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

+ **CRL.REV.P. 5/2018**

COURT ON ITS OWN MOTION

..... Petitioner

Through Mr. Rajat Katyal, APP

versus

ARIF

..... Respondent

Through Mr. Azhar Qayum, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

ORDER

% **28.05.2018**

Upon judgment dated 23rd December, 2016 passed in SC No.25/2015 arising out of FIR 803/2014 registered at police station Amar Colony under sections 341/323/354/509 IPC and section 7 & 8 of POCSO Act, rendered by the learned ASJ-01, South East Saket Courts, New Delhi being brought to our notice, we *suo moto* took cognizance of the matter under section 396/401 Cr.P.C. as the said judgment prima facie appeared to suffer from manifest error of law and the same demonstrated glaring illegalities which appeared to have resulted in miscarriage of justice. Consequently, we issued notice to the respondent.

We have heard Mr. Rajat Katyal, learned APP as well as learned counsel for the respondent.

The brief facts of the case, taken note of in the judgment dated 23.12.2016 read as follows:

“1. The facts of the case are that an information qua quarrel was received by the police on 22.09.2014 at 22.13 hrs which was written in register at serial no. 34 PP and HC Mahender went to the place of quarrel and he found complainant (name is withheld as per law and is referred to as victim hereinafter) aged about 16 years 4 months who got recorded her statement and she at about 9.45 PM went to throw garbage from her house and when she was returning one boy named Arif gave elbow blow on her breast deliberately upon which she asked can't he see and that due to this reason he started abusing her in filthy language and slapped her by holding hair. She stated that in the meantime her father reached there then he manhandled and abused him also. Her father sent her to home. On the statement of the complainant case was

registered and was investigated, accused was arrested, complainant refused for her medical examination and upon completion of the investigation charge sheet was filed for the offences punishable u/s 341/323/354/509 IPC and section 7 and 8 of POCSO Act in the Special Designated Court.”

Firstly, we notice that in the impugned judgment, the trial court has observed in paragraph 7 that in order to prove the guilt of the accused for the offence of sexual assault, it was imperative to prove the age of the prosecutrix to be below 18 years of age on the date of the offence. We find this observation itself to be completely wrong, and the same demonstrates lack of understanding on the part of the learned ASJ of the fundamental provision of law. Pertinently the charge framed against the respondent/ accused was separately framed under section 354 IPC. The relevant part of the charge reads as under:

“Secondly, on the aforesaid date, time and place, you assaulted or used criminal force to the prosecutrix Ms. ‘P’ (name withheld as per law), a minor girl aged about 16 years 4 months by shoving your elbow on her breasts, by

abusing her, by slapping her by catching hold of her hairs intending to outrage or knowing it to be likely that you will thereby outrage her modesty and you thereby committed an offence punishable under section 354 the of IPC, 1860 and within my cognizance.”

The issue with regard to the age of the prosecutrix on the date of offence had no bearing on the said charge under Section 354 IPC. The same could only have a bearing on the charge under Section 8 of the POCSO Act. The same was framed as a separate charge and same reads as follows:

“That on 22.09.2014 at about 9:45 PM at main road near S-53/37, Gandhi Camp, S. N. Puri, New Delhi within the area of PS Amar Colony, you committed sexual assault with the prosecutrix Ms. ‘P’ (name withheld as per law), a minor girl aged about 16 years 4 months by shoving your elbow on her breasts, by abusing her, by slapping her by catching hold of her hairs and you thereby committed an offence punishable u/s 8 of Protection of Children from Sexual Offences Act, 2012 and within my cognizance.”

On the aspect of age of the prosecutrix, she had given her age as 16 years at the time of recording of her statement under section 164 Cr.P.C. i.e. Ex. PW1/B which was recorded on 24th September, 2014. The alleged incident is of 22nd September, 2014. She was a 10th class fail student.

The statement of the prosecutrix was recorded before the court on 18th May, 2016. The prosecutrix had given her date of birth as 4th April, 1998 and she stated that she had passed 9th class. She also stated that she had not failed in any class till she completed her 9th class. She was cross examined by the accused. She denied the suggestion that she was above 18 years of age on the date of incident. The father of the prosecutrix was examined as PW-2. Even he denied the suggestion that the prosecutrix was 18 years of age on the date of incident.

Mr. Katyal points out that the School Leaving Certificate of the prosecutrix was filed by the prosecution. The same is available on the record and the same has been marked as PW-5/A. The same is evident from the testimony of PW-5, the Investigating Officer. However, no witness was produced from the school to prove the said document in accordance with law.

In *State of NCT of Delhi Vs. Dharmender*, CrI. Appeal 1184/2017 decided on 23rd March, 2018, this Court had occasioned to consider the manner in which the age of victim/ prosecutrix in such like cases should be determined, and the approach that the court was obliged to adopt. We find that the trial court has not undertaken the requisite exercise in the present case. Thus, the finding that the prosecution has failed to establish that the prosecutrix was below 18 years of age on the date of the incident cannot be sustained, and the same is set aside.

As noticed herein above, in any event, if the offence is perpetrated, it does not get obliterated merely because the prosecutrix may have been above 18 years of age.

Turning to the aspect of reliability of the testimonies of the prosecution witnesses, particularly, PW-1, the prosecutrix, we once again find that the approach of the trial court has been most casual. The Trial Court has failed to undertake a proper analysis of the evidence brought on record, and in the most cursory and casual manner the testimony of the prosecutrix has been discarded and disbelieved on the premise that there are contradictions to be found in the same.

We have perused the three statements of the prosecutrix: (i) Recorded under Section 161 Cr.P.C. Ex.PW1/A, (ii) Recorded under Section 164 Cr.P.C. Ex.PW1/B and (iii) testimony recorded before the Court. In the absence of any specific aspect being highlighted, we cannot agree with the conclusion drawn by the trial court that there is any material contradiction in the testimony of the prosecutrix.

Accordingly, we set aside the finding returned by the Trial Court on the said aspect as well.

It is well settled that the statement of the prosecutrix, if found credible, is sufficient to convict the accused in such like cases, since the prosecutrix would not put her name and reputation at stake by falsely implicating the accused, unless clear motive is disclosed in defence.

In the present case, though the accused claimed that there was business rivalry between the family of the prosecutrix and his own family, the said defence is not probablised upon the cross-examination of either PW-1 or PW-2, and no defence evidence was led by the accused on the said aspect.

In these circumstances, in our view, the impugned judgment cannot be sustained and the same is a result of mis-appreciation of

evidence and wrong application of the law, which has resulted in miscarriage of justice.

The impugned judgment is, therefore, set aside. The matter is remanded back to the trial court for re-consideration thereof.

The respondent shall surrender before the trial court on 3rd July, 2018.

VIPIN SANGHI, J

P.S.TEJI, J

MAY 28, 2018

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