

Neutral Citation No. - 2023:AHC:237387

Judgment reserve on 03.08.2023

Judgment delivered on 15.12.2023

In Chamber

Case :- CRIMINAL REVISION No. - 1470 of 2023

Revisionist :- Kamil

Opposite Party :- State Of U.P. And 4 Others

Counsel for Revisionist :- Bipin Kumar, Mohd. Naushad Siddiqui

Counsel for Opposite Party :- G.A., Virendra Singh Tomar

Hon'ble Ram Manohar Narayan Mishra, J.

1. By means of instant Criminal Revision the revisionist has assailed the order dated 24.02.2023 passed by learned Additional District and Sessions Judge/ Special Judge POCSO Act Court No.2, Muzaffar Nagar, whereby the complaint filed by the revisionist against respondent Nos. 2 to 5 Tanveer son of Suleman, Shahrukh son of Vakeelu, Smt. Faheem wife of Vakeelu and Smt. Jillo (wife of Tanveer), has been dismissed under Section 203 Cr.P.C.
2. A certified copy of order dated 15.02.2019, passed by J.J.B. Muzaffarnagar, has been filed today on behalf of the revisionist, which is taken on record.
3. Learned counsel for the revisionist appeared, none appeared on behalf of respondent Nos. 2 to 5.
4. Heard the submissions of learned counsel for the revisionist, learned A.G.A. for the State and perused the material on record.
5. The factual matrix of the case, in brief are that FIR was lodged at the instance of revisionist on 25.07.2017 at about 15:30 hours with P.S.

concerned vide Crime No.189 of 2017, wherein it is stated that in the night on 24.07.2017 at around 11:30 pm the victim aged about 15 years who is daughter of the complainant Kalim was sleeping in her home, the co-villagers of the informant namely Shakib and Tanveer enticed away his daughter some where else. The co-villagers Faraeem son of Wahid and Enamul son of Sharif had seen his daughter alongwith Shakib and Tanveer who were going alongwith her. The FIR was lodged under Section 363, 366 of I.P.C., the police investigated the case. The date of birth of the victim is mentioned as 10.09.2001 in school leaving certificate and accordingly she was around 15 years and 10 months at the time of incident and minor. The victim was recovered during investigation after 27 days of the incident. Her statement under Section 164 Cr.P.C. was recorded by the Judicial Magistrate-I, Muzaffar Nagar on 21.08.2017, in which she stated that in the night of 25.07.2017 she was sleeping in her home, she woke in the night around 2:00 hours and went to ease herself in the toilet situated at her boundary (Gher). Suddenly Shakib, Sharuk, Tanveer, Smt. Fahim and Smt. Jillo emerged there and dragged her to otherside of the wall and got her sniffed some substance, she fell down becoming unconscious. She regained her consciousness on the next day on 26.07.2017 at 7:30 am and found that she was locked in the room at Panipat, and all the five accused persons were present there. The accused Shakib, Shahrukh and Tanveer committed bad act with her one by one. They confined her in a room for 27 days, there she was subjected to rape many times during that period. She was crying for help during that period, but none came to rescue her. When she tried to stop Shakib for committing forceful act on her, he gave beating to her by belt and committed rape on her. Shakib and Tanveer also got her frightened and threatened her that she would be killed, if she disclosed these things to any one, they also committed rape on her. Shakib, Shahruk, and Tanveer also snatched her ornaments.

6. The Investigating Officer filed chargesheet against accused Shakib after investigation on finding his complicity in the alleged offence, but dropped the name of other accused persons on conclusion of investigation. Accused Shakib was juvenile at the time of incident, the inquiry and trial was commenced in respect of him before Juvenile Justice Board, Muzaffar Nagar. On 15.02.2019 an application was moved by the complainant before the Juvenile Justice Board (in short JJB) to summon the accused Sharukh and Tanveer also in exercise of power Under Section 319 Cr.P.C. However the said application was dismissed on 15.2.22019 by JJB with observation that the death information of accused Shakib who was facing trial before the Board, was received and said information was verified in report of P.S. concerned. The trial stood abated vide order dated 26.11.2018 against accused Shakib who was the sole accused facing trial. Therefore, the proposed accused Tanveer and Shahrukh could not be summoned in exercise of powers under Section 319 Cr.P.C., as no trial was pending before the Board in respect of the offence.

7. The complainant instituted a private complaint before the Court of learned Additional Session Judge/ Special Judge POCSO Act Court No.2, Muzaffar Nagar after dismissal of his application under Section 319 of Cr.P.C. by JJB. The complaint was registered as Criminal Case No.02/09 of 2019. The complaint was filed against Shakib, Sharukh, Tanveer, Smt. Fahim and Smt. Jillo, the accused whose name surfaced in statement under Section 164 Cr.P.C. of the victim. The complainant examined himself under Section 200 Cr.P.C. and the victim and one Faraeem who is named witness in the FIR under Section 202 Cr.P.C. in support of his case. The learned court below dismissed the complaint under Section 203 Cr.P.C. placed reliance on judgment of **Pepsi Foods Limited and another Vs. Special Judicial Magistrate 1998(5) SCC 749** with observation that the charagesheeted accused Shakib was declared

juvenile and the trial before the JJB in respect of him has already abated due to his death. The complainant has stated that in statement under Section 200 Cr.P.C. that accused Shakib and Tanveer had enticed away his daughter and this incident was noticed by Faraeem. Whereas the witness Faraeem has stated in his statement under Section 202 Cr.P.C. that he had seen accused Shakib and Tanveer taking away the victim in the night of incident at around 11:30 to 12:00 hours. The victim girl in her statement under Section 202 Cr.P.C. stated that accused Shakib, Sharukh, Tanveer, Smt. Fahim and Smt. Jillo has sealed the boundary wall of her house and got her sniffed something and thereafter could not comprehend as to what happen thereafter and she found herself in a room at Panipat next day. The court below has also observed that an unconscious person cannot walk on her feet. Therefore there is a strong contradiction in the statement of eye witnesses Faraeem and victim on this point. If she became unconscious after snuffing some substance at the instance of the accused persons, how could she walk with the accused persons thereafter in the fateful night. Therefore, the complainant version is not believable. This fact is also unnatural that two women who are wife of one of the accused and mother of other co-accused would accompany them in commission of such type of offence. Faheem is mother of the accused Shahrukh, whereas Tanveer and Jillo are husband and wife. This is against common logic that a person would commit rape on a girl in presence of his wife and mother. The prima-facie case relates to victim and accused Shakib who were minor at the time of the incident. The victim has implicated the accused persons after coming back to home deliberately to teach a lesson to them as they were related to Shakib.

8. Learned counsel for the revisionist submits that learned court below has wrongly passed the impugned order in a case S.T. No.02/09 of 2019 State Vs. Tanveer and others under Section 376(2)(G), 323

I.P.C., P.S. Mansoorpur, District Muzaffar Nagar which is mentioned in the impugned order was in fact passed in a complaint case filed by the revisionist after dismissal of his application under Section 319 Cr.P.C. by JJB in a trial against deceased chargesheet accused Shakib. Thus impugned order should have been passed in the complaint case and not in State case as cited in the order.

9. He further submitted that learned trial court has wrongly dismissed his complaint on the ground of contradiction in the statements of the victim and named witness Faraeem. This fact has come in the evidence of witnesses that victim was recovered after 28 days from the custody of the accused. Even PW2 Faraeem has stated in his statement under Section 200 Cr.P.C. that victim has stated before him after recovery that Shakib, Sharukh, Tanveer, Smt. Fahim and Smt. Jillo has enticed her away. She was taken to Panipat where she was raped by Shakib, Tanveer and Sharukh . The impugned order has been passed without considering the evidence on record in proper perspective.

10. The learned court below has carried out meticulous examination of evidence while dismissing the complaint, which is not permissible under law. The Court has proceeded only prima facie case to summon an accused while exercising powers under Section 204 Cr.P.C. In substance the court below has misread the evidence of witnesses, while passing the impugned order.

11. Per contra, learned counsel for the respondent Nos. 2 to 5 submitted that impugned order is a reasoned and speaking order and learned court below has disclosed cogent reasons while dismissing the complaint under section 203 Cr.P.C. The impugned order is perfectly legal and requires no interference in present revision.

12. Learned trial court has cited the judgment of Hon'ble Supreme Court in **Pepsi Food Pvt. Ltd. Vs. Special Judicial Magistrate 1998 5(SCC) 749**, wherein Hon'ble Supreme Court observed "as Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. it is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

13. Section 203 Cr.P.C. provides that if, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

On the other hand section 204 of Cr.P.C. provides as under:-

"1. If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—

a. summons-case, he shall issue his summons for the attendance of the accused, or

b. a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

2. No summons or warrant shall be issued against the accused under Sub-Section (1) until a list of the prosecution witnesses has been filed.

3. In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under Sub-Section (1) shall be accompanied by a copy of such complaint.

4. When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

5. Nothing in this section shall be deemed to affect the provisions of section 87.”

14. In the present case deceased (accused Shakib and respondent No.2 Tanveer) are named in the FIR lodged at the instance of father of the victim who is stated to be aged around 15 years at the time of incident. During investigation of FIR against Crime No.189 of 2017, under Sections 363, 366 and 376 IP.C. and Section 34 of POCSO Act. The statement of the victim was recorded under Section 164 Cr.P.C. by Judicial Magistrate Ist on 21.07.2017 in which she stated her age around 15 years and from her school leaving certificate also it appears that she was 15 years and 10 months of age at the time of incident, as her date of birth is mentioned therein as 10.09.2001. Thus, on both way, she had attained the age of only 15 years at the time of alleged incident. She has levelled specific allegation of commission of rape against Sharukh, Shakib and Tanveer and has attributed the role of facilitation of the

offence against Smt. Fahim mother of Sharukh and Smt. Jillo wife of Tanveer therein, but no specific allegations are made against these ladies and learned court below has rightly observed that involvement of these two women does not sound natural, as one of them is mother and the other is wife of the perpetrators of the crime of rape as alleged by the prosecutrix. However, the victim has attributed specific role of commission of rape on her, one by one against the named accused Shakib and Tanveer in FIR as well as one Sharukh in the statement recorded under Section 202 Cr.P.C. in present complaint case. She has also stated in her statement under Section 202 Cr.P.C. that these three persons committed rape on her in a fateful night after kidnapping her from her home. She has also stated in statement recorded under Section 164 Cr.P.C. that Shakib had assaulted her by belt in fateful night and these people snatched her ornaments. Thus there is no inconsistency in the statement of the victim during investigation of the offence by the police recorded under Section 164 Cr.P.C. as well as in her statement under Section 202 Cr.P.C., in subsequent complaint case filed by the father of the victim, after police submitted a chargesheet only against Shakib on point of complicity of Tanveer and Shahrukh in the offence. The informant filed an application before the JJB under Section 319 Cr.P.C. for summoning Sharukh and Tanveer under Section 319 of Cr.P.C. after death of sole accused Shakib, but same was dismissed on the ground that trial has already abated. At the stage of summoning of an accused in a complaint case under Section 202 Cr.P.C., the court has to see whether a prima facie is made out on the basis of material as well as evidence recorded at the stage of inquiry under Section 200, 202Cr.P.C. to put the proposed accused on trial and at that stage meticulous examination of the evidence recorded during inquiry proceedings is neither required nor desirable.

15. The learned trial court has not considered the fact that victim has made specific allegations of commission of raped on her in the fateful night against Sharukh, Shakib and Tanveer out of whom Shakib had already died. Therefore, the question of summoning the Shahrukh and Tanveer should have been addressed by the learned Special Judge in light of the statements of the victim recorded during different stages as well as the fact that one of them out of three alleged perpetrators of crime, two were named in the FIR.

16. Learned trial court has dismissed the complaint by embarking meticulous examination of the material in evidence on record, which was not required in the facts and circumstances of the case, as victim appears to be a child at the time of incident and she has consistently deposed regarding involvement of Shahrukh, Tanveer and deceased Shakib in her statements in the offence. The impugned order appears to be vitiated by legal and factual error on these counts and is not sustainable.

17. The revision stands **allowed**. Accordingly, the impugned order passed by Learned Special Judge dated 24.02.2023 is set-aside, the matter is remitted to court below to adjudicate on question of summoning of accused persons in said complaint case afresh in the light of observations made herein before in present revision, in accordance with law.

Order Date :- 15.12.2023

Ashish/-