

Court No. - 91

Case :- CRIMINAL REVISION No. - 743 of 2022

Revisionist :- Irfan Ahmad

Opposite Party :- State of U.P. and Another

Counsel for Revisionist :- Aftab Alam

Counsel for Opposite Party :- G.A.

Hon'ble Mrs. Jyotsna Sharma,J.

1. Heard Sri Aftab Alam, learned counsel for the revisionist and learned A.G.A. for the State. None appears on behalf of the respondent no.2 despite service of notice.

2. Perused the record.

3. This criminal revision has been filed under section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015 challenging the order dated 15.01.2022 passed by Additional Sessions Judge/Special Judge (POCSO Act), Azamgarh in a Criminal Appeal No.80 of 2017 by which the order of the Juvenile Justice Board dated 19.01.2017 was set-aside and the matter was remanded by the appellate court for deciding it afresh in a matter arising out of Case Crime No.17 of 2016, under sections 376, 504, 506 I.P.C. and section 3/4 POCSO Act and section 3(2)(v) of SC/ST Act, Police Station- Mubarakpur, District- Azamgarh.

4. Relevant facts leading to this revision are as below:-

Informant- lodged an F.I.R. alleging that her daughter, aged about 7 years, was playing in front of her house with other kids of the locality; the juvenile took away her daughter in a cabin/housing a tube-well and ravished her; she started bleeding and cried in pain; hearing her screams, other children came and apprehended him at the spot; the informant also reached at the place of occurrence; however, the accused escaped, threatening them; the victim was medically examined; blood was spotted in her private parts; after collection of the evidence a final report was submitted by the Investigating Officer; thereafter, on the protest petition moved by the

where the final report was accepted and the protest petition was dismissed vide order dated 19.01.2017; challenging the aforesaid order, Criminal Appeal No.80 of 2017 was preferred before the Special Judge (POCSO Act)/Children Court, Azamgarh; after hearing both the sides, the order of Juvenile Justice Board was set-aside with a direction to Juvenile Justice Board to hear and decide the matter afresh, keeping in mind the observation of the appellate court. Against the above order of the appellate court dated 15.01.2022, the minor accused has come in this revision through his natural guardian/father.

5. The very first submission of learned counsel for the revisionist is that the order passed by the Juvenile Justice Board was well reasoned, speaking and was passed on appreciation of evidence available and other facts and circumstances of the case; the appellate court without any good reasons took a different view of the matter; it is a principle of law that where two views are possible, the one favouring the accused is to be preferred; but the appellate court did not adhere to the established principles of law and gave the decision in a one sided and arbitrary manner; the Juvenile Justice Board as well as the appellate court relied on doubtful evidence and also ignored the fact that the prosecution story was improbable; the appellate court ignored the material contradictions in the statements of the witnesses. The final report under section 169 Cr.P.C. was submitted by the Investigating Officer of the rank of Deputy Superintendent of Police, on sufficient grounds; the protest petition was dismissed by the Juvenile Justice Board after considering all the aspects including statements of witnesses, medical report, statement of the Doctor and a detailed order was passed; however, the appellate court passed its order dated 15.01.2022 in a casual and routine manner; hence, the order of the appellate court is liable to be set-aside.

6. First, I perused the order of the Juvenile Justice Board. Passing a very detailed order, the Juvenile Justice Board in a sequential manner referred to each one of parcha nos. I, II, IIA, IIB, III, IIIA, IV, IVA, V, VI, VII, VIII and IX and also made certain observations about the medical reports of the accused as well as the victim and thereafter observed that the conclusion drawn by the Investigating Officer is correct and is based on the evidence collected; therefore, the final report is accepted and

7. I went through the order passed by the appellate court, which is under challenge in this revision; after referring to well-settled principles of law as regard the options available to the court concerned regarding final report, the appellate court proceeded to refer to the statements of the victim, aged about 7 years, wherein she supported the prosecution version and said "*when I was playing with other kids of the locality, the accused called me and carried me of to near by tube-well cabin; I made a noise, then my sister and others rescued me*". The appellate court also referred to the statement of the victim recorded under section 164 Cr.P.C., wherein she reiterated the same statement adding that she was subjected to sexual assault. The appellate court, thereafter referred to the statement of _____, sister of the victim, who supported the prosecution version and stated that on hearing screams of her younger sister, she rushed to the tube-well room and found the juvenile in the act; he (juvenile) was beaten then and there and the girl was rescued; the appellate court also referred to the statement of mother of the victim, who stated that she also reached at the spot after hearing the noise; the accused escaped from their clutches threatening them; she also stated that her daughter was bleeding from her private parts. After referring to the aforesaid statements of three witnesses, the appellate court, in my view, rightly observed that the Juvenile Justice Board dismissed the protest petition, ignoring the statements of three prosecution witnesses of facts; as far as medical evidence is concerned, the appellate court while noticing the fact of presence of blood on perineum in the medical examination of the victim, also observed that even if hymen was found intact, commission of sexual assault cannot be ruled out. In my view, such an observation is not perverse or incorrect.

8. Before I proceed further, I am inclined to refer to the most vehement argument put-forth before this Court; it is contended that the medical evidence is not only contradictory, but is also suspicious in character, therefore, no reliance ought to have been placed by the appellate court on it.

9. The medical examination of the victim was done after few hours of the incident in which hymen was found intact, no external injury and spermatozoa found in the vaginal smears but blood was found on perineum. It may be noted that this is not

rather the case is that he was caught in the act. My view is that necessary inference can be drawn in these circumstances and probability of sexual assault cannot be ruled out however whether it amounted to rape or attempt thereof, is for court concerned to decide. The opinion given by the appellate court in this regard cannot be categorized as perverse; the appellate court also rightly took note of the injuries found on the person of juvenile in the light of prosecution case that he was caught in the act at the spot and was beaten by the people gathered there.

10. I minutely perused the impugned order; the appellate court relied on the evidence given by the three prosecution witnesses of fact; mother of the victim, sister of the victim, who caught the accused in the act and who reached the spot on hearing screams of her seven years old sister and the victim herself as well as her medical report and as also the injuries of the accused, who as per prosecution version was beaten by the persons gathered there and drew a conclusion that the order of the Juvenile Justice Board is against the law and facts and therefore set it aside.

11. The Hon'ble Apex Court in **Jagannath Choudhary vs. Ramayan Singh, 2002 SCC (Cri) 1181**, while dealing with the powers of the revisional court held as below:-

"It is not to be lightly exercised but only in exceptional situations where the justice delivery system requires interference for correction of a manifest illegality or prevention of a gross miscarriage of justice. In Nosibolla, Logendranath Jha and Chinnaswamy Reddy as also in Thakur Das v. State of M.P., this Court with utmost clarity and in no uncertain terms recorded the same. It is not an Appellate forum wherein scrutiny of evidence is possible; neither the Revisional jurisdiction is open for being exercised simply by reason of the factum of another view being otherwise possible. It is restrictive in its Application though in the event of there being a failure of justice there can be said to be no limitation as regards the applicability of the Revisional power."

12. It may be noted that while exercising jurisdiction under section 397 Cr.P.C., the High Court is empowered to satisfy itself as to correctness, legality or propriety of any finding given by the courts below. While under section 102 of the Juvenile Justice Act, the High Court is empowered to call for record of any proceeding to satisfy itself as to legality or propriety of any order and pass such order in relation thereof as

the revisional powers as exercisable under section 397 Cr.P.C. and as exercisable by the High Court under section 102 of the Juvenile Justice Act, 2015 both. Thus, it is clear that the principles underlying the exercise of revisional powers under section 397 Cr.P.C. are also applicable to a large extent when the revisional powers have to be exercised under section 102 of the Juvenile Justice Act, 2015.

13. The Juvenile Justice Board though referred to the statements of the witnesses supporting the prosecution case, but did not relied on them instead relied on the evidence given by the witnesses who were essentially not the witnesses of the fact and also gave importance to the fact of lack of any external injury, absence of spermatozoa in pathological test and the fact of finding the hymen intact. In my view, the appellate court gave good reasons for not finding the order of the Juvenile Justice Board sustainable on facts and on law. In these circumstances, the approach of the appellate court in giving a different view cannot be called improper or illegal.

14. A submission has also been made before this Court that this case does not fall under the definition of section 375 I.P.C. Confronting this submission, learned A.G.A. has drawn the attention of this Court to the offence of rape as defined under section 375 I.P.C., which said that:-

"375. Rape- A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person."

15. It is important to notice that the extent of penetration is immaterial and that the perineum is part of the private parts, which sheathes the urethra. Hence, even if the penetration was very slight and was not into vagina, the same will bring the act within the definition of rape. However, I add a word of caution here that whether the act fell within the definition of rape, should be left to be decided by the court concerned when the matter is brought before it for hearing afresh.

16. On the basis of above discussion, I am of the view that the findings/observations given by the appellate court are not perverse, incorrect or illegal and the same is not liable to be

under section 102 of the Juvenile Justice Act, 2015.

17. Accordingly, present revision is **dismissed** at this stage.

18. Copy of the order be transmitted to the court concerned.

Order Date :- 11.10.2022

Saif/Neetu