



IN THE HIGH COURT OF KARNATAKA,



KALABURAGI BENCH

DATED THIS THE 23RD DAY OF NOVEMBER, 2024

BEFORE

THE HON'BLE MR JUSTICE MOHAMMAD NAWAZ

WRIT PETITION NO.200699 OF 2023 (GM-RES)

BETWEEN:

SRI. SOMANGOUDA S/O MALLANGOUDA PATIL
AGE: 28 YEARS, OCC: AGRICULTURE,
R/AT: KALAGURKI VILLAGE,
VIJAYAPUR – 586101.

...PETITIONER

(BY SRI. S. S. MAMADAPUR, ADVOCATE)

AND:

1. STATE OF KARNATAKA
BY MANAGULI P.S.
REP. BY GOVERNMENT ADVOCATE,
HIGH COURT PREMISE,
KALABURGI – 585101.



2. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

...RESPONDENTS

(BY SRI. JAMADAR SHAHABUDDIN, HCGP FOR R1;
NOTICE TO R2 IS DISPENSED WITH)



THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482 OF CR.P.C, PRAYING TO (A) PASS A WRIT OF CERTIORARI TO QUASH THE 164 (3) STATEMENT RECORDED BY JMFC COURT, B. BAGEWADI DATED 17.03.2015 IN CRIME NO.047/2015, VIDE ANNEXURE-D, CONSEQUENTIALLY QUASH THE ORDER DATED 30.06.2022 ON THE FILE OF IV ADDL. DISTRICT AND SESSIONS COURT, VIJAYAPURA, IN S.C.NO.168/2018 VIDE ANNEXURE-K, (B) DIRECT THE RECORDING OF STATEMENT OF THE VICTIM UNDER SECTION 164 (5A) BY FOLLOWING THE DUE PROCEDURE AND ETC.,

THIS PETITION, COMING ON FOR ORDERS, THIS DAY, ORDER WAS MADE THEREIN AS UNDER:

CORAM: HON'BLE MR JUSTICE MOHAMMAD NAWAZ

ORAL ORDER

Petitioner is seeking quashing of the statement of the victim recorded by the learned Magistrate under Section 164 Cr.P.C., vide Annexure-D and the order dated 30.06.2022 passed by the learned Sessions Judge, vide Annexure-K and consequently seeking a direction to record the statement of the victim under Section 164 (5A) Cr.P.C. by following the due procedure.



02. Heard the learned counsel for petitioner and the learned High Court Government Pleader for respondent No.1 – State.

03. The charge-sheet is filed against the petitioner for offences punishable under Sections 376 (I) and 376 (n) of IPC alleging that he has committed sexual intercourse on a mentally challenged victim and made her pregnant. The statement of the victim / CW.4 was recorded under Section 164 of Cr.P.C. by the learned Magistrate on 17.03.2015.

04. In the course of trial, when the matter was posted for evidence, as the victim was not in a position to depose, a direction was issued to the Superintendent, Department of Clinical Psychology, Institute of Mental Health and Neuro Sciences, Dharwad, to assess and submit a detailed report regarding the mental condition of the victim. As per report, the victim was suffering from moderate intellectual disability and therefore, the Court opined that she is not fit to understand the Court proceedings, due to her underline moderate intellectual disability.



05. The defence filed a memo stating that the statement of the victim recorded under Section 164 of Cr.P.C. cannot be treated as her evidence, since proviso to Section 164 (5A) of Cr.P.C., was not complied, and statement of the victim was not recorded with the assistance of an interpreter or special educator and also not videographed.

06. The said memo filed by the defence was opposed by the learned Public Prosecutor, contending that the statement of the victim with mental disability, recorded under Section 164 of Cr.P.C. can be considered as statement in lieu of examination-in-chief, as specified under Section 137 of Indian Evidence Act, 1872 and therefore, maker of the said statement can be cross-examined, without the need for recording the same at the time of trial.

07. The learned Sessions Judge vide impugned order has rejected the memo filed by the defence, accepting the submission of the learned Public Prosecutor



and posted the matter for cross-examination of CW.4 / victim with the assistance of an interpreter or special educator.

08. The question that would arise in this case is as to under what circumstance a victim, who is temporarily, permanently, mentally or physically disabled, whose statement is recorded under Section 164 of Cr.P.C. could be allowed to cross-examine during trial proceedings, without her evidence being recorded as required under Section 137 of the Indian Evidence Act, 1872.

09. Section 164 (5A) (a) of Cr.P.C. is extracted hereunder:-

"In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) of sub-section (2) of section 376, [section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB], section 376E or section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record the statement of the



person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police;

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement.

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed."

10. A plain reading of the above provision makes it clear that, at the time of recording the statement of a person, if the said person is found to be temporarily or permanently, mental or physically disabled, the learned Magistrate shall take the assistance of an interpreter or a special educator and the same shall be videographed, only then it shall be considered as the statement in lieu of



examination-in-chief, as specified under Section 137 of the Indian Evidence Act, without which the said statement cannot be considered as statement in lieu of examination-in-chief.

11. In the instant case, admittedly the assistance of an interpreter or special educator was not taken at the time of recording the statement of the victim under section 164 of Cr.P.C. There is no compliance of proviso to (5A) (a) of Section 164 of Cr.P.C. In fact, the learned Sessions Judge has observed in the impugned order that the victim has deposed in natural way in her statement recorded under Section 164 of Cr.P.C. and it is not clear as to whether the assistance of an interpreter or special educator was taken or not at the time of recording the said statement and also it is not clear as to whether the recording of statement of CW.4 (victim) was videographed or not. The learned Sessions Judge was not at all right in observing that these aspects can be given suitable consideration while hearing on merits of the case.



12. If the statement of a person with permanent mental or physical disability, was not taken following the due procedure contemplated under Section 164 of Cr.P.C. then such statement cannot be considered as statement in lieu of examination-in-chief, as specified under Section 137 of Indian Evidence Act.

13. The proviso to Section 164 (5A) (a) makes it mandatory to take the assistance of an interpreter or a special educator and for videographing while recording the statement of a person who is temporarily or permanently mentally or physically disabled. Since the said mandatory provision was not followed in the present case, the statement of the victim recorded under Section 164 of Cr.P.C. cannot be considered as statement in lieu of examination-in-chief. The impugned order passed by the learned Sessions Judge is therefore, liable to be set-aside. Accordingly, the following;



ORDER

- I. The petition is ***allowed***.
- II. The order dated 30.06.2022 passed by the Court of
IV Additional District and Sessions Judge, Vijayapura
in Sessions Case No.168/2018, is set-aside.
- III. The learned Sessions Judge shall record the evidence
of CW.4 / victim in accordance with law.
- IV. For the purpose of recording the evidence in chief as
well as cross-examination, the learned Sessions
Judge may seek the assistance of an expert /
interpreter / educator, if necessary.

**Sd/-
(MOHAMMAD NAWAZ)
JUDGE**