

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

(113)

CRR-2093-2022

Date of decision:- 28.10.2022

Mustafa

...Petitioner

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE SUVIR SEHGAL

Present:- Mr. Rohit Kaushik, Advocate for the petitioner.

Ms. Mahima Yashpal, DAG, Haryana.

SUVIR SEHGAL, J. (Oral)

By way of instant revision petition, accused-petitioner has assailed order dated 08.09.2022, whereby an application filed by him seeking Ossification Test of the victim in case FIR No.346 dated 28.06.2019 lodged at Police Station Tauru, District Nuh, Annexure P-1, for offences under Sections 6 and 17 of the Protection of Children from Sexual Offences Act, 2012 (for short “the POCSO Act”), has been declined.

Briefly stating, FIR, Annexure P-1, has been registered on the complaint of an uncle of a 16 year old girl (hereinafter to as “the prosecutrix/victim”) on the allegation that she used to go to the jungle to collect fodder where the house of the accused persons was located. He was told that in the forest, she was introduced by Arsida wife of Rasmuddin to her nephew, Mustafa, present petitioner, and she encouraged them to get into

physical relationship. About fifteen days prior to the registration of the case, on noticing her bloated stomach, when her family members enquired, she disclosed that she had been repeatedly raped by Mustafa and Arshida helped him in the commission of the offence. The complainant came to know that the prosecutrix was seven months pregnant and that the accused had threatened the prosecutrix to circulate the video clipping of the incident in case she revealed the incident to anyone.

Counsel for the petitioner has submitted that the prosecutrix has attained the age of majority and the birth/death register, Annexure P-3, is result of a manipulation. While inviting the attention of the Court to Annexure P-4, counsel contends that the details of birth of the prosecutrix are not available in the government records and a Non-availability Certificate has been issued by the competent authority. Reliance has been placed by the counsel upon the judgment of the Hon'ble Supreme Court on ***Rishipal Singh Solanki Versus State of Uttar Pradesh and others 2022 (1) R.C.R. (Criminal) 151*** to contend that as Annexure P-3 is fabricated, medical examination of the prosecutrix is the sole reliable method to determine the age of the victim.

Advance copy of the petition has been served upon the State.

Upon instructions received from L/SI, Vinita, State counsel has opposed the petition and has referred to Section 9 as well as 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short “the J.J. Act”). She submits that the application has been filed at a belated stage as all the prosecution witnesses have been examined and the trial is at the

stage of evidence in defence. It is her argument that the objective behind filing of the application is to delay the conclusion of the trial.

I have heard counsel for the parties and have considered the arguments raised by them.

Section 9 (2) of the J.J. Act inter alia lays down that where a claim is raised before a Court that the person is a child or was a child on the date of commission of the offence, the said Court shall make an inquiry, take such evidence as may be necessary and shall record a finding on the matter, stating the age of the person as nearly as possible. Such claim has to be determined in accordance with the provisions contained in the statute and rules framed thereunder.

Section 94 of the J.J. Act pertains to presumption and determination of age. Sub-Section (2) thereof provides for manner of determination and is reproduced hereunder:-

“(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.”

Examining the scope of Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, Supreme Court in ***Vinod Katara Versus State of Uttar Pradesh 2022 (4) R.C.R. (Criminal) 405*** after analysing the case law on the subject, including the judgment in Rishipal Singh Solanki's case (supra) has held as follows:-

32. *Subclause (3) of the aforesaid Rule clearly mandates that while conducting an inquiry about the juvenility of an accused, the Juvenile Justice Board would seek evidence by obtaining the matriculation or equivalent certificates and in the absence whereof the date of birth certificate from the school first attended and in absence whereof the birth certificate given by a corporation or a Municipal authority or a Panchayat. It is made clear by sub-clause (b) that only in the absence of the aforesaid three documents, medical information would be sought from a duly constituted Medical Board which will declare the age of the juvenile or child. Thus, it is only in the absence of the aforesaid documents that the Juvenile Justice Board could have asked for medical information/ossification test.*

33. *The 2000 Act stands repealed by the 2015 Act. The procedure for determining the age is now part of [Section 94](#) of the 2015 Act which was earlier provided under the abovementioned Rule 12 of the Rules.”*

In ***Jarnail Singh Versus State of Haryana 2013 (3) R.C.R. (Criminal) 644***, Apex Court has held that even though the provision provides for determining the age of a child in conflict with law, but the aforesaid provision should be the base for determining age, even of a child, who is a victim of crime.

In the above backdrop, it deserves to be noticed that the prosecution has produced record prepared at the village by an Aaganwadi worker, which has been duly proved by way of testimony of Raj Kumari, PW-8, to show that the date of birth of the prosecutrix is 18.09.2004 and she

was a child when the heinous offence was committed. The statutory requirement as laid down in Section 94 of the J.J. Act is that a Ossification Test is to be conducted only when there is no proof available regarding the date of birth of the child. The provision provides that first and foremost primacy has to be given to the Birth Certificate from the school or the matriculation or equivalent certificate from the concerned Examination Board, if it is available, and in case of its non-availability, the Birth Certificate given by a Corporation or a Municipal Authority or a Panchayat can be relied upon. It is clear from the facts in hand that the birth of the victim was never registered with the Registrar of Births and Deaths, but the birth record is available at the village level in the register maintained by the Aanganwadi worker. This Certificate would clearly fall within the ambit of Section 94 (2) (ii) and is a relevant document to determine the age of the victim. Since, there is material, which clearly establish the age of the prosecutrix, Ossification Test sought for by the accused-petitioner cannot be ordered.

Still further, it may be noticed that the petitioner has placed reliance upon Haryana Family Identity Card, Annexure P-2, to claim that the date of birth of the prosecutrix is 01.01.2002. This document infact demolishes the plea of the petitioner as going by this document, it is apparent that the victim was a minor when she was subjected to sexual assault by the petitioner. Looked at from any angle, this Court is satisfied that the facts and circumstances do not warrant the acceptance of the prayer made.

Finding no illegality or perversity, order passed by the Trial Court is upheld.

Petition is dismissed.

It is clarified as an abundant caution that any observation made hereinabove shall not be construed to be an expression of opinion on the merits of the case.

(SUVIR SEHGAL)
JUDGE

28.10.2022
Kamal

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No