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

+ CRL.REV.P. 6/2018

COURT ON ITS OWN MOTION

..... Petitioner

Through: Mr. Rajat Katyal, Additional Public
Prosecutor with SI Moolchand, PS –
OIA

versus

ANUJ KUMAR

..... Respondent

Through: Mr. Sumit Choudhary, Advocate
(DHCLSC)

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

ORDER

22.05.2018

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Upon the judgment dated 30.07.2016 rendered by the learned Additional Sessions Judge – 01, South-East District, Saket Courts, New Delhi in Sessions Case No. 12/14 arising of FIR No. 678/13 registered at Police Station Okhla under Section 376 IPC and Section 4 of POCSO Act, whereby the respondent/accused has been acquitted of the said offence, being brought to our notice, we *suo moto* took cognizance of the matter since on our *prima facie* examination, we found the judgment to suffer from manifest error of law demonstrating glaring illegality resulting in

miscarriage of justice. Accordingly, we invoked our jurisdiction under Sections 397/401 Cr.P.C. and issued notice to the respondent/accused.

We have heard Mr. Katyal, learned APP for State as well as learned counsel for the respondent. The brief facts taken note of in the judgment are as follows: -

“1. Brief facts of the prosecution case are that on 14.12.2013 complainant Sunita Das came to PS Okhla and made a statement that her daughter ‘N’aged 14-15 years (original name is withheld a per law and she is being referred as prosecutrix hereinafter) went for toilet at around 5 AM and did not return. She searched for her but she could not be found. She made suspicion that some unknown person has taken her daughter by alluring her. Case was registered and the investigation was initiated by ASI Prempal. During investigation prosecutrix was recovered on 15.12.2013 from village Dastampur, District Gautam Budh Nagar, UP by ASI Jagat Singh and she was medically examined at AIIMS Hospital. Statement of prosecutrix under section 164 Cr.P.C was got recorded. On 22.12.2013 accused Anuj was arrested

and upon completion of investigation, charge sheet for the offences punishable under Section 376 IPC & 4 POCSO Act against the accused was filed in the concerned court.”

The statement of the prosecutrix was recorded under section 161 Cr.P.C. by the IO SI Kusum Kumar Dangi. Thereafter, she was sent for medical examination. Before the Doctor who conducted the medical examination, the prosecutrix gave the history that she went with a person named Anuj yesterday with her consent and he (sic) promised to marry her and had sexual intercourse with her consent once. She gave no history of assault or intoxication. She stated that she has come back today (the MLC was held on 15.12.2013). The incident took place yesterday and she has not changed her clothes or taken bath. She stated that the incident involved partial penetration of penis in vagina. On medical examination, no injury was noticed. The hymen was found intact. The doctor collected three samples of the vaginal smear and sealed the same, which were handed over to the police with one sealed undergarment. The FSL report Ex.PW10/A concluded that the DNA profiles on the source of exhibits ‘A-1’, ‘A-2’ and ‘A-3’ i.e. the vaginal smear slides of the prosecutrix, Ex.B i.e. the underwear

of the prosecutrix and Ex.C i.e the blood gauge of the accused were sufficient to conclude that the DNA profile generated from the source of Ex.C is similar to the DNA profile generated from the source of Ex. 'A-1', 'A-2' and 'A-3' and Ex.B.

The trial court, however, acquitted the accused on the premise that, *firstly*, it was not established on record that the age of the prosecutrix was below 18 years; *secondly*, that the prosecutrix made different statements at different points of time i.e. she claimed consensual sexual intercourse before the doctor as recorded in her MLC; in her testimony before the Court, she claimed partial penetration, whereas; in her statement recorded under Section 164 Cr.P.C., she did not claim any intercourse with the accused; *thirdly*, the learned Additional Sessions Judge held that the IO had not stated that the *Pulandas* were not tampered with till the time that they remained in her custody, and the prosecution did not examine the doctor who took the sample while conducting the examination of the sexual intercourse. The trial court held that there was absence of link evidence that the samples were intact. Consequently, the trial court ignored the expert evidence brought on record, as per which, the DNA profile from the source of blood gauge of the accused was found to match with the DNA profile generated from the

vaginal smear and underwear of the prosecutrix. He also observed that the prosecutrix had not deposed that there was ejaculation of semen in her vagina, or that there were semen marks on her underwear.

On the aspect of the age of the prosecutrix, the prosecution had relied upon, firstly, the statement of the prosecutrix recorded under Section 164 Cr.P.C. where she had disclosed that she was in class 10 and was 14 years 11 months old when her statement was being recorded. The prosecution had also examined PW-5, the Vice Principal of GDSS School, Teh Khand, New Delhi. She produced the school record in which the date of birth of the prosecutrix was recorded as 08.01.1999. As per the said school record, she had taken admission in the school in class 6th on 02.04.2009 and her date of birth was recorded on the basis of school leaving certificate received from her previous school. The learned Additional Sessions Judge relied on the decision in *Mahadeo v. State of Maharashtra and Anr.*, (2013) 14 SCC 637, where the Supreme Court has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 is attracted for the purpose of determining the age of the victim. The reasoning adopted by the learned Additional Sessions Judge for rejecting the evidence led by PW-5 is found in Para 10 of the impugned judgment, which reads as follow:

“10. The witness who has been examined is not the author of the school leaving certificate so it cannot be said that the school record is duly established or duly proved by the prosecution as per law further the school whose record is produced is not the school which was attended first by the prosecutrix. The father of the prosecutrix, who is examined as PW6, deposed that he had handed over the birth certificate of his daughter to the police which was issued by MCD office from Jal Vihar. But no such certificate has been filed in the court. Thus the evidence produced by the prosecution is not sufficient to prove the age of the prosecutrix and to establish that she was below the age of 18 years on 14.12.2013.

Mr. Katyal has pointed out that on the aspect of the age of the prosecutrix, there is no cross-examination of PW-1, the mother of the prosecutrix who stated that her daughter was 15 years of age on the date of the incident. Even the prosecutrix was not cross-examined by the accused on this aspect. The father of the prosecutrix was, however, cross-examined and in his cross-examination, he had stated that his daughter was born on 08.01.1999 and that he has handed over the birth certificate of his daughter

to the police. The said certificate had been issued by the MCD office, Jal Vihar. He did not know if any record was produced before the registration of date of birth in the office. He denied the suggestion that he had wrongly stated the date of birth of his daughter as 08.01.1999 or that she was a major on the date of the incident.

Recently, we had occasion to deal with another decision rendered by the same learned Additional Sessions Judge, wherein the learned Additional Sessions Judge held that the prosecution has failed to establish the age of the victim to be below 18 years, whereas the victim was 12 years of age. We set aside the said finding returned by the trial court and did not approve of the approach adopted by the trial court in the matter of determination of the age of the victim/prosecutrix in such like cases. For the reasons recorded in the *State of NCT of Delhi versus Dharmender* in CrI.A. 1184/17 decided on 23.03.2018, the finding returned by the trial court on the aspect of the age of the prosecutrix cannot be sustained and, accordingly, the same is set aside. The said aspect needs reconsideration in the light of our judgment in *Dharmender* (Supra).

So far as the inconsistency in the statement of the prosecutrix as pointed out by the trial court is concerned, we find that the prosecutrix had

initially made her statement during the recording of her statement under Section 161 Cr.P.C. However, the same has not been exhibited and therefore, we are not referring to the same. She had, thereafter, disclosed the incident before the doctor who medically examined her and that is recorded in the MLC Ex.PW2/B. Before the doctor, she had disclosed consensual intercourse with the accused.

No doubt, while recording the statement under Section 164, the prosecutrix had not stated that the accused had consensual intercourse with her. However, she stated that she and the accused Anuj had gone to the house of the Mausi of Anuj where they stayed in the room situated on the terrace in the night. Anuj had asked the prosecutrix to have sex with him, she stated that she had refused the same to Anuj, whereafter, he did not have sex with her and slept quietly. However, before the Court she had deposed that the accused did penetrate her, however, when she complained of pain, he withdrew. The approach of the trial court, and the manner in which he has dealt with and appreciated the testimony of the prosecutrix borders on perversity. The trial court has observed that the prosecutrix has not explained the discrepancy in her statement. It appears to us that the approach of the trial court is devoid of any sensitivity and understanding of human

behaviour and conduct. It is very cut and dry. The trial court has failed to appreciate that for a young girl, in such like situations, it is very difficult to narrate such intimate and personal experiences. She may not have gathered the courage to make the full and complete disclosure before the learned Magistrate who recorded her statement under Section 164 Cr.P.C. Of the two statements made by the prosecutrix contemporaneously, i.e. the one under Section 164 Cr.P.C. and the one made by her before the Court, the second statement made before the Court is corroborated by the medical evidence. Moreover, the statement under Section 164 Cr.P.C. was made soon after the incident, when the shame and embarrassment experienced by the prosecutrix would have been much greater when compared to the statement made by her before the Court on Oath.

The third aspect considered by the trial court while acquitting the accused is with regard to the maintenance of the sanctity of the samples drawn both from the prosecutrix and the accused. In this regard also, we find the approach of the trial court to be completely erroneous. As noticed above, the MLC of the prosecutrix Ex.PW2/B itself notes that three vaginal smears were prepared and the undergarments of the prosecutrix were sealed into a *Pulanda* with a seal of the hospital and delivered to the IO vide Ex.PW4/A.

PW-11, Dr. Yamini Kansal, Senior Resident, Department of Obstetrics and Gynaecologist, AIIMS Hospital deposed that Dr. S. Murli, whose handwriting and signatures she could identify, had dealt with the present case. She had left the services of the hospital without information about her whereabouts. She had deposed that during the course of the medical examination, Dr. Murli collected vaginal smears of the patient. She exhibited the MLC as Ex.PW2/B. PW-4 Constable Mamta had *inter alia* deposed that after medical examination of the prosecutrix, the doctor in the hospital handed over two seal *Pulandas* alongwith the sample seal, which she handed over to the IO who took possession of the same vide seizure memo Ex.PW4/A bearing his signatures at point A.

This statement is corroborated by PW-12, SI Kusum Dangi, the IO who *inter alia* stated that after medical examination of the prosecution, Constable Mamta came back to the police station and handed over two sealed *Pulandas* to her with one sample seal. She seized the same vide seizure memo Ex.PW4/A. Similarly, the medical examination of the accused was got conducted at AIIMS by PW-3, Doctor Asit Kumar Sikary. He *inter alia* stated that he collected blood in gauge, penile swab with control which

were preserved, sealed and handed over to the police alongwith the sample seal. The same were seized vide Ex.PW10/C. PW-10, ASI Prem Lal had deposed that he got conducted the medical examination of the accused and received three sealed parcels and MLC which were handed over to the IO. The same were seized vide seizure memo Ex.PW10/E. On 09.01.2018, sealed parcels of this case were got deposited with the FSL. He exhibited the copy of the RC and acknowledgement of FSL. Pertinently, the IO Kusum Dangi (PW-12) deposed that she seized the samples vide seizure memo Ex.PW10/E and all the sealed parcels were sent to FSL.

We may observe that none of these witnesses were cross-examined on the aforesaid aspects. The FSL report (Ex.PW10/A) itself, under the heading **“DESCRIPTION OF PARCELS & CONDITION OF SEALS”** mentions **“SEAL INTACT AS PER F.A.’s LETTER”**. In these circumstances, in our view, there was no occasion for the learned ASJ to raise a doubt that the samples had not been properly sealed, or had been tampered with. Merely, because PW-12 SI Kusum Dangi had not stated that the samples had not been tampered with while they were in her custody, we fail to appreciate as to how the trial court could have concluded that there was absence of link evidence that the samples remained intact. It was not

obligatory for the I.O. Kusum Dangi PW-12 to make a negative statement of her own, that she had not tampered with the samples. There is no presumption that the police officers would tamper with the samples/evidence in the case to falsely implicate the accused. On the contrary, there is a presumption that the police and other authorities perform their official duties legally and honestly.

In the aforesaid circumstances, we are of the considered view that the judgment rendered by the learned ASJ borders on perversity. The same has led to miscarriage of justice. We accordingly set aside the same. We remand the matter back to the Special Court for reconsideration of the matter in accordance with law.

As noticed hereinabove, on the aspect of age of the prosecutrix on the date of incident, only the father of the prosecutrix (PW-6) was cross-examined and he stated that he had provided the birth certificate issued by the municipal corporation to the police, which had not been produced. Therefore, we permit the prosecution and the defence to lead evidence on the said aspect, if they so chose.

There is yet another aspect that we consider important to deal with in the present case. We were surprised to find that the State had not chosen to

prefer a leave petition to assail the judgement in question. Consequently, we had directed that the complete record in the office of the public prosecutor with regard to the processing of the case (to consider whether a leave petition should be preferred), should be produced before the Court for its perusal. Mr. Katyal has produced before us the original record. The same shows that the learned APP, Mr. Sunil Dutt rendered his opinion on 27.04.2017 that the present is not a fit case to prefer a leave petition. The noting made by him shows that he has only parroted the reasons given by the trial court, and has not applied his mind as to whether the same are in accordance with law, or not. It does not contain any critical analysis of the judgement, on the basis of the arguments that he may have advanced in the Court. The exercise undertaken by the learned APP, Mr. Sunil Dutt in recording his note dated 27.04.2017 is completely casual and mechanical in its approach. The same did not add any value to the process of decision making, which should have been the case, considering his professional experience and knowledge. After the note put up by Mr. Sunil Dutt, APP, the Chief Prosecutor Mr. B.S. Kain summarily agreed with the same on 29.04.2017, once again, demonstrating the same casual and mechanical approach. The file was, thereafter, put up to Mr. Pankaj Sanghi, Director of

Prosecution, who agree with the aforesaid opinion vide his note dated 01.05.2017. Even the Principal Secretary, Law and Justice agreed with the said note on 08.05.2017. We may observe that the Principal Secretary, Law and Justice is a judicial officer and at the relevant point of time, we are informed, it was Mr. Raj Kumar Chauhan, who was occupying the said position. It is very unfortunate that even the judicial officer did not apply his mind to the issue whether the judgment in question deserves to be assailed by way of a leave petition before this Court.

The whole purpose of having a multi layered examination of the judgment rendered by the trial court- to examine whether the same should be assailed before the higher court, is to ensure that in deserving cases the leave petitions are preferred, so as to minimise miscarriage of justice. It is clear to us that in the present case there has been a systemic failure in the matter of scrutiny of the judgement rendered by learned ASJ to decide whether, or not, the same should be assailed before this Court.

Therefore, we direct that the copy of our judgement be communicated to the Chief Secretary, Government of NCT of Delhi as well as to Mr. Kailash Gahlot, Law Minister in the Government of NCT of Delhi for taking corrective steps to ensure that such like situations are not repeated in the

future.

Petition stands disposed of in the aforesaid terms. The original note-sheets is returned to Mr. Katyal. The same should, however, be preserved.

The matter is remanded back to the trial court for 4th July, 2018 on which date the accused shall also surrender before the trial court.

VIPIN SANGHI, J

P.S.TEJI, J

MAY 22, 2018/*PB*