

Court No. - 66

Reserved
A.F.R.

Case :- CRIMINAL REVISION No. - 4921 of 2019

Revisionist :- Khushabuddin Ali

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

Counsel for Revisionist :- Atul Nayak,Rajesh Kumar Mall,Ravi Kumar Srivastava

Counsel for Opposite Party :- G.A.

Hon'ble J.J. Munir,J.

1. This Revision, under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, 'the Act') is directed against a judgment and order passed by Mr. Lakshmi Kant Shukla, learned Special Judge POCSO Act, Kushinagar at Padrauna dated 07.11.2019 dismissing Criminal Appeal no.57 of 2019 and affirming an order passed by the Juvenile Justice Board, Kushinagar at Padrauna, dated 11.09.2019, refusing bail to the revisionist in Case Crime no.315 of 2019, under Sections 363, 366, 376, 506 IPC and Section 3/4 of the POCSO Act, Police Station Kotwali Padrauna, District Kushinagar.

2. Notice was issued to opposite party no.2 vide order dated 20.12.2019. A perusal of the office report dated 27.02.2020 shows that service upon opposite party no.2 has been effected through his daughter. Service report is on record marked with Flag – A. The service report submitted by the Chief Judicial Magistrate, Kushinagar at Padrauna, dated 22.01.2020 shows that opposite party no.2 has been served through his daughter, Sukanya Yadav. Duplicate of the notice issued bears acknowledgment of receipt by Sukanya Yadav. Service upon opposite party no.2 is, therefore, held sufficient. No one has put in appearance on behalf of the complainant/ opposite party no.2.

3. Heard Sri Rajesh Kumar Mall, learned Counsel for the revisionist and the learned A.G.A. appearing on behalf of the State.

4. The prosecution in this case commenced on an FIR dated 02.07.2019 lodged at 9.14 p.m. by the second opposite party at

Police Station Kotwali Padrauna, nominating the revisionist, besides two others. The FIR was registered for offences punishable, under Sections 363, 366 IPC. The occurrence indicated there is said to have taken place on 23.06.2019. It is said in the FIR that the informant's daughter (for short, 'the prosecutrix') had headed out to the fields on 23.06.2019 at about 8:00 o'clock in the night, when the revisionist along with Golu son of Faijul Rehman and Intiyaz son of Samsul Huda took her away by blandishment. It was also reported that they had taken her away in a Maruti (Swift Car) bearing registration no. UP 53 AQ 1181. It is also said that the prosecutrix is aged 13 years and reads in Class-VII. Necessary action by the police was requested.

5. The revisionist is a minor, aged about 17 years, his date of birth according to his High School Examination Certificate being 07.03.2003. The revisionist moved for bail to the Juvenile Justice Board, who proceeded to reject the same. Aggrieved, the revisionist went up in Appeal to the learned Sessions Judge. That Appeal came up before the learned Judge (POCSO Act), who has dismissed the Appeal and affirmed the Juvenile Justice Board.

6. Aggrieved, this Revision has been brought.

7. Learned Counsel for the revisionist has argued that the prosecutrix is not a minor, but a major aged 18 years. She has eloped with the revisionist of her free will. It is upon knowledge of the FIR being lodged by her father, opposite party no.2, that she returned home along with the revisionist. She has later on implicated the revisionist at the bidding of her parents and the police on patently false charges of rape. In addition, it is submitted by the learned Counsel for the revisionist that under Section 12(1) of the Act, the juvenile has a right to be released on bail unless his case falls in one or the other three disentitling categories postulated under the proviso to Section 12(1) of the Act. It is urged further that the revisionist's case is not one that falls under any of the disentitling

categories and, therefore, the Courts below have committed a manifest illegality in refusing bail to the revisionist.

8. Learned A.G.A. has opposed the revisionist's prayer to reverse the two concurrent orders. He submits that it is a case of rape involving a minor, aged 15 – 16 years. In case, the revisionist were released on bail, it would lead to ends of justice being defeated.

9. This Court has carefully considered the submissions advanced on behalf of both parties and perused the record. It is true that in the case of bail to a juvenile, Section 12 of the Act excludes the principles governing bails provided under the Code of Criminal Procedure. It postulates a regime where bail is a matter of right to the juvenile where an adult, circumstanced like him, would not be entitled to it except where the juvenile's case is shown to fall in any of the three disentitling categories under the proviso to Section 12(1) of the Act. Now, Section 12 of the Act may be quoted, for the facility of ready reference. Section 12 (*supra*) reads:

"12. Bail to a person who is apparently a child alleged to be in conflict with law.—(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under sub-section (1) by the

officer in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

10. This regime about a universal rule of bail to the juvenile and then subjecting it to the three disentitling conditions envisaged under the proviso to Section 12(1) of the Act, in the opinion of this Court, has application in a case where a juvenile is not entitled to bail on the merits of the case. All that this Court means is this: in a case where an adult, circumstanced like the juvenile, would not be entitled to bail, the provisions of Section 12(1) of the Act would apply, entitling the juvenile to the determination of his bail plea in accordance with the said provision. *A fortiori*, it does not mean that in a case where a juvenile on the merits of the case is entitled to bail, his bail plea must still pass muster under Section 12(1) of the Act. If this construction of the provisions of Section 12 of the Act were adopted, the juvenile would be more disadvantaged than the adult, and that clearly is not the purpose or the object of the Act; it is also not the purport of Section 12 thereof.

11. In the present case, this Court notices that in the FIR, the prosecutrix has been mentioned to be 15 years old. She has been subjected to a medico-legal examination, where on the basis of an ossification test, she has been opined by the Chief Medical Officer, Kushinagar, to be aged about 16 years. A copy of this report has been brought on record by the revisionist through a supplementary affidavit dated 22.09.2020, which this Court has perused. Now, going

by the usual variation of two years on the medical estimation of age, the prosecutrix would reckon to be 18 years. It has not been brought to this Court's notice that there is any other higher certification for the prosecutrix's age relevant under Section 94(2) of the Act, that would exclude medical estimation. This implies *prima facie* that the prosecutrix is of the age of consent.

12. A perusal of the FIR shows that the revisionist has been implicated with an allegation of enticing away a minor from the custody of the lawful guardian, may be for the purpose of marrying her. There is no allegation of rape there. The statement of the prosecutrix, that was recorded by a lady constable on 03.07.2019 after she was recovered, is very important to this Court's understanding. The statement shows that the prosecutrix had known the revisionist some seven months prior to the occurrence and was in love with him. She has said that on 23.06.2019, she was thrashed by her mother, which annoyed her so much, that she went of her own to the revisionist, whom she loved. The revisionist lives in Gujarat. The prosecutrix called the revisionist over to Gorakhpur and without telling anyone at home, she left home of her own for Barhalganj Railway Station. There she boarded a train to Gorakhpur and met the revisionist there. She accompanied the revisionist from Gorakhpur to Gujarat. The revisionist housed the prosecutrix at his employer's home. However, when the two learnt that the prosecutrix's father had reported the matter to the police, both of them proceeded to Gorakhpur by train and from Gorakhpur to Padrauna by bus. The revisionist had made her comfortable somewhere and left to fetch something when the police arrived and took her away. The prosecutrix has said specifically that she was not ravished, expressing it in the words: '*mere saath koi galat kaam nahin hua hai*'. Two days later, on 05.07.2019, the prosecutrix's statement was recorded, under Section 164 Cr.P.C. There, she squarely blamed the revisionist of committing rape.

13. A perusal of the FIR, the statement under Section 161 Cr.P.C. and that under Section 164 Cr.P.C. casts a grave shadow of doubt on the prosecution story. In the event, the revisionist were an adult, in all probability, he would have been entitled to bail on merits. This being the position, it would be very unfair and discriminatory to test the revisionist's case further on the touchstone of Section 12(1) of the Act, and then condemn his claim on one or the other disentitling grounds. The Special Judge in Appeal has looked into the social investigation report and there appears nothing from his remarks in the order impugned, particularly, those carried in paragraphs 6 and 7 of that order, that the revisionist, if released on bail, would come into association with any known criminal or would be exposed to any moral, physical or psychological danger.

14. This Court does not find that in the circumstances, there is basis to infer that release of the revisionist on bail would lead to ends of justice being defeated. In the opinion of this Court, the impugned orders passed by the two Courts below cannot be sustained and deserve to be set aside.

15. In the result, this revision succeeds and is **allowed**. The impugned order dated 07.11.2019 passed by the Special Judge POCSO Act, Kushinagar at Padrauna in Criminal Appeal no.57 of 2019 and the order dated 11.09.2019 passed by the Juvenile Justice Board, Kushinagar at Padrauna in Case Crime no.315 of 2019, under Sections 363, 366, 376, 506 IPC and Section 3/4 of the POCSO Act, Police Station Kotwali Padrauna, District Kushinagar, are hereby **set aside** and **reversed**. The bail application made on behalf of the revisionist stands **allowed**.

16. Let the revisionist, **Khushabuddin Ali**, through his natural guardian/ father, Diladar Husain, be released on bail in Case Crime no.315 of 2019, under Sections 363, 366, 376, 506 IPC and Section 3/4 of the POCSO Act, Police Station Kotwali Padrauna, District Kushinagar upon his father furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the

satisfaction of the Juvenile Justice Board, Kushinagar at Padrauna, subject to the following conditions:

(i) that the natural guardian/ father, Diladar Husain will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the father will ensure that the juvenile will not repeat the offence.

(ii) The revisionist and his father, Diladar Husain will report to the District Probation Officer on the second Monday of every calendar month commencing with the second Monday of October, 2020 and if during any calendar month the second Monday falls on a holiday, then on the following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board, Kushinagar at Padrauna on such periodical basis as the Juvenile Justice Board may determine.

(iv) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

(v) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vi) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

Order Date :- 5.10.2020
Anoop