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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.M.C. No.918/2012**

% *Judgment delivered on: 23rd March, 2012*

KAMAL @ LALLU

..... Petitioner

Through : Mr.F.K.Jha and Mr.B.K.Jha, Advs.

versus

STATE OF NCT OF DELHI

..... Respondent

Through : Ms.Rajdipa Behura, APP for State.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

1. Vide the instant petitioner, the petitioner has sought to direct I.O./S.H.O. of PS Uttam Nagar to obtain report on bonney age of prosecutrix or of report of Dental Surgeon, while challenging the order passed by learned Metropolitan Magistrate and learned Additional Sessions Judge vide orders dated 19.12.2011 and 08.02.2012 respectively.

2. Learned counsel for petitioner submits that against the petitioner, a case was registered on 17.09.2011 vide FIR No.413/2011 for the offences punishable under Sections 376/342/506 Indian Penal

Code, 1860 at police station Uttam Nagar, New Delhi for the incident allegedly took place on 15.09.2011.

3. Thereafter, on 14.12.2011 petitioner/accused moved an application before learned Metropolitan Magistrate, Delhi for getting the ossification test done on the prosecutrix, because of the fact that the date of birth recorded as 01.04.1998 in the school certificate, and that too on being affidavit filed on 05.07.2004.

4. Learned counsel for petitioner submits that there is no actual record of the prosecutrix of her age, therefore, in these circumstances, her age has to be ascertained for proper justice in the instant case.

5. Vide order dated 19.12.2011, learned Magistrate dismissed his application by recording that in view of the verification of school certificate regarding the date of birth of the prosecutrix, there is no occasion for getting the bone-age test done.

6. Being aggrieved, petitioner challenged the aforesaid order by way of filing a revision. However, the same had also similar fate of dismissal by learned Additional Sessions Judge, Delhi vide order dated 08.02.2012, while observing that the prosecution has relied upon the statement of prosecutrix on the basis of which FIR was registered; on the statement recorded under Section 164 Cr. P.C.; school record to show the age of the prosecutrix is about 14 years on the date of the alleged commission of offence.

7. Learned revisional Court has further recorded that the defence of

the petitioner/accused – age of prosecutrix being 18 years or more - on the date of alleged incident, can be decided only on merits of the case, after the evidence to be led during trial. Therefore, the petitioner is not entitled to claim that prosecutrix be medically examined for her bonney-age test.

8. Learned counsel for petitioner submits that the prosecution has relied upon only on the school record; no other record of her birth is available and the age recorded in the school itself is on the basis of the affidavit, therefore, it would be difficult to bring the evidence during trial because there is no record contrary to record produced by prosecution.

9. He further submitted that the only way out is to get the ossification test so that her probable age can be determined and brought on record; which can be used by petitioner at the appropriate stage.

10. Learned counsel submits that until it is established that whether the prosecutrix was major or minor at the time of the alleged incident, proper defence of the petitioner would not come on record. In both the situations, the case will proceed differently. In such a doubtful situation, it is the obligation of the prosecution to clear the doubt and establish the case accordingly, for proper justice.

11. To strengthen his contention, learned counsel for petitioner has relied upon the decision of the Apex Court in **Sunil v.State of Haryana**

: **2010 (1) SCC 742** wherein it has been held in similar situations as under:-

“23. We have heard the learned counsel for the parties at length. It is clearly borne out from the evidence on record that the appellant belonged to the same Caste and Gotra of the prosecutrix and was a frequent visitor to the house of the prosecutrix. There was a love affair between them and the court also observed that she did not ever resist her being repeatedly deflowered by the appellant Sunil. In this background, close and careful determination of the age of the prosecutrix is imperative.

24. Dr. Verma P.W.1, who had 14 clinically examined the prosecutrix, found that her secondary sex characters were well developed. The short question in the facts and circumstances of this case remains to be determined is whether the prosecutrix was a minor? Dr. Sadhna Verma, PW1 who examined the prosecutrix referred her for verification to the Dental Surgeon and the Radiologist. The failure of getting the prosecutrix examined from the Dental Surgeon or the Radiologist despite the fact that she was referred to them by Dr.Sadhna Verma, PW1 is a serious flaw in the prosecution version. We are not laying down as a rule that all these tests must be performed in all cases, but in the instant case, in absence of primary evidence, reports of the Dental Surgeon and the Radiologist would have helped us in arriving at the conclusion regarding the age of the prosecutrix.

25. *The prosecution also failed to produce any Admission Form of the school which would have been primary evidence regarding the age of the prosecutrix. The School Leaving Certificate produced by the prosecution was also procured on 12.9.1996, six days after the incident and three days after the arrest of the appellant. As per that certificate also, she joined the school in the middle of the session and left the school in the middle of the session. The attendance in the school of 100 days is also not reliable. The prosecutrix was admitted in the school by Ashok Kumar, her brother. The said Ashok Kumar was not examined. The alleged School Leaving Certificate on the basis of which the age was entered in the school was not produced.*

26. *Bishan, PW8, the father of the prosecutrix has also not been able to give correct date of birth of the prosecutrix. In his statement he clearly stated that he is giving an approximate date without any basis or record. In a criminal case, the conviction of the appellant cannot be based on an approximate date which is not supported by any record. It would be quite unsafe to base conviction on an approximate date.”*

12. Learned counsel further submits, the prosecutrix herself stated her age of 18 years as recorded in her first MLC and also recorded that sexual intercourse was with boy friend, that too with consent. Therefore, in the given situation, the age of the prosecutrix has to be ascertained.

13. On the other hand, learned APP for State while opposing the petition has submitted that the petitioner wants the investigation has to be dealt with, as per his own wishes; as he has all the opportunities to prove the age of the prosecutrix during trial. The only purpose of the petitioner is to linger on the case and it is against the settled norms of the investigation.

14. By way of instant petition, the petitioner wants that the matter be re-investigated, that too after framing of charges against him by learned Trial Court on 08.02.2012. Therefore, the instant petition may not be allowed.

15. Heard learned counsels appearing for parties.

16. The plea of the petitioner in instant petition is that at the earliest stage, he raised this issue immediately after lodging of the FIR against him i.e. on 17.09.2011 and moved the application on 14.12.2011, even before filing the charge-sheet in this case. Since beginning he has been agitating for the same. Therefore, there is no question of delaying the trial.

17. Moreso, when the prosecutrix for the first time was taken to the hospital for her medical examination; in MLC her age was recorded as 18 years, further recorded as under:-

“H/o Sexual intercourse with boyfriend with consent”

18. Thereafter, prosecutrix was again taken to the hospital for her examination; at that juncture, her age was recorded as 14 years and she

levelled charges of rape against petitioner.

19. Whereas, the details recorded in the ration card (AnnexureP-4) reads as under:-

“Details of Family members:

Card No.APL31071834

<i>Sr. No.</i>	<i>Name</i>	<i>Year of Birth</i>	<i>Father/Husband</i>	<i>Relation to Head of Family</i>
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- | | | | | |
|-----------|--------------|-------------|--------------------|-----------------|
| <i>1.</i> | <i>Manju</i> | <i>1974</i> | <i>Late Suresh</i> | <i>Self.</i> |
| <i>2.</i> | <i>Akash</i> | <i>1991</i> | <i>Late Suresh</i> | <i>Son</i> |
| <i>3.</i> | <i>Nisha</i> | <i>1994</i> | <i>Late Suresh</i> | <i>Daughter</i> |
| <i>4.</i> | <i>Sagar</i> | <i>1996</i> | <i>Late Suresh</i> | <i>Son”</i> |

20. Even otherwise, learned counsel for petitioner has submitted that the bonney-age test report may be used by him at the appropriate stage; for which it is imperative that relevant material should be available on the record.

21. Keeping the above discussion and settled law into view as the present case is similar to the case of ***Sunil (supra)***, therefore, for just to reach on correct and proper decision on the merits, in the interest of justice, instant petition is allowed.

22. The IO of the case is directed to get the ossification test and dental report done of the prosecutrix from any government hospital within four weeks from today. The report, so collected by the IO shall be placed on Trial Court Record.

23. Copy of order be sent to the SHO, Police Station Uttam Nagar,

New Delhi for compliance.

24. *Dasti.*

SURESH KAIT, J

MARCH 23, 2012

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