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

+ CRL.REV.P. 7/2018

COURT ON ITS IOWN MOTION

..... Petitioner

Through: Mr. Rajat Katyal, APP with S.I.
Kamal Kumar, PS OIA

versus

PREM KUMAR

..... Respondent

Through: Mr. Harsh Prabhakar, amicus curiae
with Mr. Anirudh Tanwar, Advocates

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

ORDER

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26.04.2018

On the judgment dated 22.08.2016 passed by the learned ASJ Sh Sunil Chaudhary in Case No.2438/2016 arising out of FIR 462/2012 registered at PS Okhla Industrial Area under Section 363/ 366 IPC read with Section 4 of POCSO Act- wherein the respondent Prem Kumar was named as accused being brought to our notice, we *suo motu* took cognisance of the matter as the said judgment, *prima facie*, appeared to suffer from manifest error of law and demonstrated glaring illegalities resulting in miscarriage of justice. Accordingly, the present criminal revision petition was registered and the respondent was noticed.

We have heard Mr. Katyal, the learned APP as well as Mr. Prabhakar, learned counsel for the respondent from the legal aid. The brief facts of the case taken note of in the impugned judgment read as follows:

“1. Brief facts of the prosecution case as per final report are that on 07.12.2012 complainant Smt. Chanpati came to the police station and gave her complaint that her daughter ‘S’ aged about 16 ½ years, went to Sanjay Colony, Pahari to attend natural call at about 12.30 pm on 03.12.2012 but she has not returned. She raised suspicion on one boy namely Prem who resided in her neighbourhood. She complained that he used to meet her daughter and used to give his phone to her daughter for making calls and he has enticed daughter as he also was not at his home since that day. On her complaint, case under Section 363 IPC was registered and search was made of accused and victim girl. On 01.01.2013 complainant informed the police that she has received a phone call that Prem Kumar is residing with the girl at Mirzapur. On 16.01.2013 police went to village Mirzapur PS Shambhu Distt. Baka Bihar where the girl was recovered and the accused Prem Kumar was arrested. Statement of the girl was recorded and she stated that she has married with the accused and was residing with him at this home. The investigation officer collected the school certificate of the girl and her age was found 16 years so Section 366 IPC & 4 of POCSO Act was added in the case. Thereafter, upon completion of the investigation charge sheet was filed against the accused in the court”.

In support of its case that the prosecutrix was a minor, the prosecution led in evidence PW-4 Ruksana Parveen, the Vice-Principal of the Govt. Girls Senior Secondary School, Harkesh Nagar, New Delhi, who produced the original admission register pertaining to the admission of the prosecutrix as per which she was admitted in 6th class on 01.04.2008 vide Sl. No.1074 and her date of birth recorded as 10.05.1996. She exhibited the relevant

extract from the admission register containing the entry relating to the prosecutrix as Ex. PW-4/8.

Pertinently, right from the beginning, the case of the prosecution was that the prosecutrix was a minor. She was a student of 9th class at the time of the commission of the incident. We may refer, firstly, to the allegation contained in the FIR dated 03.12.2012 bearing No.462 wherein the age of the prosecutrix was described as about 16 ½ years. The statement of the prosecutrix was recorded under Section 164 Cr P where, of course, she described herself as being of 18 ½ years of age. The charge was framed against the accused describing the age of the prosecutrix as 16 ½ years. When the statement of the prosecutrix was recorded before the court, her age was noted as 17 years. There was no cross examination by the accused on any aspect including that of her age. From the testimony of the prosecutrix, it appears that she voluntarily eloped with the accused and claimed that she had got married to him – though there was no evidence of the said marriage led before the court by either the prosecution or by the defence.

The approach of the learned ASJ in the present case as well as in several other cases that we have come across has been to assume that the victim/ prosecutrix is over the age of 18 years, unless it is proven on record that the age is below 18 years. Even in respect of documentary evidence led into establish the date of birth of the victim/prosecutrix, the approach of the learned ASJ has been that unless the school certificate in respect of the first school in which the victim/ prosecutrix was admitted is produced, the same is not reliable.

Additionally, it is pointed out by Mr. Katyal that in the present case, as per the case of the prosecution, the Govt. Girls Senior Secondary School,

Harkesh Nagar was the first school attended by the prosecutrix, since prior to that she had been studying in the village and, therefore, the date of birth recorded in the records of the said school were admissible in evidence and was reliable evidence.

We may observe that the approach of the learned ASJ appears to be completely misdirected and grossly erroneous. No doubt, there is a presumption of innocence of the accused, unless proved guilty. That presumption, however, cannot lead to another presumption with regard to the age of the victim/ prosecutrix- that unless the same is proven on record to be below 18 years, the same would be assumed to be above 18 years. It was the obligation of the learned ASJ to arrive at a finding of fact in that regard and not merely proceed on presumptions or assumptions. There cannot be a “defunct” finding of fact with regard to the age of the victim/prosecutrix. We had occasion to consider the said aspect in a recent judgment arising from a judgment rendered by the learned ASJ in the case of *State of NCT of Delhi v. Dharmender*, CrI A No.1114/2017 decided on 23.03.2018.

In view thereof, we cannot sustain the findings returned by the Trial Court, since the same appear to suffer from glaring illegalities and manifest error of law, which appear to have resulted in miscarriage of justice. The judgment rendered by the learned ASJ above referred to is, accordingly, set aside. The matter is remanded back to the Special Judge, POCSO Act for reconsideration of the matter.

Mr. Prabhakar has submitted that, evidently, the accused was not guided properly by his counsel and, therefore, there was no cross examination of the prosecutrix undertaken. He submits that the accused

may be permitted to recall the prosecutrix for her cross examination. We would not like to make any comment on this aspect. It shall be for the Trial Court to consider the said aspect. The rights of the parties are preserved in this respect. The petition stands disposed of on the above terms.

The respondent shall surrender before the Trial Court on 15.05.2018.

VIPIN SANGHI, J

P.S.TEJI, J

APRIL 26, 2018

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