

A.F.R.

Court No. - 11

Case :- CRIMINAL REVISION No. - 477 of 2021

Revisionist :- Gulafsa Begum

Opposite Party :- State of U.P.

Counsel for Revisionist :- Ashish Kumar
Shukla, Deepanjali Singh

Counsel for Opposite Party :- G.A., Umesh Singh

Hon'ble Mrs. Sangeeta Chandra, J.

(Oral)

(1) Heard the learned counsel for the parties and perused the record.

(2) This Criminal Revision has been filed challenging the judgment and order dated 25.06.2021 passed by the learned Additional Sessions Judge, (POCSO Act), No.12, Sultanpur, passed in Criminal Appeal (Juvenile) No.19 of 2021, relating to Case Crime No.360/2017, under Sections 376, 504, 506 IPC and Section 3/4 POCSO Act, Police Station Kotwali Dehat, District Sultanpur.

(3) It has been submitted by the learned counsel for the revisionist that on 17.12.2017 the First Information Report of Case Crime No.360/2017, under Sections 376, 504, 506 IPC and Section 3/4 POCSO Act, Police Station Kotwali Dehat, District Sultanpur, was lodged by the revisionist against the opposite party nos.2 and 3 and other co-accused that the daughter of the revisionist aged about 14 years was raped seven months ago as a result whereof she became pregnant. When the revisionist got information of her daughter's pregnancy they tried to marry her with the opposite party no.2 but the father of the opposite party no.2 denied such proposal. The revisionist and her associates told the father of the opposite party no.2 that if the child is not aborted they would have to face dire consequences. The Investigating Officer after recording the statement under Sections 161 and 164 Cr.P.C. filed Charge-sheet on 13.06.2014 in the Court of Chief Judicial Magistrate, Court No.17, Sultanpur, against the opposite party no.2 and two persons. With regard to the other accused in the F.I.R. investigation is pending till date and they have not been arrested as yet. Later on, the opposite party no.2 was declared juvenile and the Trial was transferred to the Juvenile Justice Board, Sultanpur. After examination-in-chief and cross-

examination of prosecution witness as PW-1 i.e. the revisionist and PW-2 i.e. the victim her daughter, a date was fixed for examination of other prosecution witnesses.

(4) The opposite party no.2 filed an application for conducting DNA Test of the PW-2. Objections were filed by the counsel for the revisionist. On 25.03.2021 learned Juvenile Justice Board after considering the entire facts and circumstances and evidence available on record rejected the application for DNA Test. Against the order the dated 25.03.2021, the opposite party no.2 filed a Criminal Appeal in the court of Additional Sessions Judge, Court No.12, Sultanpur, which was registered as Criminal Appeal (Juvenile) No.19/2021 (**Shameem @ Bugul Vs. State of U.P.**). During the pendency of such Appeal, the opposite party no.2 filed an application for arrange/impleading the revisionist as opposite party no.2. The Appellate Court without deciding the application for impleadment of the revisionist decided the Appeal finally and passed impugned order on 25.06.2021. In the order dated 25.06.2021 the learned Appellate Court has ignored the provisions of Article 14--21 of the Constitution of India, the Juvenile Justice Board in its order dated 25.03.2021 had observed that the application for examination of child of the prosecution witness moved by the opposite party no.2 can only be moved at the stage when defence witnesses were being examined under Section 313 Cr.P.C. It held that sending the victim child for DNA Test would further delay the Trial which under the provisions of Statute should be concluded as expeditiously as possible.

(5) It has been submitted by the learned counsel for the revisionist that the revisionist and her daughter, the victim had never given any consent for DNA Test which is extremely necessary in such cases. Only because the learned Appellate Court observed that the DNA Test will determine the paternity of the child and would clarify the issue. Such DNA Test cannot be performed without consent of the prosecutrix. The issue involved in the prosecution of the opposite party no.2 was not whether her child was son of the accused. The issue was whether the prosecutrix was raped by the opposite party no.2 which cannot be decided only by determining the paternity of the child who was born much later. As a consequence, learned Appellate Court has erred in recording a finding that conducting of DNA Test will not be performed without the consent of the parties.

(6) Most certainly, the commission of offence under Sections 376, 504, 506 IPC cannot be determined even if DNA Test is verified with and without consent of the prosecutrix. The Supreme Court as well as several High Courts have observed that no Court can bind the prosecutrix to get the DNA Test conducted. It is probable that an adverse inference can be drawn against the prosecutrix. On refusal of the prosecutrix to undergo for DNA Test but no DNA Test can be conducted of the prosecutrix without her consent.

(7) Learned counsel for the opposite party no.2 has pointed out from his counter affidavit that the revisionist herself had given a statement before the Investigating Officer that she was willing to get DNA Test conducted of the child born to the prosecutrix.

(8) Learned counsel appearing for the revisionist in rejoinder affidavit has submitted that only because the prosecutrix's mother had made a statement to the Investigating Officer, such statement cannot bind the prosecutrix who has now become major and can decide for her child whether she wants her child to face the risk of being declared a bastard. Learned counsel for the revisionist has placed reliance upon the judgment of the Hon'ble Supreme Court in the case of **Goutam Kundu Vs. State of West Bengal & Another reported in (1993) 3 SCC 418**, where the question involved was with regard to the legitimacy of a born child during marriage of the appellant with the private respondents. The Supreme Court had observed that if the legitimacy is questioned by making out a strong case of non-access of the husband by the person questioning the legitimacy, on whom burden of rebuttal of presumption of legitimacy lies, the Court will also consider the effect of ordering the blood test on the status of the child and the character of the mother. No one can be compelled to give sample of blood for analysis.

(9) Learned counsel for the revisionist has relied upon Paragraph-26 of the judgment in **Goutam Kundu (Supra)** case which is being quoted hereinbelow:-

"26. From the above discussion it emerges :-

(1) that courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in

order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis."

(10) Learned counsel for the revisionist has placed reliance on another judgment of the Hon'ble Supreme Court in the case of **Ashok Kumar Vs. Raj Gupta & Others, Civil Appeal No.6153 of 2021 decided on 01.10.2021** and has referred to Paragraph-17 of the judgment which is being quoted hereinebelow:-

"The appellant (plaintiff) as noted earlier, has brought on record the evidence in his support which in his assessment adequately establishes his case. His suit will succeed or fall with those evidence, subject of course to the evidence adduced by the other side. When the plaintiff is unwilling to subject himself to the DNA test, forcing him to undergo one would impinge on his personal liberty and his right to privacy."

(11) Learned counsel for the revisionist has also placed reliance upon a judgment rendered by the **Calcutta High Court Anandmay Bag Vs. State of West Bengal and Another decided on 07.05.2007** where the Court has observed in Paragraphs- 14 & 16 thereof is as follows:-

"14. This is a case under Section 376 of the Indian Penal Code and in a case of Section 376 of the Indian Penal Code, DNA test may be a valid test but not always relevant, more so, when during investigation or during pendency of trial there was no attempt by the prosecution to hold such test. Section 375 of the Indian Penal Code defines rape and Section 376 of the Indian Penal Code is the penal provision of rape. In several decisions the Supreme Court held that in a case of rape medical evidence is not always final but medical evidence plays the role of secondary evidence. If the Court finds that

evidence of prosecutrix is sufficient to come to the conclusion that prosecution case was true then there can be conviction on the basis of sole evidence of prosecutrix. In State of Punjab v. Ramdev Singh reported in 2004 SCC (Cri) 307, the Supreme Court held that absence of injury in a case of rape is of no consequence. In State of M.P v. Dayal Sahu, it was held by the Supreme Court that non-examination of doctor in a case of rape is not always fatal to the prosecution when the testimony of the prosecutrix inspires confidence of the Court and non-production of doctor's report is not at all fatal. It was a case of rape on a girl of 13 years and if the learned Trial Court finds that evidence of the prosecutrix is sufficient, the DNA test is not at all necessary. The learned Judge must be aware of the age of the victim and in such a matter consent is of no consequence.

16. In view of the discussion made above it is clear that in this case the prosecution prayer under Section 311 of the Code of Criminal Procedure for holding DNA test cannot be allowed as during investigation or during the stage of charge or during the stage of trial there was no attempt for holding DNA test. After closer of prosecution evidence, examination of accused under Section 313 of Cr. PC and after discloser of entire defence case prosecution prayer to hold DNA test of the victim, her male child and accused cannot be allowed to establish the offence under Section 376 of IPC Whether determination of paternity of the child is relevant or not through DNA test that can be decided in a different forum and not in this case."

(12) Learned counsel for the revisionist has also placed reliance upon a decision of the the Madras High Court in the case of **G. Vasanthi Vs. M. Muneeshwaran delivered on 02.01.2019 and reported Online on Website of the said High Court.** A reference has been made to Paragraph-19 of the said judgment where it has been observed that the learned Trial Court would be justified in drawing an adverse inference against the litigant on refusal to undergo DNA Test. While character of the mother may be exposed the status of the child shall remain in law even if the result of the DNA test does not establish the paternity of the child. Just as identity of the rape victim and that of juvenile in conflict of the law is concealed. Similar protective measures shall be taken in such cases.

(13) It was a case where **G. Vsanthi (Supra)** the parties were fighting an application for dissolution of marriage.

(13) Learned counsel for the revisionist has also placed reliance upon a judgment rendered by Madurai Bench of the Madras High Court of 02.11.2011 in **Muthukutti Vs. The Deputy Director and others decided on 02.11.2011**, DNA Section Forensic Science Department, Mylapore, Chennai and other. The petitioner therein wanted the DNA Test to be conducted of her child within a stipulated time and prayed that a direction to be issued by the Court with regard to the same. The Madurai Bench referred the observations made by the Supreme Court in the case of **Yedla Srinivasa Rao Vs. State of Andhra Pradesh reported in (2006) 11 SCC 615**, and emphasize that merely because the petitioner had offered to conduct DNA Test it would not mean that the complainant and the minor child can also be subjected to such test without their consent. It was observed that the consent of the complainant and the consent of the minor child was relevant.

(14) This Court having heard the learned counsel for the revisionist and counsel appearing on behalf opposite party no.2 has carefully gone through the judgment rendered by the learned Additional District and Sessions Judge, challenged in this Revision. It is apparent that the learned Additional Sessions Judge has misdirected his energies. The question before the learned Trial Court was not whether the child that was born to the prosecutrix was the child of the opposite party no.2. There was no question for determining the paternity of the child, the question involved in the case was whether rape was committed on the prosecutrix by the opposite party no.2. There was no reason for the prosecutrix to let her child undergo DNA Test.

(15) The order dated 25.06.2021 is **set aside** and the learned Trial Court order dated 25.03.2021 is **affirmed** subject to the modification that the Trial Court's observation regarding such application being moved under Section 313 of the Cr.P.C. would be considered on its merits when it is taken up, shall also not be read against the revisionist that victim of rape can be compelled to undergo DNA test after such long time of the alleged incident.

(16) The Revision stands **allowed**.

Order Date :- 3.12.2021

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