

(2021) 01 P&H CK 0435

In the Punjab And Haryana At Chandigarh

Case No : Criminal Miscellaneous Petition (M) No. 28585 Of 2020 (O&M)

Sumitra

APPELLANT

Vs

State Of Punjab

RESPONDENT

Date of Decision : 28-01-2021

Acts Referred:

Indian Penal Code, 1860 — Section 363, 366A, 376
Code Of Criminal Procedure, 1973 — Section 164, 164(1), 173, 207, 482
Juvenile Justice (Care And Protection Of Children) Act, 2015 — Section 94
Protection Of Children From Sexual Offences Act, 2006 — Section 26
Protection Of Children From Sexual Offences Act, 2012 — Section 25, 26, 26(4)
Hindu Minority And Guardianship Act, 1956 — Section 6

Citation : (2021) 01 P&H CK 0435

Hon'ble Judges : Amol Rattan Singh, J

Bench : Single Bench

Advocate : Arjunveer Sharma, Amit Mehra

Final Decision : Allowed

Judgement

Amol Rattan Singh, J

Case heard by video conferencing.

Other orders recorded before that apart, on 22.12.2020 the following order had been recorded:-

â??All cases listed today have been taken up for hearing by way of video conferencing because of the situation existing due to the COVID-19

pandemic.

By this petition, the petitioner seeks quashing of the impugned order dated 27.08.2020 (copy Annexure P-1), passed by the learned Judicial Magistrate

Ist Class, Ludhiana, upon FIR no.44, dated 17.03.2020, having been registered at Police Station Basti Jodhewal, Ludhiana, alleging therein the

commission of offences punishable under Sections 363, 366-A of the IPC, with Section 376 thereof added later, by which order the application moved

by the petitioner for recording the statement of her minor daughter (prosecutrix), under the provisions of Section 164 of the Cr.P.C., has been dismissed.

On 04.11.2020, the following order had been passed by this court:-

â??All cases listed today have been taken up for hearing by way of video conferencing because of the situation existing due to the COVID-19 pandemic.

Pursuant to the last order passed, an affidavit of the ACP, North, Ludhiana, has been filed, stating therein that as per the school records at the place

where the petitioners' daughter last studied, she was born on June 10, 2007, with the same date also being given on her Aadhar card.

Very obviously therefore, even today the petitioners' daughter is 13 years old and at the time of the alleged occurrence she was less than 13 years old.

That being so, whether or not her statement under Section 164 of the Cr.P.C. needs to be recorded again, would be seen after first seeing the

statement already recorded on June 10, 2020 before the JMIC, Ludhiana, with the allegation being that she had told her mother (petitioner) that before

recording the statement she had in fact been slapped by the investigating officer and had been told to give a statement in favour of the accused.

Consequently, the statement of the petitioners' daughter, recorded under the provisions of Section 164 of the Cr. P.C. not being present in the record

sent by the trial court (as per the Reader of this court), the said statement be sent via sealed envelope before the next date of hearing and put up

before this court.

Adjourned to 08.12.2020.â??

The statement of the petitioners' daughter recorded by the learned JMIC, Ludhiana, on June 10, 2020, has been sent to me (physical copy re-sealed by

the Reader of this court), in which the petitioners' daughter is stated to be 18 to 19 years old as told by her parents to her, with herself not knowing her

exact date of birth, with her further having stated that she had gone to Bihar of her own accord with the boy named therein and that she had also

married him and was 2½ months pregnant, further stating that she wished to continue staying with the family of her in-laws.

As per the learned Magistrate, the statement was made voluntarily without any coercion and the recording of the said statement was explained to the

girl in simple Hindi which she admitted to be correct and appended her signatures thereto (with the said signatures seen to be in English).

Mr. Pathak, learned State counsel, has also brought to the notice of this court (what had already earlier been informed to this court by learned counsel

for the petitioner on a previous date), that in fact the foetus had been aborted on July 22, 2020.

Mr. Sharma, learned counsel for the petitioner, however first draws attention to the statement made by the petitioners' daughter before the Child

Welfare Committee, Ludhiana, on 16.11.2020, which he has only forwarded by way of a 'Whatsapp' communication to the Reader of this court.

He submits that the said statement is to the effect that the petitioners' daughter was in fact taken forcibly to Bihar by the boy named therein (the same

as named before the learned JMJC in the statement under Section 164 of the Cr.P.C.) and that he had forcibly married her and that all that had been

done to her, was by force.

He next draws attention again to the affidavit of the DCP (Detective) Ludhiana, dated 28.09.2020, in paragraph 10 of which it is stated that as per the

Aadhar card and the record provided by the school of the petitioners' daughter, her date of birth was recorded to be 10.06.2007 though as per the

radiological test conducted at the GMC & Rajindra Hospital, Patiala, her age was found to be between 17 to 19 years and therefore the exact age of

the prosecutrix was not clear at this stage of investigation.

Since a radiological test is to be considered only in the absence of documentary evidence qua the age of any juvenile even as per Section 94 of the

Juvenile Justice (Care and Protection of Children) Act, 2015, therefore if the said school record documents as have been referred to by the DCP are

actually found to be authentic, obviously the petitioners' daughter would have to be considered, at this stage at least, to be juvenile in the age group of

13 to 14 years and, on that premise, her statement under the provisions of Section 164 of the Cr.P.C. would need to be recorded even in terms of

Section 26 of the Protection of Children from Sexual Offences Act, 2006, in the presence of the parents of the child or of any other person in whom

the child reposes trust.

However, first the authenticity of the certificate needs to be determined by the learned Area Magistrate and if it is found that the certificate is not

genuine and cannot be relied upon as regards the age of the petitioners' daughter, then naturally, if her age is approximately found to be in the vicinity

of 18 years, whether or not her statement under Section 164 of the Cr.P.C. needs to be recorded again would be considered.

The learned Magistrate would take evidence as regards the validity and genuineness of the certificate relied upon by the DCP (Detective) Ludhiana,

obtained from the school where the petitioners' daughter is stated to have studied.

That is to say, it would first be determined as to which school it is and as to whether any such certificate issued by that school can be considered to be

genuine or not in the opinion of the learned Magistrate.

Thereafter, the Magistrate would give her/his own opinion as regards her/his impression as to the approximate age of the petitioners' daughter.

A comprehensive report with regard to all the above shall be sent by the learned Magistrate to this court before the next date of hearing.

Adjourned to 28.01.2021.

Learned counsel for the petitioner further draws attention to the fact that though the said statement recorded on 10.06.2020 was by the JMIC,

however even as per the zimni order passed by that court on the said date (copy Annexure P6), it has been recorded that ASI Ramesh Kumar (stated

to be the investigating officer), was allowed to stay in court and record the statement.

He thus submits that with the allegation being that in fact the said investigating officer had slapped the petitioners' daughter prior to the statement

having been made, his presence itself could have been a source of fear with the girl.

In view of the above, without casting any aspersion, whatsoever, on the learned Magistrate who recorded the order dated 10.06.2020, it is directed

that the petitioners' daughter would now be produced before a different Magistrate in view of what has been recorded in the zimni order dated

10.06.2020.â??

Pursuant to the said order a report dated 25.01.2021 has been received from the JMIC, Ludhiana, stating therein that upon summoning the Principal of

the school where the prosecutrix is last stated to have studied, her date of birth was found to be entered as 10.06.2007 in the admission register for the year 2018-19, which date was entered on the basis of an Aadhaar Card submitted by the parents of the prosecutrix.

It has been further stated in the report that a Junior Assistant in the Regional Office of the Punjab School Education Board was also summoned, who produced a certificate granting affiliation to the school that the prosecutrix last attended, with the said School Education Board.

On the basis of the above, the learned Magistrate has further stated that the certificate issued on 27.06.2020 by the said school, giving therein the aforesaid date of birth of the petitioner, is seen to be a valid and genuine certificate.

Last, it has been stated that upon posing questions to the prosecutrix, as per the assessment of that court, her age appeared to be 13 to 14 years.

That being so, though otherwise an Aadhaar Card is not a firm proof of age because at the time of filling in a form for issuance of an Aadhaar Card,

no authentic proof of age is asked for by the Unique Identification Authority of India, however, in view of the fact that even as per the assessment of

the learned Magistrate, as regards the intellectual capacity of the prosecutrix, as also her physical appearance, she appeared to be 13 to 14 years of

age, this petition is allowed, with the prosecutrix to make any statement that she wishes to under the provisions of Section 164 of the Cr.P.C., in the

presence of her parents before the Area Magistrate.

It is directed that at the time when the prosecutrix is taken before the learned Magistrate from the place where she is currently staying, i.e. the Child

Care Home, Doraha, the investigating officer in the FIR in question, shall not go either to that home or be present before the Magistrate, nor shall he

meet/or attempt to meet the prosecutrix during the course of that journey. She would be accompanied by two lady police officials who would not try to

tutor her in any manner, with the parents of the prosecutrix to reach before the learned Magistrate on 04.02.2021 at 12.00 noon, but with it further

directed that the parents will not be allowed to meet the prosecutrix outside the court before she makes a statement and they would be sitting in the

court prior to the prosecutrix being brought there.

Naturally, while recording her statement, the learned Magistrate would adhere to

provisions of Sections 25 and 26 of the Protection of Children from Sexual Offences Act, 2012, including sub-section (4) of Section 26, which postulates that, wherever possible, the statement of a child would be recorded by audio/video electronic means.

The said provisions read as follows:-

â??25. Recording of statement of a child by Magistrate.â?

(1) If the statement of the child is being recorded under section 164 of the Code of Criminal Procedure, 1973 (2 of 1974)(herein referred to as the Code), the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child:

Provided that the provisions contained in the first proviso to sub-section (1) of section 164 of the Code shall, so far it permits the presence of the advocate of the accused shall not apply in this case.

(2) The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code.â?

â??26. Additional provisions regarding statement to be recorded.-

(1) The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.

(2) Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, while recording the statement of the child.

(3) The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.

4. Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means.â?

Her statement would be recorded before the Magistrate without meeting her

parents but in their presence, with no police official to be present at the time of the recording of her statement.

Of course, thereafter, she would be allowed to meet her parents. Consequently, the impugned order passed in the present petition, dated 27.08.2020, by the JMIC, Ludhiana, rejecting the application of the petitioner to get the statement of the minor girl (prosecutrix) recorded in the presence of the petitioner, is hereby set aside.

Though this is a petition seeking only the setting aside of the aforesaid order, however, Mr. Sharma has also submitted at this stage that with the girl having been shown to be a minor, even as per the aforesaid report of the learned JMIC, her custody be now handed back to her parents, with her to be released from the said protection home.

Though in terms of the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956, the custody of even a minor married girl is to be with her husband, however, with no proof of marriage actually having been brought before this court, I find the request to be reasonable in the circumstances of the case, especially when this court is exercising jurisdiction under Section 482 of the Cr.P.C.

Hence, after the prosecutrix has got recorded any statement under the provisions of Section 164 of the Cr.P.C before the concerned Magistrate, her custody would be returned to her parents, i.e. the present petitioner and the petitionersâ?? husband.

The petition stands allowed in the above terms.