20.12.2021.**

DATE OF PRONOUNCEMENT :

While hearing the bail plea of the petitioner Suresh, it is noticed that the prosecutrix in her statement has stated that the accused was not known to her. During the course of investigation, a photograph was shown by the police just to ascertain his identity. She has been examined in the trial on 10.08.2021 as PW-1 wherein it is deposed by her that a boy named Suresh took her away and raped her. As per her, who the accused Suresh, she didn't know.

It is transpiring that when she was examined in the trial, the accused was not produced from the jail no endeavours were made to ascertain/verify the fact that whether the accused present in the court was the same against whom she made allegations of rape. The authority/obligation provided under section 165 of the Indian Evidence Act has not been used/exercised by the presiding officer.

It is a case of committing an offence of aggravated penetrative sexual assault upon a girl below 16 years where the culprit was not known to the victim, how it can be proved beyond reasonable doubt that the accused facing trial is the same person who committed the offence.

This Court vide order dated 14.12.2021, sought an explanation from the Presiding Officer with a view to apprise why no steps were taken for the purpose of ascertainment of the identity of the accused as well as why the examination was not deferred until the production of the accused.

An explanation has been furnished by the learned Judge below whereby, taking resort of Section 36 and 37 of the POCSO Act, it is apprised that for the purpose of maintaining the privacy of the victim as well as in order to ensure fairness of the trial, she was not exposed to the accused and therefore, the identification was not conducted. Reliance has also been placed on **M.Kanan Vs. state of Tamil Nadu 2018 Criminal Law Journal Page 116.**

In my considered view, though the victim is not supposed to be confronted with the accused and every endeavour should be made to avoid exposure of the victim. Yet whenever a situation arises, as arose in this case, the identification of the accused should be made through a different mechanism. The accused may be kept in a veiled area and his face should be shown to the prosecutrix on a monitor or screen installed at distant portion so that the victim can be protected from being frightened after

seeing the accused and thereafter the screen can be shut down. This issue is deemed appropriate to be dealt hereinafter.

This Court is conscious of the fact regarding the procedure established by law and the special provisions envisaged in the POCSO Act. Section 42A of the POCSO Act envisages that the provisions of the special Act shall be in addition to the other existing laws. The general law does not derogate or limine special provision. In case of inconsistency in between the special law and general law, the provision of the special Act would have overriding effect upon the general law. This can be understood from the old principle of criminal jurisprudence. There is latin maxim, '*Generalis Specially bus Non-derogant*' which means that general laws do not have overriding effect over special laws or the general law does not detract from specific law. In other words '*Generalis Specially Bus Non-derogant*' means that for the purposes of incorporation of two statues in apparent conflict, the provisions of a general statues must yield to those of a special one. However, this Court cannot shut its eyes off when the problem like above emerges. It is said that for every problem, there is a solution. For a moment; leave apart the factual and legal aspect of this matter, imagine that a victim have no acquaintance or does not know the accused and she is molested or ravished by an unknown accused then what procedure should be followed? Whether the accused can be left scot-free for the deficit evidence of identification or he should be tried and punished adequately.

The Courts are meant to impart justice and only for that very purpose, it is established. When a situation arises that the victim below 18 years old does not know the accused who ravished her,

then of course it is the duty of the Court to evolve a mechanism for the solution of the problem. Certainly, the mechanism must not be in conflict with the special and general law and in all circumstances the same should be in consonance with the prevailing law and criminal jurisprudence. Thus, this court deem it appropriate to lay down a guideline to be followed by the Courts below whenever the fact situation arises like the present matter, until the law is made on this issue.

Before that, it is felt apposite to discuss the principles of criminal jurisprudence having relevance with the issue.

Burden of Proof on Prosecution

The burden to prove the case beyond every shadow of reasonable doubt is always upon the prosecution. It is required that it must stand on its own legs and prove the guilt of the accused beyond reasonable doubt. (**Woolmington v. Director of Public Prosecution [1935] UKHL 1**) The intention of the legislature in laying down these principles has been that hundreds of guilty persons may get scot-free but even one innocent should not be punished. As has been held in various landmark judgements of the Hon'ble Supreme Court (**SL Goswami v. State of Madhya Pradesh (1972 AIR 716)**; **Himachal Pradesh Administration v. Om Prakash (1972 AIR 975)**) the burden of proving the guilt of the accused is on the prosecution and the standard of proof is "beyond reasonable doubt". So, every doubt must be wiped out by the prosecution for the court to make the decision of conviction.

Test Identification Parade and its importance in administration of Justice

However, the situation slightly changes in cases where the accused is not known to the victim but the crime has been proved, then the accused is to be identified by the

witness/victim and a trial is initiated against such person so identified to be the perpetrator of the crime. In such cases, the process of the Test Identification Parade comes into picture. Identification parades have been in common use for a very long time, 'for the object of placing a suspect in a line-up with other persons for identification so as to find out whether he is the perpetrator of the crime.' The holding of a test identification parade becomes absolutely necessary where the name of the offender is not mentioned by the those who claim to be the eyewitnesses/victim of the incident but they claim that although they did not know him earlier they could recall his features in sufficient details and would be able to identify him if and when they happened to see him. It is taken as a relevant fact and coverable under Section 9 of the Indian Evidence Act. As has been held by the Hon'ble Apex Court in **Ramanathan v. State of Tamil Nadu (1978 AIR 1204)** the object of test identification is two-fold:

1. To test the memory and veracity of the witness.
2. To ensure that the Police Investigation is going in the right direction and the trial is not initiated against a wrong person, thereby filling the gap in the investigation regarding the identity of the culprit.

Though Test Identification is not a substantive piece of evidence in itself, it corroborates the evidence given by the witness in the court. (**State of Andhra Pradesh vs. KV Reddy (1976 AIR 2207)**). Since any test identification parade is going to be used as corroborative evidence and connects the suspect with the crime, it must be ensured that the parade is done absolutely fair. Unless the identity of the actual accused is not established, the case of the prosecution may fall down and then there would be no option left with the court except to set the suspected accused free; even when it's established that the offense has been committed by one accused, not known to the victim.

The case of mistaken identity may often occur in good faith, but the consequences can be very serious for the accused/suspect and for this reason caution in relation to such evidence is required. **Chris Taylor, Law Express Evidence, (Pearson, Chennai, 4th Edn., 2009)** That is the reason why there is a requirement of subsequent identification in court of law. In developed legal position, even the identification done at the first time during trial can be taken as a reliable piece of evidence provided the evidence is sterling worth and reliable.

POCSO Cases

Ensuring these constitutional mandates and principles; it becomes difficult in case of POCSO cases wherein as per Section 24(3) of Protection of Children from Sexual Offences Act, 2012 (POCSO Act), the investigating officer should ensure that at no point of time the child comes in contact with the accused. This provision is inserted by the legislature to ensure the welfare of the child and is as per guiding principles of the United Nations Convention on Rights of Child. The aim of POCSO Act is to protect children from sexual offences and to introduce child-friendly mechanisms for trial and investigation of such offences. However, a question arises that if the child is not allowed to come in contact with the accused then how can test identification parade be conducted where the accused is not known to the victim. Since it would be a travesty of justice in both sides, if the culprit is acquitted in absence of evidence of identity or convict the accused who is brought by the police but not sure whether he is the same person who committed offence.

There are numerous points that are kept in mind by this court to highlight the importance, need and method of test identification in POCSO Act cases where the victim/witness is a child; and he/she doesn't know the accused who committed the offence.

- a. Though the act mandates that the child should not be confronted with the accused and so not to brought before the accused, the need and importance of holding a test identification parade could not be ruled out. Given the sensitive nature of the case it becomes important for this court to devise a method of test identification parade wherein both the rights of the suspects as well as that of the child are protected.
- b. The law of the land that is the Constitution of India through Article 21 guarantees the Right to Life and liberty which can be taken only by due process of law. Since the Test identification parade connects the accused to the case, it becomes imperative that the identification parade should be absolutely fair and according to the principles laid down by the Hon'ble SC in **Mulla v. State of Uttar Pradesh (AIR 2010 SC 942)** and other precedents.

Rationale Behind Section 24(3) of the Act

To understand the rationale behind Section 24(3) of the POCSO Act; a reference to its parent convention is warranted. Article 3 (1) of the **United Nations Convention on the Rights of Child** states "In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."

According to United Nations Guidelines on Justice in matters involving child victims and witnesses of crime, **"DIRECT CONTACT"** between child victims and witnesses and the alleged perpetrators at any point in the justice process should be avoided except when absolutely necessary. Thus there appears no absolute bar for conducting identification parade with a safe mechanism.

In light of the above this court is of the opinion that the welfare of the child should be at the heart of all processes involved during the course of administration of justice.

There should be absolutely no direct contact between the child and the preparator at any point of time as it can have a negative impact on the psyche of the child victim. The process of Test identification parade could be conducted by means of videography and other similar mediums to ensure the same.

Need for guidelines & Conflict in Laws

It has been observed by this court that in the absence of any guiding rules on the subject; the identification proceedings are either carried out in jail where the other criminals are also present which diminishes the aims and objectives of the POCSO Act or the accused is granted bail on the ground of improper identification parade; thus, frustrating the justice delivery mechanism. On one hand we have liberty of an individual which is paramount consideration for any sovereign state but on the other hand we have child victims who have suffered mental and physical trauma. The same issue was raised and discussed in workshop on "Sensitization of Stakeholders dealing with POCSO Act, 2012" which was held on 1- 2nd July, 2017 at Rajasthan State Judicial Academy; wherein all the participants suggested that accused may be identified by the means of photography or videography, group photo of 6-6 persons may be taken and shown to the child.

It would be relevant to mention here that the High court of Delhi also in **Rakesh Kumar v. State (2014 SCC ONLINE 3387)** on 30th June 2014 issued the guidelines for the same.

Approach of Court: Harmonious Construction

This Court is required to strike a fair balance of these two conflicting considerations so that rights of innocent children and the accused who is not yet proved guilty can both be protected. There has to be a reasonable balance so that the police could also conduct investigation in a fair manner.

The conflicting provisions have to be interpreted harmoniously. Though POCSO Act is a penal legislation, the provision in question i.e. Section 24(3) of the Act is a welfare provision which is inserted to protect the rights of the child victim/witness involved. It is the duty of this court to ensure that every provision enacted by the legislature remains operative. (**CIT v. Hindustan Bulk Carriers ((2003)3 SCC 57)**). The doctrine of harmonious construction has allowed Courts to easily understand the two argumentative laws and allowed society at large with justice and this court is inclined to adopt the same approach in the present case. In **Yakub Abdul Razak Memon v. State of Maharashtra ((2013) 13 SCC 1)** the supreme court held that the conflict between the provisions of two statutes has to be resolved by references to purpose and policy underlying two enactments.

Guidelines

In order to strike the balance between these two prepositions of the law, this court deem it fit and appropriate to issue the following guidelines in respect of Test Identification Parade (TIP) in cases of POCSO Act.

- a) In every case where the witness/ victim is a child below the age of 18 years TIP proceedings shall be held in one of the court rooms during the course of trial. No pre-trial identification would be mandatory.
- b) Installation of CCTV cameras, computer screen or mechanism in a room where TIP proceedings will be conducted so that the child witness is not confronted face to face with the accused participating in the TIP proceedings.
- c) Person accused of the offence and the others having some resemblance with the features of accused; who may be participating in the TIP will be explained the

procedure and the manner of TIP proceedings to be held in a case of child witness.

- d) The child and the accused should not be at one place in the court room, it must be separate, so that he or she may not be exposed directly or confronted.
- e) The presiding officer of the court shall show the live streaming of accused standing with other persons in a separate area; to the victim on the monitor/screen. The presiding officer then ask the victim to identify the accused among the others standing with him. As soon the process is done, the screen shall be shut down. The presiding officer then note down the response as well demeanor of the witness in the case file.
- f) So far as possible only female officers may be deployed wherever the witness happens to be a girl child for the purposes of identifying the accused person.
- g) No police official shall be seen in a uniform right from the stage when the child enters the TIP Room and till he/she leaves the premises after the completion of TIP proceedings. The child witness shall be entitled to accompany his parents/guardians or any of his close relatives so as to make the child comfortable before participating in identifying the accused in the Test Identification Parade.
- h) The child friendly atmosphere will be created in a room where the child is brought first and the stay of the child will be made most comfortable so that the child finds the place to be attractive and conducive to his/her requirements.
- i) Necessary arrangements for light refreshment to the general liking of children below the age of 16 years shall also remain in place to keep the mood of the child upbeat.

This order shall be conveyed by the Registry of this Court to all learned special Judges POCSO Act cases and all the

District & Sessions Judges of the State, who shall ensure the immediate implementation of this order amongst all the judicial officers and all courts in their respective jurisdiction, which are conducting the trial of POCSO Cases.

In the present case, the bail application filed by the petitioner under Section 439 Cr.P.C is rejected.

The criminal misc. bail application stands disposed of.

PREETI VALECHA /03

(FARJAND ALI),J



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