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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRL.M.C. 1512/2020, CRL.M.A. 7692/2020 & CRL.M.A. 7693/2020

AFROZ KHANPetitioner

Through: Mr.Rajesh Kumar Tarun, Advocate.

Versus

THE STATERespondent

Through: Mr.Amit Ahlawat, APP for State.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER
% **16.06.2020**

CRL.M.A. 7692/2020 & CRL.M.A. 7693/2020 (Ex.)

Exemptions allowed subject to all just exceptions.

The applications stand disposed of.

CRL.M.C. 1512/2020

Vide the present petition, the petitioner assails the impugned order dated 25.02.2020 of the Trial Court of the learned ASJ-01 (POCSO)/ Central/ THC, Delhi in relation to FIR No.75/2019, PS Pahar Ganj vide which the matter was re-notified for further arguments on charge for the date 01.04.2020 and it is submitted that the matter is now fixed for the date 27.07.2020 for consideration on charge.

The petitioner submits that he has been involved allegedly in the commission of the offence punishable under Section 376D/506 of the

Indian Penal Code, 1860 r/w Section 6 of the POCSO Act, 2012 and seeks the removal of the invocation of the POCSO Act, 2012 submitting to the effect that the prosecutrix was a major submitting to the effect further that through the report of ossification test of the victim/prosecutrix dated 25.11.2019, it was opined that the age of the prosecutrix was 20-21 years and thus, on the date of the alleged commission of the offence which is September, 2018, she was not a minor and was of 19 years and 10 months of age approximately at the time of the incident and was a major.

The petitioner has thus, submitted that the provision of Section 6 of the POCSO Act, 2012 ought not to be attracted against him.

Inter alia it is submitted on behalf of the petitioner that seeking the said redressal, the petitioner had initially filed CRL.M.C.3752/2019 whereby vide order dated 10.12.2019, this Court had directed that the Ossification Test of the prosecutrix be got done by the prosecution, in as much as, it had been submitted on behalf of the petitioner that the reliance that had been placed by the State qua the age of the prosecutrix as being a minor on the basis of a school certificate without contemporaneous record, was to the detriment of the petitioner.

Vide proceedings dated 01.08.2019, the matter was listed for 10.12.2019. The ossification test was indicated to have been conducted at the Lok Nayak Hospital, Delhi and as per the report of the office of the Medical Superintendent, Lok Nayak Hospital, it was opined that on the date of the examination the age of the prosecutrix was between 20-21 years and this opinion was based on the physical, dental and radiological findings. The said findings are stated to be of a report dated 25.11.2019 as per the copies of the testimonies of Dr.Upma Narang, Civil Assistant Surgeon (Dental), Maulana Azad Medical College, New Delhi examined as CW-1 before the learned Trial Court, Dr.Daya Ram Haldwani,

Director Professor (Physiology), Maulana Azad Medical College, Delhi as also stated in the testimony of CW-3 Dr. Satyam, Specialist Department of Radio Diagnosis, L.N. Hospital, Delhi stating therein to the effect that the collective opinion of the Board was given on 25.11.2019 which had opined that the age of the person examined was 20-21 years. Dr. Dhiraj D. Buchade, Associate Professor, Forensic Medicine at MAMC and Lok Nayak Hospital on the date 12.02.2020 examined as CW-4 by the learned Trial Court also stated to the effect that on the basis of general physical examination, dental examination and X-Ray and CT Scan findings, it was opined by the Board that the age of the person examined i.e. the prosecutrix was between 20-21 years and the age estimation report was already exhibited on the record as Ex.CW1/A.

It has been submitted on behalf of the petitioner that despite the testimonies of the doctors and despite the order dated 10.12.2019 of this Court in CRL.M.C.3752/2019, wherein it had been observed to the effect:-

“After some arguments, learned counsel for the petitioner seeks permission to withdraw the present petition with liberty to approach the Trial Court raising the issue of the section 6 of POCSO Act in view of the ossification report sought by this Court pursuant to order dated 01.08.2019.

Permission is granted with liberty as prayed for.

However, it is made clear that the Trial Court shall take into consideration the ossification report of the prosecutrix at the time of passing the order on charge.

The petition is, accordingly, dismissed as withdrawn.

Pending applications stand disposed of.”

with the directions of this Court vide the said order dated 10.12.2019 that the trial Court shall take into consideration the ossification report of the prosecutrix at the time of passing the order on charge, whereafter, the petition CRL.M.C.3752/2019 was withdrawn by the petitioner seeking liberty to approach the Trial Court raising the issue

qua the aspect of the Section 6 of the POCSO Act in view of the ossification report sought by this Court pursuant to order dated 01.08.2019, the learned Trial Court vide order dated 25.02.2020 has observed to the effect that in view of the mandate of Section 94 of the Juvenile Justice Care and Protection Act 2015 which gives priority to the date of birth certificate provided by the school and it is only in the absence thereof reliance has to be placed upon the birth certificate by the municipal authority and when that is also not available, then on the Ossification Test Report and that the record from the school of the victim in support of date of birth had been filed along with the charge sheet qua which learned counsel for the petitioner then and now submits that the same was without support of any contemporaneous documents and was thus, contended to be a document on which reliance could not be placed,- in relation to which the learned Trial Court observed to the effect that however, the veracity of the said school certificate and the other documents from the school would be determined during trial and that when the matter was only at the stage of framing of charge, only prima facie facts and circumstances have to be considered and it was further observed to the effect that in these circumstances in the presence of school certificates and record pertaining to date of birth of the victim which indicated the date of birth of the victim to be 15.09.2001, the prosecutrix was thus, *prima facie* a minor on the date of the offence in September 2018, and that thus the trial of the matter had been proceeded before the Trial Court.

On behalf of the petitioner, it has thus been urged that the impugned order dated 25.02.2020 seeking to record evidence qua the aspect of the veracity of the alleged age of the prosecutrix and documents issued by the municipal authority, be set aside.

On behalf of the State, the present petition is vehemently opposed placing reliance on the provisions of the Juvenile Justice Care and Protection Act 2015 as well as the Juvenile Justice Care and Protection Rules 2016 with specific reference to Section 94 of the said enactment, which reads to the effect:-

“94. Presumption and determination of age.

1. Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

2. In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining —

i. 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;

ii. the birth certificate given by a corporation or a municipal authority or a panchayat;

iii. and only in the absence of (i) and (ii) above, 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.

3. The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.”

and Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 which reads to the effect:-

“Rule 12(3):- In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

On a consideration of the submissions that have been made on behalf of either side, it is essential to observe that the aspect of the veracity of the birth certificate has essentially to be ascertained and can be verified only during the trial as has rightly been held by the learned Trial Court, though, undoubtedly, vide order dated 10.12.2019, this Court directed the aspect of ossification report of the prosecutrix should be taken into consideration at the time of passing of an order on charge but it cannot be overlooked that the framing of the order on charge is only on a prima facie consideration of the entire matter.

In the instant case, the averments that have been made in the charge sheet and in the FIR, indicate that the prosecutrix has categorically alleged that she was 17 ½ years of age at the time of the alleged commission of the offence and that the affidavit of the mother of the

prosecutrix as mentioned in the impugned order reflects the date of birth of the victim/prosecutrix to be 15.09.2001, the Admission and Withdrawal Register pertaining to the victim also indicates her date of birth to be 15.09.2001.

In the circumstances the veracity of the date of birth as put forth through the school record of the school of the victim cannot be negated presently without an analysis of the cross-examination of the testimony of the prosecutrix and her parents and the custodians in whose domain the school record of the prosecutrix is maintained. In the circumstances, there is no infirmity in the impugned order whatsoever.

The petition is thus, declined.

Nothing stated hereinabove shall however amount to any expression on the merits or demerits of the trial before the learned Trial Court.

ANU MALHOTRA, J

JUNE 16, 2020
'neha chopra'