

\$~6.

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

+ **CRL.REV.P. 87/2018**

COURT ON ITS OWN MOTION

..... Petitioner

Through: Mr. Rajat Katyal, APP for the State

versus

VINAY @ CHOTU PANWADI

..... Respondent

Through: Mr. S.K. Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

ORDER

01.05.2018

%

1. On the judgment dated 27.04.2017 rendered by learned ASJ Sh. Sunil Chaudhary in Case No. 1257/2016 titled *State v. Vinay @ Chotu Panwadi* arising out of FIR No.131/2013 registered at PS – Pul Prahladpur, being brought to our notice and upon examination of the same and on prima facie finding that the said judgment appears to suffer from manifest errors of law and demonstrates glaring illegalities resulting in miscarriage of justice, we suo moto directed registration of the present Criminal Revision Petition under Section 397/401 Cr.PC and issued notice to the respondent accused.

2. We have heard Mr. Katyal, the learned APP as well as learned counsel for the respondent and perused the impugned judgment as well as the evidence recorded in the case.

3. The learned ASJ has, firstly, held that the prosecution had failed to establish that the prosecutrix was below 18 years of age. The case of the prosecution was that the prosecutrix was 13 years of age at the time when the incident took place, i.e., on the night of 21–22, April, 2013.

4. The brief facts of the case, taken note of in the impugned judgment itself, read as follows:

“The facts of the case as per final report are that on 22.04.2013 on receiving DD No. 22A SI Shailender Kumar reached at the spot near water tank, Railway Colony, Tuglakabad where he found the complainant present who made her statement that she with her children comprising two sons and two daughters was sleeping in her Jhuggi in the night and her daughter aged 13 years (name withheld as per law and is referred as victim hereinafter) was sleeping on the cot and her husband was sleeping outside and at about 11.45 PM the victim raised noise, she saw that Chotu Panwadi, who used to put his stall of beetle, was in the Jhuggi and had caught hand of the victim. He ran away upon her awaking. She was told by the victim that he was rubbing hand on her cheeks and breast. She stated that now he is threatening them why they have reported to the police. On the statement of the complainant case was registered and investigation was started and the statement of victim was got recorded u/s 164 CrPC and her age record was collected from school. The accused was arrested and upon completion of the investigation charge sheet was filed against the accused for the offences punishable under section 451/354A/506 IPC and section 8 POCSO Act in the court being Special Designated Court to try the case under Protection of Children from Sexual Offences Act, 2012.”

5. To establish that the age of the prosecutrix was around 13 years, the prosecution led in evidence PW4 Ms. Pushpa Rani, Principal, S.D.M.C. School, Railway Colony, Tuglakabad-I, New Delhi, who produced the file

containing the application form regarding the admission of the prosecutrix in the said school coupled with the affidavit given by her father showing her date of birth. As per the said record, the prosecutrix was admitted to the said school in class I on 04.07.2007 vide Serial No. 7378. The prosecutrix passed out from the school in class V on 22.03.2013. As per the school record, the date of birth of the prosecutrix was 01.07.2002. The copy of the application form was exhibited as Ex. PW4/A; copy of the affidavit was brought on record as Ex. PW4/B; and the copy of the admission register containing the relevant entry was produced on record as Ex. PW4/C.

6. In the cross-examination of PW4, it was not suggested on behalf of the defence that the prosecutrix was more than 18 years of age on the date of the offence. It was not even suggested that the entry had wrongly been made, or that the father of the prosecutrix had wrongly given the date of birth on the application form, or in the affidavit.

7. Pertinently, the statement of the prosecutrix was recorded under Section 161 Cr.P.C. on 23.04.2013, wherein her age was recorded as 13 years. Even when her statement was recorded on 04.07.2013 under Section 164 Cr PC vide Ex.PW1/A, the learned Magistrate recorded her age as 13 years. Even before the Court, the learned ASJ recorded the age of the prosecutrix as 14 years as on 01.03.2014 and that she was studying in class VI. Neither the prosecutrix, nor her parents PW2 or PW3 were challenged on the aspect of the age of the prosecutrix as on the date of the incident being more than 18 years of age. Even in the statement made by the accused under Section 313 Cr.P.C., the statement recorded by PW4 and the documents led in evidence by him to establish the date of birth of the

prosecutrix were put to him which showed that the date of birth of the prosecutrix was 01.07.2002. His only response was “I do not know”. He did not set up a plea that the prosecutrix was more than 18 years of age.

8. The approach of the learned ASJ in discarding the evidence produced by the prosecution and returning a finding that the prosecution had not established that the prosecutrix was below 18 years of age, borders on perversity. In paragraph 6 of the judgment passed by the learned ASJ, he observes as follows;

“6. As per Section 2(d) of Protection of Children from Sexual Offences Act, 2012 ‘child’ means any person below the age of eighteen years. As such to bring home the guilt of accused for offence under the Act the age of victim on the date of occurrence below 18 years is required to be proved by the prosecution. In the present case the prosecution to prove her age has called her school record which is produced by PW4. As per record produced by the witness, the victim was admitted in 1st class on 04.07.2007 as per entry in the admission register at serial no. 7378 and her date of birth is recorded as 01.07.2002. The witness stated that the admission was given on the strength of the affidavit given by father of victim and that parents had not given any date of birth certificate issued from any government authority. None from the parents examined by the prosecution has given the date of birth of the victim nor has produced any birth certificate issued by any authority empowered to issue birth certificate under the law in the trial. Thus, in the facts the age of the victim below 18 years is not proved as per law. Reliance may be placed in this regard on the case of Satpal Singh v. State of Haryana (2010) 8 Supreme Court Cases 714.”

9. The learned ASJ has carried the dictum that the accused is presumed to be innocent unless proven guilty too far. The said presumption cannot be

stretched to such an extent that the age of the victim/ prosecutrix would also be presumed to be above 18 years in every case in which the Judge is of the view that the prosecution has not conclusively established, the age to be below 18 years.

10. We had recently occasion to deal with the approach of the same learned ASJ in another case being CrI.A. No. 1184/2017 titled *State vs. Dharmender* decided on 23.03.2018. In our view, in the matter of appreciation of evidence, as well as in the matter of his approach displayed by the learned ASJ, in dealing with the aspect of age of the prosecutrix, he has fallen in grave error, leading to miscarriage of justice.

11. Even on the aspect of appreciation of evidence in support of the charge led by the prosecution, we are of the view that the approach appears to be rather mechanical, with no proper application of mind. While holding that there are contradictions in the testimonies of prosecutrix PW1 and her parents PW2 and PW3, the learned ASJ has failed to point out as to what are the contradictions which, according to him, render the case of the prosecution doubtful. The only contradiction/ exaggeration which emerges from the record is with regard to the statement made by PW3, the mother, who apart from supporting the charge, also appears to have taken the opportunity of labelling the charge of theft on the accused– by claiming that cash of Rs.17,500/- and one mobile phone were also found missing. Admittedly, this was not the case of the prosecutrix, or the complainant at the initial stage. The learned ASJ should have considered whether the entire testimony of PW3 deserved to be rejected, when the prosecution and her father PW2 were consistent in their testimonies.

12. In view of the aforesaid, we set aside the impugned judgment and remand the case back to the Trial Court for a fresh decision on merits after due application of mind and appreciation of evidence. The respondent accused shall surrender before the Trial Court on 16.05.2018.

13. The petition stands disposed of in the aforesaid terms.

VIPIN SANGHI, J

P.S.TEJI, J

MAY 01, 2018

B.S. Rohella