

HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (Criminal) No. 28 of 2019

.....Petitioner

Versus

State of Uttarakhand through the
Secretary Home Secretariat
Dehradun and others

....Respondents

Ms. _____ petitioner present in person.
Mr. P.S. Bohara, A.G.A for the State.

Hon'ble Ravindra Maithani, J.

This Court is now required to decide as to for the purpose of criminal investigation, what would be the sex of the petitioner. Petitioner, who is present in person says that she is “she” and should be identified as such, whereas learned State counsel would urge that the Investigating Officer has to act in accordance with the Indian Penal Code, 1860 which defines ‘men’ and ‘women’ and accordingly, the Investigating Officer has taken a decision.

2. Heard petitioner, present in person, learned A.G.A and perused the records.

3. In the instant case, an F.I.R was filed by the petitioner, which was registered as F.I.R No. 311 of 2018 under Section 377 and 385 I.P.C. The petitioner claims that she has identified herself as “she” and she should be treated as such. In view of the judgment passed by Hon'ble Supreme Court, in the case of National Legal Services Authority Vs. Union of India, (2014) 5 SCC 438. On the last date i.e. on 02.04.2019, when the matter was heard, the Court passed, *inter-alia*, the following order:-

“Petitioner states before the Court that in defiance of the direction of Hon'ble Supreme Court in the case of National Legal Services Authority Vs. Union of India, (2014) 5 SCC 438, the Investigating Officer has submitted the charge-sheet under Section 377 I.P.C and this has been done despite the fact that

the writ petition on the subject is still pending in the Court. A supplementary affidavit has also been filed.

Petitioner would argue that she has determined her sex as female. She has got recognition as such by the State of Maharashtra and in one of the counter affidavits filed by the State in the instant case, it was deposed by the office of the State Government that matter is under investigation under Section 376 I.P.C and now Section 376 I.P.C has been deleted without any valid reason.

Categorical reference has been made to paragraph 135.2 and 135.5 of the judgment of National Legal Services Authority case (*supra*). A compliance affidavit and a report from Investigating Officer are presented before the Court. Copies of the same be served to the petitioner and then be taken on record.

Petitioner has very painfully argued that based on chromosomes and biological sex of the petitioner, her right to self-identification of gender has been denied. A reference has also been made to a circular, which is at page no. 24 of the counter affidavit to argue that Investigating Officer has also defied to the circular issued by the State of Uttarakhand.” *(emphasis supplied)*

4. In a nutshell, what has been argued by the State is that petitioner is not “she” but is “he”, based on her biological sex. What is important to notice is that a report of Investigating Officer dated 02.04.2019, filed in the Court reveals that the Investigating Officer started reading the DNA of the petitioner and biologically declared on her own that the petitioner is not “she” but is “he”. Though, the report also records that the petitioner has conducted reassignment surgery and has also obtained a certificate that she may be addressed as “she”.

5. It is brought to the notice of the Court that based on the F.I.R, lodged by the petitioner, charge-sheet has already been filed under Section 377 I.P.C and bail cancellation is pending in this Court, which is listed sometime after two weeks from now. Outcome of this petition will definitely have an affect on that charge-sheet as well.

6. Needless to say, this is an issue of grave social importance; it is not touching upon the petitioner alone but thousands of others, who may have to face such kind of situation. On behalf of State of Uttarakhand, an affidavit has been filed by a Joint Secretary. In Para No. 6 of the affidavit the senior public servant of Uttarakhand State, states that based on the statements of the witnesses, the Investigating Officer has taken a decision and at that moment, it was recorded that Section 376 I.P.C was also added. But in Para No. 6 part

2 of the affidavit, it is stated that this fact is not yet conclusive proof. These lines of the senior public servant depicts that the discretion was given to the Investigating Officer to identify the gender of the petitioner and as stated, Investigating Officer on the basis of some DNA study declared that the petitioner is not a complete women, biologically.

7. The Court would not like to comment as to the way, State is proceeding in the matter. It will be resolved at the later stage but some references of the judgment of Hon'ble Supreme Court in the case of National Legal Services Authority (*supra*) has to be made. In Para No. 28 of the judgment, reference has been made to the decision of United Kingdom in the case of *Corbett Vs. Corbett* (1970) 2 All.E.R 33, in which case a view was expressed that any operative intervention should be ignored and the biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means. Hon'ble Supreme Court has on the other hand upheld the "psychological test" instead of "biological test". In Para No. 37 of the judgment of Hon'ble Supreme Court in the case of National Legal Services Authority (*supra*), it was held as hereunder:-

“37. The judgments referred to above are mainly related to transsexuals, who, whilst belonging physically to one sex, feel convinced that they belong to the other, seek to achieve a more integrated unambiguous identity by undergoing medical and surgical operations to adapt their physical characteristic to their psychological nature. When we examine the rights of transsexual persons, who have undergone SRS, the test to be applied is not the “biological test”, but the “psychological test”, because psychological factor and thinking of transsexual has to be given primacy than binary notion of gender of that person. Seldom people realize the discomfort, distress and psychological trauma, they undergo and many of them undergo “gender dysphoria” which may lead to mental disorder. Discrimination faced by this group in our society, is rather unimaginable and their rights have to be protected, irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role. Right of transgenders, pure and simple, like hijras, eunuchs, etc. have also to be examined, so also their right to remain as a third gender as well as their physical and psychological integrity. Before addressing those aspects further, we may also refer to few legislations enacted in other countries recognising their rights.”

(*emphasis supplied*)

8. It is pertinent to mention here that the petitioner has deposed that she has undergone “gender reassignment surgery” in Para No. 3 of the petition and a certificate to that effect has been enclosed as annexure no.2 to the petition.

9. Hon’ble Supreme Court, in the case of National Legal Services Authority (*supra*), did not accept the *Corbett* principle of “biological test” rather preferred to follow the psych of the person in determining sex and gender. It has been categorically held in Para No. 81 which is quoted hereinbelow:-

“81. Article 14, 15, 16, 19 and 21, above discussion, would indicate, do not exclude hijras/transgenders from their ambit, but the Indian law on the whole recognize the paradigm of binary genders of male and female, based on one’s biological sex. As already indicated, we cannot accept the *Corbett* Principle of “biological test”, rather we prefer to follow the psyche of the person in determining sex and gender and prefer the “psychological test” instead of “biological test”. Binary notion of gender reflects in the Penal Code, 1860 for example, Section 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NREGA, 2005, etc. Non-recognition of the identity of hijras/ transgenders in the various legislations denies from equal protection of law and they face widespread discrimination.”
(emphasis supplied)

10. It appears that this aspect of “biological test” and “psychological test” could not be noticed by the State. Perhaps State did not consider that the Hon’ble Supreme Court in the case of National Legal Services Authority (*supra*) did not accept the *Corbett* principle of determining sex because the senior public servant leaves it to the wisdom of Investigating Officer to determine sex of the petitioner. It may be noted here that in the case of National Legal Services Authority (*supra*) this right has been given to the petitioner in view of Para No. 135.2 of the judgment which is as hereunder:-

“**135.2** Transgender persons’ right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.”
(emphasis supplied)

11. As stated hereinbefore, the Investigating Officer has gone to analysis DNA; the “biological test”; in a nutshell, the Investigating Officer has gone to *Corbett* principle.

12. This Court may dispose of this matter by order now but perhaps State may consider it applicable to the case of the petitioner alone whereas, as stated, this is not an issue which effects the petitioner alone. The instant issue arises from constitutional conscience; it arises from right to equality, right to life as enshrined under Article 14 and 21 of the Constitution of India. It is an issue which the State is obligated to consider in letter and spirit of the judgment of the Hon’ble Supreme Court, in the case of National Legal Services Authority (*supra*). Therefore, this court is of the view that a Senior Officer of the State of Uttarakhand should be asked to answer this Court all those questions which have been raised hereinbefore in this order.

13. Therefore, let Home Secretary State of Uttarakhand file an affidavit, replying the issues raised by the petitioner in her petition as well as in the supplementary affidavit dated 19.04.2019. In addition to it, it shall also be clarified, as to how the Investigating Officer may be given the right of determination of sex or gender of the petitioner? How the Investigating Officer can determine the sex and gender of the petitioner based on some DNA analysis and “biological test”? How Investigating Officer could apply the *Corbett* principle which was not accepted by the Hon’ble Supreme Court? The affidavit must be filed within 10 days from now.

14. Having considered the importance of the matter learned Advocate General may like to assist the Court on this issue of seminal importance.

15. List this case on 13.05.2019, as the first case with BCA
No. 7 of 2019.

(Ravindra Maithani, J.)
29.04.2019

Shubham