

A.F.R.

Neutral Citation No. - 2023:AHC:221481

Reserved On: 07.08.2023

Delivered On: 22.11.2023

In Chamber

Case :- CRIMINAL REVISION No. - 1915 of 2020

Revisionist :- Saleem Khan @ Saleem Master

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

Counsel for Revisionist :- Ganesh Shanker Srivastava

Counsel for Opposite Party :- G.A.

with

Case :- CRIMINAL REVISION No. - 1926 of 2020

Revisionist :- Sageer And 2 Others

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

Counsel for Revisionist :- Ganesh Shanker Srivastava

Counsel for Opposite Party :- G.A.

Hon'ble Ram Manohar Narayan Mishra,J.

1. Heard learned counsel for the revisionists, learned AGA for the State and perused the material placed on record.
2. Despite service of notice, none appeared on behalf of the opposite party No.2.
3. Instant criminal revision has been preferred against the impugned judgement and order dated 16.9.2020, passed by learned Additional District and Session Judge/Special Judge (POCSO Act), Bulandshahr in Special Session Trial No.1493 of 2020, arising out of Case Crime No.236 of 2020, under Section 316, 120-B IPC and 16/17 POCSO Act, Police Station Khurja Dehat, District Bulandshahar.
4. As both the criminal revisions have arising out of same impugned order passed by Special Judge (POCSO Act),

Bulandshahr, hence, both the revisions are being disposed of by this common judgement.

5. The factual matrix relevant for the present criminal revisions, in brief, are that first information report in present case was lodged at the instance of prosecutrix at police station concerned at 15:26 hours, stating that her date of birth is 14.5.2002. She visited the place of her phupi (bua) situated at Village Bhatwara, Police Station Khurja Dehat, District Bulandshahr in year 2019 where accused Aakil, the nephew of her phuphi, committed rape on her finding her alone in her house. He used to commit rape on her frequently by keeping her in fear, due to which she got pregnant in the January, 2020 and when she told this fact to Aakil, he continued to commit rape on her on pretext of solemnizing marriage with her. She told this fact to family members when she got pregnant for six months and thereafter family members including her uncle Sageer, Zaheer, Doctor Nazeer, maternal uncle Salim Master came at her place on 29.6.2020 in Bulandshahar and took her to Khurja on same day on pretext of solemnizing her marriage with Aakil where they took her to the clinic of Dr. Geeta and got her fetus aborted. Accused persons also threatened her with life. In FIR, these accused persons are named alongwith accused Aakil. The police investigated the case and got the statement of prosecutrix recorded under Section 161 and 164 Cr.P.C. She was brought before medical witness for medico legal examination but she refused to get her internal examination done by the Doctor, but the prosecutrix in her statement under Section 164 Cr.P.C. made specific allegations against Aakil, his elder brother Khursheed, his father and uncle. In statement under Section 161/164 Cr.P.C, prosecutrix referred these persons as relatives of Aakil.

6. Police submitted the chargesheet against accused Aakil for charge under Section 452, 376 IPC and 3/4 of POCSO Act but concluded that charge under Section 316, 120-B IPC, which was attributed to other named accused persons namely, Sageer, Zaheer, Dr. Nazeer, Salim Master and Dr. Geeta was not substantiated and their naming was found false. Therefore, the charge under Section 316 and 120-B IPC is dropped after investigation. Learned Special Judge has passed the impugned order on 16.6.2020. Feeling aggrieved by said order, the revisionist has preferred present criminal revision before this court.

7. Learned counsel for the revisionist submitted that the impugned order is not speaking order. The Investigating Officer, on conclusion of investigation has given finding that no offence under Section 316, 120-B IPC has been made out and he filed chargesheet only against accused Aakil for other charges. The Magistrate or criminal court has jurisdiction to issue process against the proposed accused only if there is sufficient material available to issue process against them and they are sent up for trial by the Investigating Officer on conclusion of investigation. The course left to the Magistrate after submission of final report by the police, further investigation in the matter without taking cognizance or deal with the protest petition, if any, filed by the complainant but in the instant case, neither any further investigation was ordered or any protest petition was filed by the complainant. Even, no tentative finding of guilt of the accused revisionist has been recorded by the Special Judge.

8. Per contra, learned AGA submitted that there is no illegality, infirmity or perversity in the impugned order passed by learned trial

court while taking cognizance of the offence against revisionist and issuing process to them for facing trial for charge under Section 316, 120-B IPC and 16/17 of POCSO Act. Her date of birth is mentioned as 14/5/2002, in school record. It is settled principle of law that the Magistrate or criminal court is not bound by the police report submitted under Section 173(2) of Cr.P.C. after completion of investigation but the court has to travel bounds of law and without recording its subjective satisfaction with regard to, prima facie, case against accused to put him on trial, on the basis of material collected during investigation, he cannot straight way issue process against the accused. Although, the impugned order is not a speaking order yet, so far as co-accused Aakil is concerned, the Investigating Officer has given a finding on the basis of material collected during investigation that sufficient evidence has been found against him for his prosecution on said charges levelled against him in first information report as well as statement of the witnesses recorded during investigation.

9. Inasmuch as accused Aakil has not assailed the cognizance taking and summoning order issued against him in impugned order, however, so far as the present revisionists are concerned, the Investigating Officer has not found their complicity in the offence on the basis of material collected during investigation and their name have been dropped after investigation and they are not chargesheeted.

10. This Court in **Dev Narayan vs. State of U.P., 2001 Cr.L.J. 357 (All)** and Hon'ble Apex Court in **Rajendra Kumar Sitaram Pande and others vs. Uttam and Another, (1999) 3 SCC 134** held that an order, taking cognizance on a police report, is not an

interlocutory order and revision against such order lies under Section 397 Cr.P.C.

11. On perusal of impugned order, it appears that this is a mixed order, wherein accused Aakil has been chargesheeted and present revisionist, who are also named in FIR and are exonerated after investigation and a final/closure report is deemed to have been filed in their favour by the Investigating Officer. However, learned court below has not issued any notice to the complainant/ prosecutrix with regard to final report filed in favour of the revisionist.

12. This is settled law that even after receipt of final report, the Magistrate can exercise its discretion by treating protest petition as complaint case after rejecting final report as held by Hon'ble Apex Court recently in **Zunaid vs. State of U.P. and Others, in Criminal Appeal No.2628-2629 of 2023 decided on 29.8.2023**. Hon'ble Apex Court held that there remains no shadow of doubt that on the receipt of the police report under Section 173 Cr.P.C., the Magistrate can exercise three options. Firstly, he may decide that there is no sufficient ground for proceeding further and drop action. Secondly, he may take cognizance of the offence under Section 190(1)(b) on the basis of the police report and issue process; and thirdly, he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. It may be noted that even in a case where the final report of the police under Section 173 is accepted and the accused persons are discharged, the Magistrate has the power to take cognizance of the offence on a complaint or a Protest Petition on the same or similar allegations even after the acceptance of the final report. A Magistrate is not

debarred from taking cognizance of a complaint merely on the ground that earlier he had declined to take cognizance of the police report. No doubt a Magistrate while exercising his judicial discretion has to apply his mind to the contents of the Protest Petition or the complaint as the case may be. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also.

13. On the basis of foregoing discussion, no doubt can be expressed on jurisdiction of the criminal court or magistrate to take cognizance of alleged offence on the basis of Section 190(1)(b) Cr.P.C. in a case, even though a final/closure report has been filed by the investigating Officer in favour of the concerned accused without adopting the procedure prescribed under Chapter XVI of the Code and court below has adopted the procedure in present case by taking cognizance of the offence alleged against present revisionists and issuing process to them to face trial for alleged offences. However, on perusal of impugned order, it cannot be comprehended that learned court below has applied its judicial mind while exercising his discretion in issuing process against those accused persons who are not chargesheeted by the Investigating Officer for the alleged offences. The existence of powers is one thing and due exercise of power is other thing. The impugned order is not a speaking order

alleast in respect of present revisionists. Undoubtedly, the trial court was well within its bound to issue process to present revisionists neglecting or rejecting final report submitted by the Investigating Officer in their favour but the order must be reasoned which could disclose judicial mind of the court while exercising its power to take cognizance and issuing process to such an accused who has not been chargesheeted by the Investigating Agency. However, the impugned order is a criptic order and the learned court below has not expressed any reason or discuss any material on the basis of which the court proceeded to take cognizance of the offence against the present revisionist and issued summon to them to face trial. Therefore, the impugned order which is devoid of any reason cannot be sustained under law and the revision is liable to be allowed.

14. In view of aforesaid, present revisions stand **allowed** and the impugned order passed by the court below is set aside in respect of present revisionists.

15. The matter is remanded back to court below with direction to pass a reasoned order in respect of present revisionists, in the light of judicial authority cited above, after giving opportunity of hearing to the prosecutrix, if it deemed fit, as well as the prosecuting officer in charge of the case.

Order Date :- 22.11.2023

Kamarjahan