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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 25th October, 2018

+ CRL. M.C. 4181/2016

LK (PROSECUTRIX)

..... Petitioner

Through: Mr. Siddharth Aggarwal, Mr.
A.S. Pujari, Mr. Zeeshan
Diwan, Ms. Rupali Samuel &
Ms. Surabhi Dhar, Advs.

versus

STATE OF DELHI NCT & ANR.

..... Respondents

Through: Mr. K.S. Ahuja, APP for the
State with SI RN Ashang
Somatai, PS Patel Nagar.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. The petitioner is the complainant (prosecutrix) in the criminal case arising out of first information report (FIR) no. 145/2015 which was registered by police station Patel Nagar on 15.02.2015, whereby investigation was taken up into offences allegedly committed under Section 376 of Indian Penal Code, 1860 (IPC), Section 6 of Protection of Children from Sexual Offences Act, 2012 (POSCO Act) and Sections 23 and 26 of Juvenile Justice Act, 2000. In the said FIR she had indicated her age to be 17 years and she accused the second respondent of having subjected her to forcible sexual intercourse constituting the offence under Section 376 IPC and Section 6 of POCSO Act five-six months prior to the report to the police, such

conduct having continued thereafter, she having been rendered pregnant with a child, her pregnancy at the time of medical examination carried out on 19.03.2015 found to be more than 12 weeks' old. The investigation having been completed, report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C) was submitted on 19.05.2015 seeking trial of the second respondent for the aforesaid offences, this in addition to offences punishable under Sections 3 and 4 of the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986. The Special Court constituted under the POCSO Act took cognizance and issued summons to the second accused who had been earlier released on bail by default, by order dated 19.05.2015, the charge-sheet having not been submitted within the statutory period of 90 days in terms of Section 167 (2) Cr.P.C.

2. During the course of proceedings, after the presence of the second respondent had been secured and before the question of charge could be considered, the presiding officer of the Special Court decided to hold an inquiry into the age of the prosecutrix and for such purposes summoned three medical officers viz. Dr. Mukta Rani, Dr. Pooja Abbey, Dr. Rakesh Sharma who had been involved in the medical examination and examined them as CW-1, CW-2 and CW-3 respectively on 21.12.2015. Reference was made to the age estimation report dated 24.03.2015 issued by board of doctors of the Department of Forensic Medicine & Toxicology, Lady Hardinge Medical College & Smt. S.K. Hospital, New Delhi, wherein it had been opined that having regard to the physical, dental and radiological

finding, the age of the prosecutrix possibly was more than eighteen and less than twenty years.

3. After having examined the above-mentioned three medical officers CW-1, CW-2 and CW-3, the Special Judge, by his order dated 10.02.2016 held that the prosecutrix was “major on the dates of the alleged occurrences”. Having returned such a finding, the file of the criminal case was made over to the District & Sessions Judge (West) for it to be assigned “to the appropriate forum for trial”.

4. Feeling aggrieved by the finding and directions to such effect, by order dated 10.02.2016, the present petition has been filed by the prosecutrix invoking the inherent power and jurisdiction of this Court under Section 482 Cr.P.C., her prime grievance being that the Special Court under the POCSO Act, has adopted a procedure unknown to law, findings adverse to her interest having been returned without she even being heard or examined. The respondent/State joins the petitioner in seeking to assail the afore-mentioned order of the Special Judge.

5. The second respondent was served with a notice for 12.01.2018. He did not appear on the said date and a fresh notice was issued to be served through the concerned SHO for 21.03.2018. He eventually appeared on the said date with a counsel engaged by him. He was given an opportunity to submit his reply within two weeks. No reply has been filed by the second respondent till date. There is no appearance on his behalf on the matter being called out.

6. Having heard the submissions of the petitioner and the learned additional public prosecutor for the State and having gone through the record, this Court finds merit in the challenge to the order dated 10.02.2016. The subject of determination of age is generally governed by Section 7A of Juvenile Justice (Care and Protection) of Children Act, 2000 which was in force during the relevant period. This provision is to be read alongside Rule 12 of the Juvenile Justice (Care and Protection) of Children) Rules, 2007 which, to the extent relevant, reads thus:-

“12. Procedure to be followed in determination of Age.—

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

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7. Though, as pointed out by the learned additional public prosecutor, a statement has also been made (under Section 164 Cr.P.C) by the prosecutrix that she had been enrolled in school, she having studied upto the level of 3rd standard, no school record could be traced since she is not aware of the particulars of the educational institution. The prosecutrix is a resident of West Bengal and appears to be coming from a poor strata of society. As per her version, her mother had died before she came to Delhi she having been engaged as a child labour. There is no clarity whether or not her father is alive or traceable. Be that as it may, in absence of any school record, the investigating agency and the prosecution would rely, *inter alia*, on the

medical opinion as to her age. The prosecutrix has been consistent since the beginning from the time of lodging of the FIR, that her age as on 15.02.2015 (the date of registration of the FIR) was 17 years. Noticeably, she alleged that she had been subjected to sexual intercourse by the second respondent from five-six months prior to the report to the police. She would also allege that she was subjected to such sexual intercourse repeatedly thereafter on several occasions. Since she was found pregnant with a child, the age of the foetus having been assessed to be more than 12 weeks, it has to be assumed that such physical relationship would have been subsisting at least three months prior to the date of lodging of the FIR.

8. The crucial question in these facts and circumstances is as to whether it can be said with certainty at this stage of the process if she was major on the date she was subjected to sexual intercourse. The prosecutrix, in her statement under Section 164 Cr.P.C. recorded on 16.02.2015 had reiterated her age to be 17 years. The radiological opinion undoubtedly was that as on 19.03.2015 (the date of *x-ray* examination) she was more than 18 years' old and less than 20 years. But then, it has to be borne in mind that such material only constituted "opinion", which, as per the caution administered by Rule 12 (3) (b) of Juvenile Justice (Care and Protection of Children), Rules, 2007 has to be construed with the benefit of margin of one year.

9. The investigating agency had concluded that the prosecutrix was a child on the date on which the offences were committed. This is why, it invoked, *inter alia*, the penal clause of Section 6 of POCSO

Act to seek prosecution of the second respondent. This report was acted upon by the Special Judge by cognizance being taken and process being issued to secure the presence of the second respondent for he to be put on trial as accused. This implies that the Special Court was satisfied, *prima facie*, that the prosecutrix was a child on the relevant date.

10. The question as to whether the prosecutrix was a child or not would be one of the questions that would fall for final determination during the trial. The evidence on the basis of which clear conclusions on this subject could be reached would include the testimony or version of the prosecutrix i.e. the petitioner. In the inquiry held ahead of the trial – the question of charge not having been considered – the material gathered does not include the deposition of the prosecutrix. The approach of the Special Judge has in fact, condemned the version of the prosecutrix without she being heard.

11. On the foregoing facts and in the circumstances, the impugned order cannot be upheld. It is set aside. The question as to whether the prosecutrix (the petitioner) was a child or an adult on the relevant date(s) is kept open for it to be determined and findings returned at the appropriate stage of the process.

12. As a consequence of the impugned order dated 08.10.2015 (and orders dated 10.02.2016 & 27.04.2016 emanating therefrom) being set aside, the case will have to go back to the Special Court under the POCSO Act. Ordered accordingly.

13. The criminal court where the case is presently pending shall make it over to the concerned Sessions Judge who, in turn, shall pass it over for further proceedings in accordance with law to the Special Court having appropriate jurisdiction. Any proceedings taken out in the wake of the impugned orders which have been set aside will be treated as *non-est*.

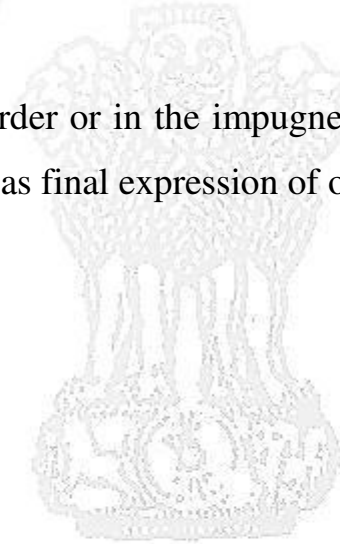
14. Needless to add, further proceedings before the Special Court under POCSO Act shall begin from the stage of consideration of the charge.

15. Nothing in this order or in the impugned order which has been set aside will be treated as final expression of opinion on the merits.

R.K.GAUBA, J.

OCTOBER 25, 2018

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