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

+ CRL.REV.P. 3/2018

COURT ON ITS OWN MOTION

..... Petitioner

Through: Mr. Rajat Katyal, APP for the State.

versus

MOHD. NAEEM

..... Respondent

Through: Mr. Pankaj Srivastav, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

ORDER

24.04.2018

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1. We have heard Mr. Katyal, the learned APP as well as Mr. Srivastav, learned counsel for the respondent – Mohd. Naeem.

2. On the judgment dated 27.09.2016 passed in Case No.1184/2016, Sessions Case No.125/2014 arising out of FIR No.159/2014 registered at PS – Jaitpur under Sections 377/ 511 IPC and Section 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act/ the Act), wherein the respondent was made as the accused, being brought to our notice, we suo moto took cognizance of the said decision since we were of the prima facie view that the present is a fit case for interference by this Court in exercise of its jurisdiction under Sections 397/ 401 Cr.P.C. as the said judgment appeared to us to suffer from manifest error of law and demonstrated glaring illegalities resulting in miscarriage of justice. Accordingly, the respondent was issued notice and we have heard the learned counsel on his behalf.

3. The case of the prosecution – taken note of in the impugned judgment itself, reads as follows:

“1. The facts of the prosecution case are that an information of quarrel at H. No. A148, Jaitpur was received on 15.03.2014 at 21.58 Hrs which was reduced into writing as DD No. 51A. After one minute one more information was received that at A-148, Gali No. 5 Saurabh Vihar one boy is misbehaving and it was written as 52A. SI Munesh Lal was entrusted with both the information to inquire and he with Ct. Anand Pal reached at the spot where they came to know that one boy namely Naeem has been beaten up by the public and he has been taken to hospital by the police. They met one Mohd. Usman Ali there who told them that Naeem had tried to commit wrong act with his son. SI Munesh sent the victim boy and his father for medical examination to AIIMS Hospital through Ct. Anand Pal where victim boy was medically examined. The complainant got recorded his statement stating that he is residing as tenant and do private job and on 15.03.2014 he came from his duty at around 8 PM his wife told him that Naeem residing in their neighborhood has committed wrong act with their son. He inquired from his son who told him that Naeem on the pretext of playing the game took him to his house at around 1 PM and tried to insert his penis into his anus and when he started crying he left him. He shared this incidence with the neighbors, they gathered over there and started beating Naeem and he dialed on 100 number. On this statement case was registered under section 377/511 IPC and investigations were carried out. Upon completion of investigation, charge sheet for the offence punishable under Section 377/511 IPC r.w. section 8 of POCSO Act against the accused was filed.”

4. Firstly, we observe that the Trial Court has returned a finding that it is not proved that the child is below 12 years of age on the date of the incident. We may observe that the offence does not get obliterated merely because the child may, or may not, be below 12 years of age. The only effect of the

child being found to be below 12 years of age is that the offence gets aggravated to “Aggravated Penetrative Sexual Assault” as defined in Section 2(1)(a) read with Section 5 of the POCSO Act. Even if the child is above 12 years of age, the offence, if ingredients are fulfilled, would fall under Section 3(b) and (c) of the POCSO Act.

5. We may also observe that the yardstick adopted by the learned ASJ in the matter of determination of the age does not appear to be entirely correct. We had occasion to deal with another judgment rendered by the same learned ASJ, wherein, on the aspect of age of the victim/ prosecutrix, the learned ASJ had similarly dealt with the issue of the age of the victim. We had disapproved of the same in our decision rendered in CrI.Rev.P. No.1184/2017 titled *State of NCT of Delhi Vs. Dharmender* decided on 23.03.2018. Therefore, we are of the opinion that the impugned judgment on the said aspect cannot be sustained and the error appears to have led to miscarriage of justice.

6. On the aspect of reliability of the testimony of a child witness, the learned ASJ while passing the impugned judgment has, in our view, not considered the evidence on record with the care & attention that it deserves. While observing that the child witness is open to tutoring and his examination requires careful scrutiny, the learned ASJ, in our view, has not examined the evidence after conducting a careful scrutiny. Moreover, in paragraph 9.2, the learned ASJ has also relied upon the statement of the child recorded under Section 161 Cr.P.C., which could not have been done since the same does not constitute evidence in the case. On the said aspect as well, we may refer to our decision in *Dharmender* (supra). The

testimony of the child witness also does not appear to have been fully appreciated on the aspect of his being tutored.

7. We may also observe that the Trial Court has not taken into consideration the presumptions created by law under Sections 29 and 30 of the POCSO Act.

8. The Trial Court has also not considered whether, in the circumstances of the case, the lesser offence under Section 18, i.e. for attempt to commit the offence under the Act, was made out in this case. The facts of the case set out by the prosecution, prima-facie, also appear to make a case under Section 363 IPC. However, no charge was framed on that aspect. In our view, the aforesaid aspect needs to be considered by the learned Trial Court in the correct perspective.

9. Accordingly, we set aside the impugned judgment and remand the case back to the learned Special Judge, POCSO to re-try the case. The respondent shall surrender before the Trial Court on 09.05.2018.

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

VIPIN SANGHI, J

P.S.TEJI, J

APRIL 24, 2018

B.S. Rohella