

(2013) 09 AHC CK 0159
In the Allahabad High Court

Case No : Criminal Miscellaneous Bail Application No. 24170 of 2013

Panch Lal

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 26-09-2013

Acts Referred:

Citation : (2014) 1 ACR 454 : (2014) 1 ALJ 30 : (2014) 84 ALLCC 22

Hon'ble Judges : Ramesh Sinha, J

Bench : Single Bench

Advocate : R.S. Shukla and Pt. Laxmi Kant Pandey, for the Appellant; Devesh Pandey and P.B. Singh, for the Respondent

Final Decision : Disposed Of

Judgement

Ramesh Sinha, J.—Heard Sri. R.S. Shukla and Sri. Laxmi Kant Pandey, learned counsel for the applicant and Sri. Devesh Pandey, learned counsel for the complainant and Sri. Akhilesh Singh, Government Advocate, assisted by Sri. Vikas Sahai, learned AGA. While arguing the present bail application, it was pointed out by the learned counsel for the applicant that as per the Radiologist report dated 13.5.2013, the age of the prosecutrix is between 16 to 19 years on the basis of ossification test conducted by the said Radiologist. Dr. R.L. Gupta, Radiologist, M.L.N. Colvin Allahabad, a photocopy which has been annexed as Annexure-6 at page-27 of the affidavit filed in support of the bail application.

2. It further transpires that the Supplementary Medico Legal Report of the prosecutrix was also prepared by Dr. Sweta Yadav, Medical Officer of District Women Hospital on 15.5.2013, a copy of which has been annexed as Annexure-7 of the affidavit filed in support of the bail application. In the report, it was endorsed by the said Medical Officer that the radiological age is between 16 to 19 years and further has made endorsement that final age to be given by the C.M.O. office if the Hon'ble Court desires. The report which was submitted by Dr. R.L. Gupta, Radiologist, appears to be a vague one and there was no further report of the C.M.O., Allahabad with respect to the exact age of the prosecutrix.

Hence, this Court vide order dated 30.8.2013 summoned the C.M.O., Allahabad along with Dr. R.L. Gupta, Radiologist, to explain about the radiologist report prepared by the Dr. Gupta fixing 3.9.2013 for their appearance before this Court.

3. On 3.9.2013, an affidavit was filed by Sri. Dr. R.L. Gupta, Radiologist, who appeared along with Dr. Padmakar Singh, C.M.O. Allahabad. Dr. Gupta in his affidavit has reiterated the report which he has prepared of the prosecutrix on 13.5.2013 and has submitted that he opined about the age of the prosecutrix on the basis of X-ray report carried out on the person of the victim. Paragraph Nos. 5 & 6 of the affidavit filed by Dr. Gupta are quoted here-in-below:--

5. That for issuance of age certificate regarding the victim girl in such type of cases, the Chief Medical Officer can examine the victim only after issuance of an order by a competent court of law, but in the present case there was no order from any competent court of law and as such the Chief Medical Officer was handicapped to issue any age certificate ascertaining the age of the victim girl.

6. That if there was any order of competent court of law then the Chief Medical Officer on the basis of physical appearance as well as Radiological report has to issue an age certificate to the victim, but in the present case, the victim has never appeared before the Chief Medical Officer.

4. Dr. Padmakar Singh, C.M.O., Allahabad also supported the averments made by Dr. R.L. Gupta in paragraph Nos. 5 and 6 of the affidavit and has submitted that he has not examined the victim after she was examined by Sri Dr. R.L. Gupta, Radiologist, as there was no orders from any competent court of law for ascertaining the age of the prosecutrix. He further stated before the Court that if there was any order from the competent court of law, then he was under an obligatory duty to determine the age of the prosecutrix on the basis of her physical appearance as well as radiological report and would have issued certificate accordingly, but in the instant case the victim has never appeared before him.

5. The above averments made in the affidavit by Dr. R.L. Gupta and which was supported by the statement of Dr. Padmakar Singh, C.M.O. Allahabad does not appeal to the Court and the Court further desired to know as to why the Investigating Officer of the case after getting the prosecutrix examined by the Radiologist did not produce the prosecutrix before the C.M.O., Allahabad for determining the age of the prosecutrix. Hence, the Court summoned the Investigating Officer as well as S.S.P., Allahabad in this regard also and further directed that Sri. Padmakar Singh the C.M.O., Allahabad and Dr. R.L. Gupta, Radiologist, shall also remain present on 5.9.2013.

6. On 5.9.2013, the S.S.P., Allahabad Sri Umesh Kumar Srivastava as well as Investigating Officer of the case along with Dr. Padmakar Singh, C.M.O., Allahabad and Dr. R.L. Gupta, Radiologist, were present before this Court in compliance of the Court order dated 3.9.2013.

7. An affidavit of compliance has been filed by the S.S.P., Allahabad. In paragraph No. 7 of the affidavit, it has been stated that a show cause notice has been issued to the concerned Circle Officer on 2.9.2013 by the S.S.P., Allahabad for dereliction of duty and directed him to submit his explanation within three days as it has been found that the Investigating Officer of the criminal cases are not performing their duties in proper manner and final report and charge-sheet are being submitted without proper investigation of the case and for which the accused persons are being benefited in the court of law because of the laches on the part of the Investigating Officers.

8. In paragraph No. 12 of the affidavit it was further stated by Sri Srivastava that the Radiologist on the report regarding age of the victim has made an endorsement that final report regarding the age of victim will be given by the C.M.O., Allahabad, if so desired by any court of law and under the bona fide belief, the Investigating Officer relied on the same and has proceeded on the basis of the same by submitting the charge-sheet No. 94 of 2013 on 6.8.2013 against the accused namely, Panch Lal (the applicant) and Sanjay alias Daroga.

9. The C.M.O., Allahabad was pointed out about the averments made by S.S.P., Allahabad that Dr. R.L. Gupta, Radiologist, had made the aforesaid endorsement which has been stated by the S.S.P., Allahabad, then there lies no fault on the part of the Investigating Officer for not producing the prosecutrix before the C.M.O. for final determination of her age.

10. It was then stated by Dr. Padmakar Singh, C.M.O., Allahabad that there is a Division Bench judgment of this Court in the case of Bobby alias Javed Khan and another v. State of U.P. decided on 17.1.2002 reported in 2002 (44) ACC 365 : (2002 All LJ 811) by which it has been directed by the Court not to issue age certificate under the circumstances mentioned in. paragraph No. 7 of the said judgment, which are quoted hereinbelow:--

7. Taking all the above aspects into consideration we are of the view that issuance of such certificate by the Chief Medical Superintendent, Etah (Annexure-3) either on asking of Sangeeta or Bobby alias Javed Khan, petitioner No. 1 amounts to interference with the process of investigation. We, therefore, feel it expedient to give the following directions to be followed before issuing age certificate of a girl if asked for:

(i) That as and when an application by a girl or anybody else on her behalf for issue of age certificate, the Chief Medical Officer/Superintendent concerned shall ask for an affidavit of the applicant indicating the necessity of such certificate and whether any report has been made to the police alleging kidnapping/abduction;

(ii) that the police station under which girl usually resides with her parents shall be noticed to inform as to whether any case has been registered alleging kidnapping/abduction of the girl;

(iii) that the parents and in their absence near relations of the girl shall be noticed at the expense of the petitioner to appear at the time of medical examination. If it is reported by the police that on the basis of a complaint, FIR has been registered under Sections 363 and 366, I.P.C. or for any other offence, the Medical Officer shall refuse to examine the girl and issue certificate of age.

11. He further pointed out that the Principal Secretary vide letter dated 23.5.2002 has also circulated the said judgment of the Court for being complied with by the C.M.O.s and Medical Officers of the State.

12. On the basis of the said judgment of the Division Bench of this Court, the C.M.O, Allahabad has stated that the Radiologist had made an endorsement that for the final determination of the age of the prosecutrix would be the made if any court of law so desires and in the absence of order by competent court of law, hence, he did not determine the final age of the prosecutrix for the said reason.

13. I have gone through the Division Bench Judgment of this court passed in Bobby alias Javed Khan and another (2002 All LJ 811) (supra) and from a perusal of which it is apparent that the directions which have been given by the Division Bench of this Court with respect to the cases where the accused having kidnapped a girl approached the C.M.O. to obtain a certificate as to the age of girl and being armed with such certificate moved this Court to direct the Chief Judicial Magistrate or any other Magistrate to record the statement of the prosecutrix u/s 164, Cr.P.C. and then for quashing the FIR. In this regard, it is necessary that paragraph Nos. 5 and 6 of the said judgment to be taken note of in order to appreciate that under what circumstances this Court passed the said order. Hence, the same are being reproduced hereinbelow:

5. The defence plea that K. Sangeeta was major at the relevant time and that she left her parental home on her own volition and married to petitioner No. 1 cannot be accepted on its face value and the whole criminal proceedings and the FIR cannot be quashed. It has come to our notice that in large number of cases of this nature, the accused having kidnapped a girl approached the Chief Medical Officer to obtain a certificate as to the age of the girl and being armed with such certificate moved this Court to direct the Chief Judicial Magistrate or any other Magistrate to record the statement of the girl u/s 164, Cr.P.C. and then quash the FIR.

6. Recording of statement of witness u/s 164, Cr.P.C. and examination of the victim girl by the Doctor of ascertaining her age by ossification test are part of investigation. The function of the Court and investigating agency are well defined and well demarcated. No one should tread over the jurisdiction of the other. It has been well settled by a decision of the Apex Court in Jogendra Nahak and Others Vs. State of Orissa and Others, , that statement of an witness u/s 164, Cr.P.C. cannot be recorded by the Magistrate un-sponsored by the Investigating Officer. So far issuance of certificate of age of the victim by the Chief Medical Officer is concerned, it is contended by the learned A.G.A. that such certificate is

issued on the basis of the letter No. 4362 dated 26th August, 1986 of the Secretary, Health Department, Government of U.P. The said letter has been brought to our notice where in paragraph 1(d), it is provided that Chief Medical Officer can issue age certificate as mentioned therein. The said Government Order in our opinion, is being misused and misapplied by the Medical Officer and he being hand-in-gloves with the kidnapper issues certificate of age of the victim girl to protect him from the criminal proceedings. It is not the intention of the State Government that Chief Medical Officer without ascertaining the necessity of age certificate can examine a girl at the behest of the kidnapper/abductor and issue such certificate. In the present case, it appears from the certificate, copy where of at Annexure-3 that Chief Medical Superintendent, Etah on the basis of X-ray report opined that Sangeeta was aged about 19 years. A photograph of a girl to whom the Medical Superintendent identified as Sangeeta is attached to such certificate. The X-ray was conducted by the Radiologist, District Hospital, Etah. Questions arise as to who met the expenses of the X-ray, inasmuch as, whether X-ray was done at the State's expense or at the expense of Sangeeta or somebody else and further who identified the girl to the Radiologist whether in fact Sangeeta appeared before the Radiologist and her X-ray was done or someone else impersonated herself as Sangeeta. In a case under Sections 363 and 366, I.P.C. determination of age of the victim girl is one of the main factors to bring home the charge to the accused. It is, therefore, the duty of the Investigating Officer to get the victim girl examined by the doctor by way of ossification test and in that process no one can complain the identity of the girl.

14. Hence, it is clear that from the above judgment, this Court had issued directions to all the C.M.Os. of the State through Principal Secretary, Health Department, Govt. of U.P. not to issue age certificate without ascertaining its necessity merely at the behest of kidnapper/abductor.

15. It appears that the C.M.O., Allahabad probably has not read through the aforesaid Division Bench Judgment of this Court, which he has referred or he has wrongly interpreted the said judgment and Dr. R.L. Gupta, Radiologist and Dr. Sweta Yadav, Medical Officer, who have made an uncalled for endorsement in the Medico Legal Report that "final age to be given by the C.M.O. office if the Hon'ble Court so desires" and the C.M.O. was also waiting an order from the court of law for final determination of age of the prosecutrix when the Radiologist himself has given a vague opinion regarding the age of the prosecutrix between 16 to 19 years.

16. In the instant case, the accused were arrested in pursuance of an FIR which was lodged by the father of the prosecutrix Mohd. Latif registered as case crime No. 103 of 2013, under Sections 363, 366, 376, 504, 506, I.P.C. and 3/4 Protection of Children from Sexual Offences Act, 2012., Police Station Khiri, District Allahabad who stated that the age of his daughter was about 15 years and has been enticed away by the applicant Pancham and co-accused Sanjay alias Daroga.

17. The Investigating Officer of the case also did not realise the significance of the age of the victim in a abduction and rape case which has been opined by the Radiologist between 16 to 19 years, whereas father of the prosecutrix has stated her daughter's age to be 15 years and the prosecutrix has stated her age to be 16 years in her statement u/s 164, Cr.P.C. which was recorded by the Magistrate on 16.5.2013. Under the said circumstances, it was the duty of the Investigating Officer also to produce the prosecutrix before the C.M.O., Allahabad for final determination of her age after she was examined by the Radiologist and Medical Officer, but he also did not conduct a fair and proper investigation and submitted the charge-sheet in the case on 6.8.2013.

18. In the case in hand, the accused were arrested and sent to jail and the matter was under investigation by the police. The Investigating Officer after getting the prosecutrix examined by the Radiologist had also got her statement u/s 164, Cr.P.C. recorded before the Magistrate and it is not a case in which the accused persons had approached the C.M.O. with the prosecutrix for issuing a certificate of age of the prosecutrix. Hence, no order from any Court was required by the C.M.O. to determine the final age of the prosecutrix after she was examined by the Radiologist and Medical Officer.

19. The prosecutrix has levelled allegation of gang rape against the accused persons including the applicant in her statement u/s 164, Cr.P.C. The matter is of serious in nature and without final determination of the age of the prosecutrix, the Investigating Officer has submitted the charge-sheet which also amounts dereliction in duty by the Investigating Officer.

20. The Court has come across various cases in which the accused persons are being benefited by the laches on the part of the Investigating Agency and Medico Legal Experts who collude with the accused persons and they are benefited during the course of the investigation and trial which gives rise to crime in the Society especially against the women and boost the moral of accused persons to commit crime and get escort-free and the victim of the crime are devoid of justice from the court of law.

21. The Court while deciding the bail applications under Sections 363, 366 and 376, I.P.C. has also found that such cases from District Muzaffarnagar when the prosecutrix or the victim is produced by the Investigating Officer of the case before the Radiologist and the Medical Officers then it has been found that the said persons though have performed the ossification test of the victim and prosecutrix but have not mentioned the age of the prosecutrix and the Court had also summoned the concerned C.M.O. as well as Radiologist, Muzaffarnagar and had also questioned them about non-mentioning of the age of the victim and the prosecutrix in the radiologist report and further why the prosecutrix and the victim were not examined for determination of the age. The C.M.O. Muzaffar Nagar had appeared and stated before the Court that the Investigating Officers of the said cases have not produced the victim and prosecutrix before him for their determination of age. The Court directed the S.S.P., Muzaffar Nagar to

enquire about the said conduct of the Investigating Officers for not producing the prosecutrix of victim before the C.M.O. for determination; of age. When it was questioned to the Radiologist also that why he did not mentioned the age of the prosecutrix after her ossification test, then he submitted that the victim and prosecutrix have to be produced by the Investigating Officer before the C.M.O. for determination of age and after physical appearance the C.M.O. determines the age of the prosecutrix.

22. It is very unfortunate to note that the manner in which the C.M.O., Allahabad, Radiologist, Medical Officer of Women Hospital and Investigating Officer of the case have discharged their duties in a case of gang rape cannot be appreciated by the Court. The Court gives them last opportunity and cautions them that in future they would carry out their official duties in a most careful manner realising their responsibility towards the Society.

23. It is clarified that this Court has not observed or given any dissenting view as has been laid down in the case of Bobby alias Javed Khan and another (2002 All LJ 811) (supra) and by this judgment it has only been pointed out that the C.M.O. was not right in waiting for the orders of the Court for further examining the prosecutrix for final determination of her age after she was examined by the Radiologist and Medical Officer concerned, as the facts of the present case is entirely different to that of the cases which have been referred in the case of Bobby alias Javed Khan and another (supra) and the same cannot be made applicable in the present case.

24. It is further made clear that the judgment in the case of Bobby alias Javed Khan and another (2002 All LJ 811) (supra) of this Court should not be wrongly interpreted by the C.M.Os., C.M.S's., and Medical Officers of the State according to their own whims and it should be followed under the facts and circumstances as may arise in the cases which are referred in the said judgment and not in such cases like the present one.

25. The final age of the prosecutrix has not been determined by the C.M.O., Allahabad after she was examined by the Radiologist, hence for the proper adjudication of the present bail application as well as for the purpose of trial of the accused persons, it is directed that the complainant of the case Mohd. Latif shall produce his daughter, prosecutrix Km. Fatima, before the C.M.O., Allahabad for final determination of her age on the basis of the Radiologist report within two weeks from today and within next two weeks thereafter the C.M.O., Allahabad shall examine the prosecutrix and submit a report to this Court regarding the final determination of age of the prosecutrix in a sealed cover by the next date.

26. List the matter for further hearing on 28.10.2013.

27. The Registrar General of this Court is directed to send a copy of this order to the Principal Secretary (Health), U.P. Govt., Lucknow for necessary information and its compliance. Let a copy of this order be also given to the learned

Government Advocate for necessary information and its compliance to S.S.P., Allahabad, and C.M.O. Allahabad.