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

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Reserved on:15.11.2022
Pronounced on:22.11.2022

+ **CRL.REV.P. 414/2018**

STATE (GNCTD)

..... Petitioner

Through: Mr. Manoj Pant, APP for State
with SI Sita Ram, P.S.
Karawal Nagar

versus

MD. JABBAR

..... Respondent

Through: Mr. Somdutt Kaushik,
Advocate

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present criminal revision petition under Section 397 read with Section 401(5) of the Code of Criminal Procedure, 1973 has been filed against the impugned order dated 06.03.2018 passed by learned Additional Sessions Judge, Special Court (POCSO), North East District, Karkardooma Courts, Delhi, whereby the learned Trial Court discharged the accused for the offences punishable under Section 06 of The Protection of Children from Sexual Offences Act, 2012 ("POCSO Act") in case FIR no. 58/2017 registered at Police Station Karawal Nagar, New Delhi for offences punishable under Sections 376/506 IPC & Section 6 POCSO Act.

2. The brief facts of the present case are that the victim, a minor girl, aged about 14 years, lodged a complaint with the police alleging that for past four months, she had been residing with her grandmother and paternal uncle's son namely Sonu in a rented house. Her parents had died in her childhood and she stays home. It is alleged that one Jabbar uncle (accused), aged about 50 years was residing near her house and had been teasing her since December 2016. It is further alleged that one day, Jabbar gave her Rs. 50/- and asked her to eat *cheej* and took her to third *pulia* in an isolated place and gagged her mouth with a piece of cloth and did wrong acts with her. Thereafter, accused threatened her that if she disclosed the incident to anyone, he will kill her and due to fear, she did not tell anyone about the incident. She further alleged that on 30.01.2017, at around 6.00pm, accused met on her way to Sombazar, threatened her and took her to a secluded place where he again raped her and upon raising alarm, he threatened to kill her brother and grandmother. She further alleged that on 13.02.2017, in the afternoon accused again caught hold of her hand and tried to take her with him but she resisted and ran away and came home. She narrated the entire incident to her grandmother, who informed her cousin Sonu. Thereafter, cousin of victim informed the police.

3. Subsequently, on the basis of the statement of the prosecutrix, MLC and counseling report, FIR No.58/2017 under section 376/506 IRC and 6 of POCSO Act was registered and investigation was initiated. The statement of prosecutrix u/s 164 Cr.P.C was recorded on 14.02.2017 and she was taken for Ossification test at GTB

Hospital to ascertain proof of her age. On 27.02.2017, accused surrendered in Court and thereafter, accused was medically examined and statement of the accused was recorded. After perusing documents on record and evidence collected, Ld. Sessions Court discharged accused under section 6 of POCSO Act and framed charges only under section 376/ 506 IPC against the accused.

4. Learned APP for the State has argued that the age of the victim was determined on the basis of ossification test which opined that the age of the victim is between 16 to 18 years. He, therefore, states that benefit which was given by the concerned court for assessment of age of the prosecutrix of two years margin of error on the higher side was erroneous. It is therefore, stated that the discharge under POCSO Act is not sustainable in law.

5. Learned APP for the State has contended that the benefit of margin of error of two years could not have been granted in this case and in case the same is not granted, the victim will fall under category of 'child' and charge under POCSO Act will be made out.

6. Section 6 of the POCSO Act reads as under:

*“6. Punishment for aggravated penetrative sexual assault
(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.
(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”*

7. The impugned order reads as under:

“I have carefully considered the rival submissions.

No doubt that there is no cardinal principle that in all cases where the age has been determined by way of radiological examination, because of the possibility of margin of error, two years should be added to the upper age limit. However at the same time, it is also well settled that there is a margin of error when the age of a person is determined by radiological examination. Therefore, such margin has to be kept in mind.

In the present case, no document in the form of birth certificate and certificate of first school attended by victim or in the form of matriculation certificate is available on record. Therefore, the only way to determine the age of the victim was through the ossification test. The report of the ossification test has stated the age of the victim to be 16-18 years. In the present case, the doctor has opined that the victim could also be 18 years old. If that be the case, then at least on the basis of given opinion, upper age limit of the victim has to be taken and this benefit has to accrue to the accused.

Therefore, even at the stage of charge, as the doctor has opined the age of victim could be 18 years and there is no evidence on record which could discredit this opinion of the doctor and which the prosecution itself proposed to bring, I find that this benefit has to go to accused. I accordingly find that the victim cannot be said to be a child under POCSO Act and no charge under POCSO Act can be framed against the accused...”

8. This Court finds itself in agreement with the finding of learned

Trial Court since a perusal of the ossification test report reveals that the doctor concerned on the basis of ossification test has clearly mentioned that the bone age of the victim is between 16-18 years. The learned Trial Court has rightly observed that no document had been filed by the prosecution to support the claim of the prosecution that the victim in this case was less than 18 years of age. The ossification test is not conclusive of age determination and it is settled law that judicial notice of the fact of margin of error of two years on either side has to be taken in case of radiological examination i.e. ossification test. In such cases, the benefit of doubt goes in favour of the accused in the present case. The ossification test report itself estimates the age of the victim between 16-18 years. Therefore, applying the margin error principle of two years on either side, the age could be between 14-20 years. If the margin of error is taken on the higher side, the upper limit of age estimated by the ossification test will be 20 years. Therefore, the learned Trial Court committed no error in arriving at a conclusion that since the doctor had opined the age of victim could be 18 years and there is no evidence on record to discredit the doctor's opinion, which the prosecution itself proposes to bring on record at the stage of evidence. This Court holds that the order does not suffer from any illegality or infirmity. The learned Trial Court has also rightly observed that the victim cannot be said to be a child under POCSO Act, and therefore, has rightly send the case for trial as per law to a POCSO non-designated court.

9. In view of the forgoing discussion, this Court finds no reason

to interfere with the impugned order. Accordingly, the present revision petition stands rejected in above terms.

10. Nothing expressed herein shall have any bearing on the merits of the case during trial.

SWARANA KANTA SHARMA, J

NOVEMBER 22, 2022/ns

