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

Date of decision: 31.01.2020

+ CRL.M.C. 426/2020 and CRL.M.A. 1770/2020

SHIV SHANKAR MISHRA

..... Petitioner

Through: Mr. Dhruv Gupta, Mr. Vishal Sharma
and Mr. Harshil Gupta, Advs.

versus

STATE & ANR.

..... Respondents

Through: Mr. Hirein Sharma, APP for State
with SI Prateek Saxena, PS – Jaitpur,
Delhi
Mr. Jai Kishan Sharma, Manager, Bal
Vaishali Public School, Jaitpur, Delhi

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (O R A L)

1. Vide the present petition, petitioner seeks setting aside of order dated 21.01.2020 passed by learned Additional Sessions Judge (POCSO Act), South-East, Saket District Courts, New Delhi in Sessions Case No. 183/2019 arising out of FIR No. 675/2018 dated 04.11.2018 registered at Police Station – Jaitpur for the offences punishable under Sections 354/354A/506 IPC read with Section 8 of POCSO Act, 2012, whereby the prayer of the petitioner to conduct an Ossification test on the complainant/respondent No.2 was erroneously rejected by the learned trial Court.

2. Learned counsel appearing on behalf of petitioner submits that impugned order is erroneous and contrary to the record and is against the settled cannons of law. Vide the impugned order dated 21.01.2020, Id. Trial Court erroneously believed and relied upon age related documents of the complainant purportedly obtained from a private school which show her to be minor on the date of alleged offence, however, as a matter of fact, the complainant was a major, hence, in order to test the jurisdiction of the learned trial Court and the veracity of case of prosecution, an ossification test is warranted in the facts and circumstances of the present case coupled with the fact that even invocation of the provisions of the POCSO Act could be tested accordingly. However, the Id. trial arbitrarily rejected the same.

3. Learned APP appearing on behalf of the State submits that as per the case of the prosecution, on 04.11.2018, a written complaint was given by the complainant/ respondent no.2 herein alleging that the petitioner, who happens to be a close friend of her father, allegedly molested her at an unknown place in the month of January, 2017 and thereafter, again, molested her at her house in the month of June, 2017. Upon the said complaint, an FIR bearing No. 675/2018 dated 04.11.2018 was registered against petitioner under the provisions mentioned above.

4. On 04.11.2018, the petitioner was arrested by the investigating authorities in the aforesaid FIR but was subsequently admitted on regular bail on 30.11.2018. He further submits that there is a school certificate, where her date of birth is recorded 06.12.2000. If proof of date of birth is available, there is no requirement of Ossification test. The exercise being done by petitioner is just to delay the trial. The investigating authorities filed a charge sheet in the aforesaid FIR under Sections 354A/354B/506 IPC and section 8 of POCSO Act, 2012, and cognizance was taken by the concerned Court. The investigating authorities also filed some age related documents pertaining to complainant collected from her school, namely, New Bal Vaishali Public School, Delhi, claiming her date of birth as 06.12.2000 and that of her real younger brother as 19.12.2001. Thus, the complainant was 17 years and 11 months old on the date of incident.

5. On 22.10.2019, the matter was listed for arguments at the stage of charge before the Ld. trial Court. It was submitted on behalf of petitioner that facts of the case warrant that an Ossification test be conducted on the complainant as her purported date of birth i.e. 06.12.2000 is false and her true date of birth was 06.02.1998, thus, complainant was major on the date of alleged offence in the month of January, 2017.

6. The petitioner also filed some documents before the trial Court which were the print outs of the Facebook page of the brother and father of the complainant, which were available in public domain, which clearly showed that the date of birth of the complainant and her brother was 6th February and 19th August, respectively, as against their claim of 6th December and 19th December, respectively. The petitioner also filed an application dated 10.01.2020 under Section 91 Cr.P.C. for directions to the prosecution/investigating authorities to file on record and also to supply to the petitioner, the Call Detail Records of mobile no. 9871471791 used by the complainant for the period from January, 2017 onwards and the matter was reserved for orders on said two aspects. However, on 21.01.2020, the Id. Trial Court erroneously passed the impugned order whereby the prayer for conducting an Ossification test was rejected and the application u/s 91 Cr.P.C. seeking directions to place Call detail Record of the mobile no. 9871471791 on record was allowed and the matter was adjourned for 03.02.2020 for arguments on charge on merits.

7. The documents on record purportedly given by a private school namely New Bal Vaishali Public School, Delhi, viz. 1) application form for admission of the complainant, 2) a single sheet reflecting the admission

details of complainant and her brother, 3) affidavit purportedly given by the father at the time of admission of the complainant in the said school, did not clearly establish her true age and it was a specific contention of the petitioner/ accused that complainant was a major on the date of the alleged offence.

8. On perusal of the impugned order, learned trial Court has held that *“As per Section 94 of the Juvenile Justice (Care & Protection of Children) Act, 2015 when the date of birth from the school of the child is available then there is no occasion for directing her ossification test In view of the provision of the Juvenile Justice Act.”*

9. As per Section 94(2) of the Juvenile Justice Act, 2015, the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof, the birth certificate given by a Corporation or Municipal Authority or Panchayat shall be considered. However, in the absence of aforesaid proof certificates, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board. Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen

days from the date of such order.

10. In the present case, the respondent No. 2 got admitted in second standard on the basis of an affidavit as stated by Manager of the School, who is present in Court wherein stated that the victim passed her first standard from a school of her village. However, there is no school leaving certificate produced by the parents of victim. Based upon the affidavit, her age is mentioned as 06.12.2000, whereas, the messages of her own father on her daughter's birthday were of 6th February. However, the year is not clear from the messages but there is a doubt whether she was born on 6th December or 6th February.

11. In view of the doubt as created by the petitioner, for the fair trial, it is the duty of the Court to ascertain the age of the victim. Accordingly, I hereby set aside the order dated 21.01.2020 and consequently, trial Court is directed to take steps for Ossification test of the victim.

12. Petition is accordingly disposed of.

13. Order *dasti* under signatures of the Court Master.

(SURESH KUMAR KAIT)
JUDGE

JANUARY 31, 2020/PB