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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% *Order pronounced on 04.11.2022*

+ CRL.M.C. 2380/2020

PANKAJ SAINI

..... Petitioner

Through: Mr. Kanhaiya Singhal, Ms. Priyal
Garg and Mr. Prasanna, Advocates.

versus

STATE AND ANR.

..... Respondents

Through: Mr. N.S. Bajwa, APP for State with
SI Nitesh Sharma, PS Fatehpur Beri.
Mr. Pankaj Vashishth & Mr. Salman,
Adv. for R-2 with R-2 in person.

CORAM:

HON'BLE MR. JUSTICE TALWANT SINGH

Talwant Singh, J.:

1. The petitioner has filed this petition under Article 227 of the Constitution of India to set aside the impugned order dated 18.09.2020 passed by the learned ASJ in case FIR No.52/2019 registered at PS Fatehpur Beri under Sections 376/363/365 IPC & Section 6 of POCSO Act. The petitioner is the accused in the above case. He had moved an application under Section 34(2) of the POCSO Act read with Section 165 of the Evidence Act praying for conducting ossification test to determine the age of the prosecutrix/complainant, which was dismissed.

1.1 As per the petitioner, the date of birth of complainant is 03.08.1999, however, in the school records, her date of birth is mentioned as 03.08.2001. Hence, an application was moved before the learned Trial Court for

determination of the age of the victim. The operative portion of the order passed by the learned Trial Court on this application is reproduced hereunder:-

“5. I have carefully considered the submission and perused the record.

6. Here it shall be apposite to reproduce Section 94 (2) of Juvenile Justice (Care and Protection of Children) Act, 2015 which reads as under:

Section 94: Presumption and determination of age :-

(1)

(2) In case, the committee or the Board has reasonable ground 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;

7. In case titled as ‘**Jarnail Singh Vs State of Haryana**’, decided on **01.07.2013 in Criminal Appeal No.1209/2010**, Hon’ble Supreme court held that the provision contained in Juvenile Justice (Care and Protection of Children) Act, 2015 also apply for determining the age of a Child who is a Victim of crime.

8. On bare reading of Section 94 of JJ Act, it is apparent that the age of child is ascertained, by adopting the first available basis, out of number of options postulated in Rule 94 (2). If, in the scheme of options U/s 94 (2), the option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The Highest rated option available, would conclusively determine the age of minor. In scheme of Section 94 (2) of JJ Act, the date of birth certificate from the school or the matriculation (or equivalent) certificate of concerned child, is highest rated option. In case, the said certificate is available, no other evidence can be relied on. It is only in absence of any of document as envisaged U/s 94 (2) (i) or (ii), Section 94 (2) (iii) postulates the determination of age of concerned child on the basis of medical opinion.

In the present case, the matriculation certificate /

marksheet or JJ Act, 2015, there is no requirement under law for ordering ossification test of Victim for determining her age.

9. *In the present case, father of Victim lodged her missing complaint on 04.02.2019 informing that the Victim "A" aged 17 years 06 months is missing. The Statement of Victim was recorded U/s 164 Cr.P.C on 08.02.2019. The Victim also disclosed her age as 17 years 06 months at the time of recording her statement U/s 164 Cr.P.C on 08.02.2019. Even before examining doctor, the Victim revealed her age to be 17 years 06 months. Thus, the Victim has consistently disclosed her age to be 17 years 06 months on different stages of Investigation. Reckoning the age of Victim from her date of birth i.e., 03.08.2001 as disclosed in matriculation certificate, the Victim was 17 years 06 months old at the time of incident. So, age of Victim disclosed by father of Victim and Victim during investigation is also in line with date of birth of Victim disclosed in matriculation certificate of Victim "A".*

*Pertinently, the Victim has stated in her statement recorded U/s 164 Cr.P.C that accused raped her in the year 2014 when she was 12 years of age. Even as per the accused, the Victim was 20 years of age as on 04.02.2019. So, the Victim was below 18 years of age in the year 2014 even if, it is assumed that she was 20 years of age on 04.02.2019 as alleged by the present case. Thus, the contention of learned counsel for accused that the school record has been manipulated in order to implicate the accused for offence under POCSO Act is devoid of any merit. The Judgements of **Hargovind** and **Vimal Chadha** (*supra*) are not applicable to the facts of the present case and thus of no help to accused. For the aforesaid reasons. I find no material in the present application and the same is ordered to dismissed".*

2. Notice was issued. Status Report has been filed alongwith copies of the school admission form dated 03.04.2007 and school leaving certificate dated 31.03.2011. A copy of the admission and withdrawal register, a certificate issued by the school and 10th class matriculation certificate of the victim issued by Central Board of Secondary Education, have also been annexed. All these documents bear the date of birth of the victim as 03.08.2001.

3. The learned counsel for the petitioner submits that school authorities have not seen the birth certificate of the prosecutrix at the time of her admission to school as the same was not produced. His further argument is

that the parents generally tend to get a lower age recorded at the time of admission of a ward so that in future the child may get some benefit at the time of joining service etc.

3.1 It has been further submitted that the petitioner is the friend of complainant, so he knows that she was born in 1999. Even if all the averments made by the counsel for the petitioner and the judgment relied upon by him are applied, the outcome would be that on the date of registration of the FIR, i.e., on 04.02.2019, the prosecutrix would be presumed to be aged 19.5 years old but the learned counsel for the petitioner has failed to argue as to what would be the effect of that age regarding the allegation made by the prosecutrix that first sexual assault on her had occurred in the year 2013, as she had stated to the doctor and duly recorded in the history of the MLC. Similarly, in her statement under Section 164 Cr.P.C. made before the learned Metropolitan Magistrate she had stated that in the year 2014, the petitioner had made forcible physical relations with the prosecutrix for the first time, although they were known to each other but at that point of time, the prosecutrix was aged around 12-13 years.

3.2 The effect of adding two more years to the age of prosecutrix, if the arguments of learned counsel for the petitioner is to be believed is that the age of the prosecutrix was 14-15 years in the year 2014. Even then, the prosecutrix would still be a minor child on the said date. Moreover, where matriculation certificate, coupled with school record, is available to confirm the age of the victim nothing more is required.

4. The order passed by the learned Trial Court is a reasoned one and all the submissions made by the counsel for the petitioner have been duly discussed and the final order has been passed on the application moved

under Section 34 (2) of the POCSO Act.

5. In view of the above, the present petition is not maintainable and the same is hereby dismissed.

TALWANT SINGH, J

NOVEMBER 04, 2022/nk

Click here to check corrigendum, if any

