

23.12.2021
Court No.2
Sl no. 4.
GB

*CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
APPELLATE JURISDICTION*

**C.R.R. 38 of 2020
With
CRAN 1 of 2021**

In Re: An application under Section 401 read with Section 482 of the Code of Criminal Procedure.

In the matter of : The victim

..... Petitioner

Mr. Rajat Das.

... for the Petitioner.

Mr. Aditi Shankar Chakraborty, Ld. A.P.P.
Mr. Nilay Chakraborty.

... for the State.

CRAN 1 of 2021 is an application for extension of interim order passed on February 27, 2020 in CRR 38 of 2020. The petitioner prays that the interim order already passed be extended.

Affidavit-of-service is taken on record, from which it appears that the accused persons, namely the opposite party nos. 2 and 3 have refused service. Thus, the Court has decided to proceed with the matter as refusal of service is treated as good service.

The learned public prosecutor is before this Court.

The petitioner is aggrieved by the order dated December 24, 2019 passed by the learned Additional Sessions Judge, Fast Track Court, Siliguri, passed in Sessions Case No.72(5) of 2012, Sessions Trial No.12 of 2013 by which the prayer for DNA test of the opposite party no.2 was rejected.

The victim urges that unless the DNA test of the opposite party no.2 is done and matched with the sample of the baby who was born out of the

alleged sexual assault upon the petitioner when the petitioner was a minor is allowed, the allegations would not be proved and the paternity of the girl child born would not be established. Further contention is with regard to the sections, which the prosecution has incorporated in the charge-sheet, as it is the specific case of the victim that the facts and circumstances would lead any reasonable man to conclude that the victim was raped by the opposite party no.2.

Reliance is placed on the birth certificate of the victim as also the ossification test, which shows that the victim was a minor at the relevant point of time, even when the child was born. Thus, according to Mr. Das, the age of consent as per law being 18 years, the allegation of rape of a minor, squarely applies as there could be no occasion for consensual sex.

The learned public prosecutor submits that the *de facto* complainant was the father of the victim. That there was no allegation of rape at the relevant point of time and, as such, the prosecution did not incorporate the section in the charge-sheet. Learned public prosecutor further submits that even at the stage of trial, if the learned trial court deems it fit, the section can be incorporated.

Having considered the rival contentions of the parties and having gone through the statements, deposition and materials on record, this Court is of the opinion that the victim was much below the age of consent. The fact that a child was born is also not disputed. The child was conceived when the victim was around 14 to 15 years on account of the sexual activity between the opposite party no.2 and the victim, is the specific allegation which appears from the depositions. As per the ossification test the victim was 14 to 15 years old. It is informed that the petitioner's evidence is over.

The victim shall be at liberty to renew the prayer for DNA test at the appropriate stage before the learned trial judge upon serving a copy to the opposite parties and the same shall be disposed of expeditiously in accordance with law, upon taking into consideration the relevant factors, the consequences thereof and the provisions of law under the relevant statutes enabling the petitioner to claim maintenance.

The victim shall also file an application before the learned trial judge for a direction upon the investigating agency to incorporate Section 376 of the Indian Penal Code and investigate and thereafter file a supplementary charge-sheet under Section 173(8) of the Code of Criminal Procedure. The said application should be disposed of within one month from the date of filing, according to law upon hearing the opposite parties.

Accordingly, CRR 38 of 2020 along with CRAN 1 of 2021 are disposed of. The observations herein are tentative and the charges etc. will be proved in trial. The trial judge will proceed independently.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Shampa Sarkar, J.)