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

% *Date of Decision : 01st August, 2014*

+ CRL.REV.P. 130/2014

RAHUL DEV

..... Petitioner

Through : Mr.Alok Lakhanpal and Mr.Sushil
Thakur, Advs.

versus

STATE & ANR

..... Respondents

Through : Ms.Rajdipa Behura, APP for the State
with SI Premvir Singh, PS Sultanpuri.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J. (ORAL)

1. Petitioner is aggrieved by the order dated 23.10.2013 by learned ASJ, whereby he has been ordered to face trial for committing the offence punishable under Sections 363/366/376/346 IPC.
2. The facts that led to the filing of present revision petition are that an FIR was lodged on 16.10.2012 by the mother of the prosecutrix alleging that her daughter, aged about 17 years, had gone out of the house on 15.10.2012 at about 2 pm, and did not return. She suspected that somebody had enticed her daughter and taken her away. She requested the police to search for her daughter and take legal action against the offender.
3. On the basis of the statement of the complainant, case FIR No.466/2012 under Section 363 IPC was registered at PS Sultan Puri. Subsequently, the daughter of the complainant was recovered on 02.11.2012

from Gurgaon. She was brought to Delhi and her statement u/s 161 CrPC was recorded. On 03.11.2012, the daughter of the complainant was produced before the learned MM and her statement u/s 164 CrPC was recorded. During investigation, the I.O. also collected the date of birth certificate of the prosecutrix and after recording of the statement of other witnesses, the chargesheet was filed. The learned M.M. took cognizance of the offence and after compliance of requirements of Section 207 CrPC, the case was committed to the Court of Sessions.

4. Vide order dated 23.10.2013, charges were framed against the accused/present revisionist for committing the offences punishable under sections 363/366/376/346 IPC. The grievance of the petitioner is that the prosecutrix was above 17 years of age and in her statement under Section 164 Cr.P.C. had stated that she consented to have physical relations with the petitioner. Since at the time of entering into physical relations with the petitioner, the age for consent as per Section 375 (sixthly) was 16 years, learned Trial Court could not have ordered for framing of charges under Section 376 IPC by giving retrospective effect to the raising of the age of consent to be 18 years by Criminal Law (Amendment) Act, 2013

5. Heard.

6. Counsel for the Petitioner submits that the offence under sections 363/366/346/376 IPC are not made out against the petitioner. With regard to the offences u/s 363/366/346 IPC are concerned, counsel for the petitioner submits that the Ld Trial Court did not consider the statement of the prosecutrix u/s 164 CrPC wherein it has been stated by her that she joined the company of the accused of her own and had no objections in living with him. Further, she admitted of having physical relations with him, with her

free consent. He further submits that there was no force used on the part of the accused to compel the prosecutrix to stay with him and nor she was wrongfully confined by him.

7. It has been further submitted that the mother of the prosecutrix has also mentioned her age as 17 years which is in consonance with the date of birth recorded in the certificate of the prosecutrix, collected by the IO during investigation. He further submits that at the time when the offence was allegedly committed, the age of consent was 16 years and it was only after the Criminal law (amendment) Act 2013 came into force that age required for consent was raised to 18 years. Since the prosecutrix herself in her statement u/s 164 CrPC has stated that she had physical relations with the accused with her consent and at that time her age was above 16 years, the petitioner could not have been charged for the offence under section 376 IPC. He submits that the substantive law cannot have a retrospective effect, unless otherwise notified. Hence, the impugned order directing him to be charged for committing the offence u/s 376 IPC would be in violation of Article 20(1) of the Constitution of India.

8. On behalf of the State, Ms.Rajdipa Behura, Ld. APP submits that in her statement under section 164 Cr.P.C., the prosecutrix mentioned that the appellant enticed her away from her house to take her to Gurgaon on the pretext of dropping her to her uncle's house after roaming here and there for some time. But he did not drop her to her uncle's house and insisted that she should stay with him. Thus, the offences for which he has been charged are clearly made out. As per the school certificate, the date of birth of the prosecutrix is 7.8.1995 and the date of registration of FIR was 16.10.2012. Hence, the age of the prosecutrix at the time of registration of FIR was about

17 years and 2 months. She further submits that as per the Criminal Law (Amendment) Act, 2013, the age of consent was increased from 16 years to 18 years, implying that the consent of the prosecutrix who is below the age of 18 years, is immaterial. Hence, the offence under Section 376 IPC would also be made out irrespective of the consent.

9. Learned APP for the State further submits that an amendment would have retrospective effect and would apply to the pending cases, in which investigation was not complete on the date on which the amendment Act came into force. In the present case, the Criminal Law (Amendment) Act, 2013, came into effect from 3.2.2013 and the chargesheet was filed after 03.02.2013. In support of her submission, she placed reliance on the judgment of Hon'ble Supreme Court in the case of ***Hitender Vishnu Thakur and Ors. Vs. State of Maharashtra and Others AIR 1994 SC 2623***

10. I have heard the rival contentions of the parties. As far as charges framed for committing the offences under Section 363/366/346 IPC are concerned, at the outset, it is observed that at the stage of framing of charge, the trial Court is only required to consider whether there are sufficient ground to proceed against the accused or not. At the stage of framing of charge, the defence of the accused cannot be put forth. Permitting the accused to adduce evidence for his defence at the stage of framing of charge and for examination thereof at that stage would be against criminal jurisprudence. (vide ***State of Orissa Vs. Debendra Nath Padi AIR 2005 SC 359***).

11. The learned ASJ while passing the order on charge has also charged him for committing the offence punishable under Section 376 IPC and had observed as under:

“.....As per the age proof i.e., school certificate, the date of birth of the prosecutrix is 7.8.1995 and on the date of registration of the FIR i.e., 15.10.2012, she was aged around 17 years two months (approximately). As per the statement of the prosecutrix under Section 164 Cr.P.C., the accused had allured her and made physical relations with her during the period she remained with him. Under these circumstances, both the provisions of Section 376 IPC were required to be invoked which neither the IO nor the SHO nor the ACP have bothered to invoke before forwarding the charge sheet to the Court.

.....

Heard arguments on charge. On the basis of complaint, statements of witnesses and other material placed on record, prima facie charge under Section 363/366/376/346 IPC has been settled against the accused Rahul Dev to which he pleads not guilty and claims trial.

.....”

12. Prior to coming into force of above amendment, clause *Sixthly* of Section 375 IPC read as under:-

“375. Rape- A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

.....

Sixthly.- With or without her consent, when she is under sixteen years of age.

.....”

13. Now the question that arises for consideration is whether learned trial court was justified in charging the petitioner for committing the offence punishable under Section 376 IPC, though on the date of alleged offence, when petitioner and the prosecutrix had physical relations, the age for consent was 16 years. In this regard, at the outset, it is necessary to mention that the **Criminal (Amendment) Act, 2013 received assent of the**

President on 02nd April, 2013. The notification to this effect was issued on 02nd April, 2013 and is to the effect that :

“

*CHAPTER I
PRELIMINARY*

1. (1).....

(2) *It shall be deemed to have come into force on the 3rd day of February, 2013.*

.....”

Clause Sixthly was amended as under :

“.....9. *For sections 375, 376, 376A, 376B, 376C, 376D of the Penal Code, the following sections shall be substituted, namely:-*

‘375. A man is said to commit “rape” if he-

.....

Sixthly-With or without her consent, when she is under eighteen years of age.

.....’ ”

14. When the Criminal Law (Amendment) Act, 2013 came into force with effect from 3rd day of February, 2013, the contention of learned APP for the state that in all of the cases pending investigation on the date when this amendment came into force were deemed to be covered by this amendment is not legally tenable. Once the date has been specified in the notification from which this amendment Act had come into force, it could not have been applied retrospectively.

15. The question of retrospective operation of substantive law was considered by Hon'ble Supreme Court in the case of ***The Government of Andhra Pradesh and Ors. Vs. Ch.Gandhi AIR 2013 SC 211***. The relevant portion of the report is reproduced as under:

“.....23. Presently, we shall deal with the contention of the learned Counsel for the State who has laid emphasis on the fact that the said Rule has been substituted by the amendment dated 16.12.2003 and, therefore, it has to be treated to have retrospective effect. At this juncture, we may fruitfully refer to a passage from Maxwell on the Interpretation of Statute, 12th edition, wherein it has been stated thus: Perhaps no rule of construction is more firmly established than thus - 'that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only'. The rule has, in fact, two aspects, for it, 'involves another and subordinate rule, to the effect that a statute is not to be construed so as to have greater retrospective operation than its language renders necessary'.

24. In Francis Bennion's Statutory Interpretation, 2nd Edn., while emphasizing on the concept of retrospective legislation and rights, the learned author has stated thus:

The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of ex post facto law is enshrined in the United States Constitution and in the Constitution of many American States, which forbid it. The true principle is that *lex prospicit non respicit* (law looks forward not back). As Willes, J. said retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law'.

25. In *Hitendra Vishnu Thakur v. State of Maharashtra and Ors.* MANU/SC/0526/1994 : (1994) 4 SCC 602, this Court dwelled upon

the ambit and sweep of the amending Act and the concept of retrospective effect and, eventually, ruled thus:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly-defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

26. From the aforesaid analysis of law, it is graphically clear that there is a presumption against the retrospective operation of a statute, and further a greater retrospectivity cannot be conferred on a statute than the language makes it necessary.....”

16. The reliance placed by learned APP on the case of ***Hitendra Vishnu Thakur v. State of Maharashtra and Ors. (1994) 4 SCC 602*** has also been referred to in the above noted case.

17. Thus the legal position is that a statute which affects substantive right is presumed to be prospective in operation unless made retrospective either expressly or by necessary intendment. Indian Penal Code being a substantive law cannot have retrospective operation unless otherwise

provided, either expressly or by necessary implication. Hence, at the time of alleged commission of offence, in the present case, the age of consent was 16 years.

18. In view of the statement under Section 164 Cr.P.C. made by the prosecutrix who had already attained the age of consent as per the legal position at the relevant time, learned trial court committed an error in directing the petitioner to be also charged for committing the offence under Section 376 IPC. In view of increase in age of consent by Criminal Law (Amendment) Act, 2013 which came into effect only on a subsequent date, the petitioner could not have been charged for committing offence under Section 376 IPC in view of the statement of the prosecutrix and that she was having the required age and had consented to the physical relations.

19. As per the birth certificate, the age of prosecutrix at the time of alleged commission of offence was 17 years 2months. The relevant portion of the statement of the prosecutrix under Section 164 Cr.P.C. is as under:

*“15 October ko Rahul mujhe mere ghar se behla phusla kar le gaya. Usne bola tha ke hum dono thoda ghume ge aur phir tumhe tumhare mama ke ghar chodd doonga. Phir vo mujhe bas se Gurgaon le gaya. Rahul ne Gurgaon me pehle se kirye par karma liya hua tha. Rahul mujhe mere mama ke ghar choddney ke bajye mujse uske sath rahne ke liye jidd karne laga. Rahul ne kaha ke tum mere sath 2-4 din raho, phir mein tume tumhare mama ke ghar chodd aaunga. Mujhey Rahul ke sath rehne me koi khas aafat nahi thi kyunki mai use pasand karti hun. Rahul mere mama ke ghar ke pass rehta hai. Mai Rahul ko karib ek saal se janti hun. Mai Rahul ke sath karib 15 din rahi. Kintu maine apni mummy mujhe lene aa gayi. Uske ke baad meri mummy mujhe thane le gayi thi. Mai aab mummy papa ke sath rehna chahti hoon. **Rahul aur mere teen sharirik sambandh bhi bane lekin voh sab par marji ke sath hua. Mein yeh bayan kisi ke dabav mein nahi de rahi hun. Mein Rahul ko pasand karti hun.**”*

20. The impugned order that the petitioner be also charged for committing the offence punishable under Section 376 IPC, is against the settled legal position. While passing the order on charge, the learned Trial Court has also adversely commented on the conduct of IO/SHO/ACP in not invoking the Section 376 IPC before forwarding the chargesheet to the Court.

21. As per State, the chargesheet has been filed on 03.02.2013. Learned Trial Court failed to note that though the Criminal Law Amendment came into force on 03.02.2013 but it received assent of the President on 02.04.2013 and notification to this effect was also issued on 02.04.2013. There was no occasion for learned Trial Court to make the above observation that the proposed amendment were yet to receive the President's assent and to be notified thereafter. In the circumstances the observation/comments by learned Trial Court that *".....Under these circumstances, both the provisions of Section 376 IPC were required to be invoked which neither the IO nor the SHO nor the ACP have bothered to invoke before forwarding the charge sheet to the Court....."* were unwarranted. Thus, these comments are also liable to be expunged.

22. The impugned order dated 23.10.2013, to the extent that it has directed the petitioner to face trial for committing the offence under Section 376 IPC and the observation made about IO/SHO/ACP, is quashed.

23. The revision petition is allowed in above terms.

Order *dasti*.

PRATIBHA RANI, J

AUGUST 01, 2014

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