

Court No. - 90

Case :- APPLICATION U/S 482 No. - 21540 of 2023

Applicant :- Aftab Khan @ Majnu

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

Counsel for Applicant :- Mohd. Shoeb Khan

Counsel for Opposite Party :- G.A.

Hon'ble Dinesh Pathak,J.

1. Heard learned counsel for the applicant, learned AGA and perused the record.

2. The Applicant has invoked the inherent jurisdiction of this Court U/S 482 Cr.P.C. to quash the order dated 25.05.2023 passed by the learned Additional Session Judge/Special Judge POCSO Act, Court No.1, Gorakhpur in Special Session Trial No.300 of 2015 (State of U.P. VS. Aftab @ Majnu) arising out of Case Crime No.65 of 2015 under Sections 376, 452 I.P.C. and Section 3/4 POCSO Act, P.S. Khajni, District Gorakhpur, rejecting the application dated 25.05.2023 under Section 311 Cr.P.C. moved on behalf of the present applicant (accused).

3. Respondent no.2 (father of the victim) has lodged an FIR, being Case Crime No.65 of 2015 dated 18.04.2015, against the present applicant levelling allegation of rape and outraging the modesty of her minor daughter with an averment that on the date of incident dated 11.04.2015 at about 11.30 P.M. while the minor daughter of the first informant was sleeping in house, neighbor's son (accused) barged into the house and tried to forceful sexual assault on the minor girl. During investigation, the victim was medically examined for the purposes of ascertaining her age. On the basis of the ossification test report dated 24.04.2015 submitted by the Radiologist, the Chief Medical Officer has submitted his report dated 28.04.2015 opining age of the victim to be 19 years old.

4. Ossification test report and the report submitted by the Chief Medical Officer are part of the case diary. Prosecution has also produced the educational certificate of the victim which has been proved and marked as Exhibit - Ka/8. During pendency of trial accused has filed an application dated 25.05.2023 under Section 311 Cr.P.C. to call upon the Radiologist and the Chief Medical Officer in witness box to prove the ossification test report and the

report dated 28.04.2015 submitted by the Chief Medical Officer. Learned trial court, vide order dated 25.05.2023, has rejected the aforesaid application with an observation that the educational certificate of the victim is already proved, therefore, there is no need to examine the Radiologist and the Chief Medical Officer to prove the report dated 24.04.2015 and 28.04.2015, which is under challenge before this Court.

5. Learned counsel for the applicant has questioned the legality and validity of the alleged educational certificates, which is a mark-sheet of the victim, marked as Exhibit - Ka 8, and submitted that same can not be considered as an educational certificate for the purposes of provision as enunciated under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in brevity "J.J. Act"). It is further submitted that the ossification test report dated 24.04.2015 and the report dated 28.04.2015 submitted by C.M.O. are prosecution's documents, however, the same is required to be proved for the purposes of fair trial which is a right of the accused. It is further submitted that the statement of the accused under Section 313 Cr.P.C. is already concluded, therefore, his application to call upon the Chief Medical Officer and the Radiologist under Section 311 Cr.P.C. can not be rejected to observe just and fair trial.

6. Per contra, learned A.G.A. has vehemently opposed the submissions as raised by learned counsel for the applicant and supported the order impugned dated 25.05.2023 rejecting the application under Section 311 Cr.P.C. moved on behalf of the accused.

7. Having considered the rival submissions advanced by learned counsel for the applicant as well as learned A.G.A. and perusal of record, it is manifested that the ossification test report dated 24.04.2015 and, on that premise, medical report dated 28.04.2015 submitted by the Chief Medical Officer, Gorakhpur, opining the age of the victim to be 19 years are part of the case diary. At this juncture, while trial is going on and the legality/validity of the educational certificate, marked as Exhibit - Ka 8, is still to be examined under the provisions as enunciated under Section 94 of J.J. Act, it would not be befitting for this court to make any comment on the educational certificate (Exhibit - Ka 8), as tried to be submitted by learned counsel for the applicant. However, right of fair trial of the accused can not be denied which is a constitutional right and at the time of his defence in the light of the provisions under Section 233 Cr.P.C. he has a right to make a request for issuing a process to call upon any person as a witness

to whom he thinks necessary to be examined for the purposes of his defence and to prove his innocence.

8. In the given circumstances of the present case, the ossification test report dated 24.04.2015 and the medical report dated 28.04.2015 submitted by CMO opining the age of the victim to be 19 years are prosecution documents and part of the case diary. However, prosecution has not made any endeavor to prove the aforesaid documents, which would be left to be unattended, and the same is relevant for the purposes to ensure the fair trial and prove the innocence of the accused as submitted by learned counsel for the applicant. On the aforesaid premise denying the opportunity to the accused to call upon the Radiologist and the Chief Medical Officer, Gorakhpur, would amount injustice and denial of fair trial to the accused.

9. In this conspectus as above, I am of the considered opinion that to secure the ends of justice application dated 25.05.2023 under Section 311 Cr.P.C. moved on behalf of the present applicant is liable to be allowed and the Radiologist as well as Chief Medical Officer, Gorakhpur, are liable to be called upon being a witnesses to prove the documents dated 24.04.2015 and 28.04.2015.

10. Resultantly, instant application is **allowed** and the order impugned dated 25.05.2023 passed by the learned Additional Session Judge/Special Judge POCSO Act, Court No.1, Gorakhpur in Session Case no.300 of 2015 is hereby quashed and the application dated 25.05.2023 under Section 311 Cr.P.C. moved on behalf of the present applicant (accused) is hereby allowed.

11. Learned trial court is directed to issue a process against the Radiologist concerned and the Chief Medical Officer, Gorakhpur, to appear before the court as a witness to prove the documents as mentioned in the application dated 25.05.2023.

12. It is expected that the learned trial court shall make an endeavour to summon the witnesses and conclude their evidence/cross examination expeditiously, preferably, within sixty (60) days from the date of production of certified copy of this order.

Order Date :- 17.11.2023/vkg