

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

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CRM-M-47635-2022 (O&M)
Date of order: 13.02.2024

Sunil Kumar

.....Petitioner(s)

Vs.

State of Haryana

.....Respondent(s)

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

Present:- Mr. Ram Bilas Gupta, Advocate
for the petitioner.

Mr. Aditya Pal Singla, AAG Haryana.

Nidhi Gupta, J.

Present petition under Section 482 Cr.P.C. is filed seeking quashing of impugned order dated 30.08.2022 (Annexure P5) vide which the application filed by the petitioner for conducting ossification test of the prosecutrix in case FIR No.493 dated 07.11.2021 under Section 506 IPC and Section 6 of POCSO Act, Police Station Adarsh Nagar, Ballabgarh, District Faridabad, has been dismissed by learned Additional Sessions Judge, Faridabad.

2. Brief facts of the case are that FIR in the present case was registered against the petitioner on the statement of the prosecutrix herself and the same reads as under:-

“Statement of Shivani daughter of Sudhir Sharma resident of Bijlipur Nemtabad District Bulandshahar at present tenant House no.225, Gali No.3, Yadav Colony, Ballabgarh aged 16 years studied upto 8th class. Stated that I am resident of above said address. We are two sisters, two brothers. I am the eldest

and now staying at home. In December 2020, my mother was to give birth to my younger brother so my mother had gone to my grandmother(nani) house at village Gwara District Aligarh for the delivery and when my brother took birth on 8 February then in the end of February my mother came back. Then during that in the end of December 2020, date I do not remember, at about 4/5 P.M. my brother-sister had gone outside to play, father was on duty then son of our landlord namely Sunil came inside our house and he forcibly raped me and gave threatening to kill me. Due to the fear I did not inform to anyone. After that Sunil raped me for 3-4 times during December to February. Last time, when in August 2021 my mother was not at house then Sunil came to my house and he forcibly raped me. Even now whenever I see him I was frightened. Then I told everything to my mother. Legal action may be taken against Sunil. I am giving this statement in front of my mother without any pressure and as my consent. Statement got recorded, heard and is correct" Sd/-Shivani Sharma".

3. Learned counsel for the petitioner inter alia submits that in the FIR, the prosecutrix has wrongly stated her age to be 16 years. It is contended that the learned trial Court, as also the Investigating Officer without verifying any document of date of birth of the prosecutrix, have considered her to be a minor. It is stated that no offence under POCSO Act is made out against the petitioner as on the date of alleged incident, the prosecutrix was more than 18 years old.

4. It is further submitted that the fact that the prosecutrix is major is proven because during the COVID- 19 period in 2020 the prosecutrix got covaxin injection in the Category of more than 18 years old.

It is further stated that the prosecutrix is working since last 4 years in the Bansal Medical Store Aanaz Mandi, Ballabgarh, District Faridabad.

5. Further contends that as per the investigation no actual Birth Certificate of the prosecutrix is on record i.e. no Birth Certificate from the Competent Authority is on record; and the alleged School Leaving Certificate is based on the Affidavit dated 4.4.2017 (Annexure P-2) submitted by the so-called father of the prosecutrix namely Sudhir Sharma, and in that affidavit it is mentioned that there is no record of registration of birth in the Municipal Corporation. It is contended that the said Sudhir Sharma is not the biological father of the prosecutrix. The mother of the prosecutrix is residing with said Sudhir Sharma and no legal marriage has been performed between Sudhir Sharma and the mother of the prosecutrix.

6. It is also submitted that the Ld. Trial Court has observed in para 12 of the impugned order that the ossification test can definitely be conducted to determine the age of the prosecutrix, however, ossification test will be conducted only in the absence of birth certificate given by Municipal Authority and in absence of the school certificate. It is reiterated that in the present case there is no authentic document on record to show the date of birth of the prosecutrix. The school leaving certificate is based on affidavit given by the so-called father of the prosecutrix wherein it is admitted that he has no other document to show the date of birth of the prosecutrix i.e. he has not got any registration made with the Municipal Corporation regarding birth of the prosecutrix and he has no birth certificate issued in the name of the prosecutrix. In view of this, the

ossification test of the prosecutrix is necessary to decide the case in the interest of justice & equity.

7. Further contends that the medical examination of the prosecutrix was conducted on 07.11.2021 where in it was reported that no external and internal injury was found on the body of the prosecutrix.

8. No other argument is made on behalf of the petitioner.

9. I have heard learned counsel for the petitioner.

10. Perusal of record of the case shows that the petitioner is the 30-year-old son of the landlord in whose house the prosecutrix - who has stated herself to be 16 years of age, at time of incident - and her family were tenants. It is the prosecution case that from the period December, 2020 to August, 2021, the petitioner had repeatedly raped the minor prosecutrix. By way of present impugned order, the petitioner's application for conducting ossification test of the prosecutrix has been dismissed by the learned trial Court on the ground that ossification test is only required in absence of any proof of date of birth. Relevant findings of the learned trial Court in this regard are as follows:-

"5 The present application deserves to be dismissed outright on the ground that, prima facie, there is on case file Student Admission Form stated to be of the victim/prosecutrix issued by school namely Tinny Tots Public School, Ballabgarh, mentioning the date of birth of prosecutrix. Further, there is on case record, School Leaving Certificate of the prosecutrix, depicting the date of birth of prosecutrix as 10.08.2005.

6. Further, perusal of the case file reveals that, prima facie, there is on file Aadhar card of the victim. Prima facie, there is on file affidavit executed by the father of the victim/prosecutrix

dated 04.04.2017, mentioning that, date of birth of his daughter is 10.08.2005.

7. Further, there is on case file, copy of admission and withdrawal register of Tinny Tots Public School, depicting the date of birth of prosecutrix as 10.08.2005.

8. So, bare perusal of record on case file, in the shape of documents, i.e. Student Admission Form stated to be of the victim/prosecutrix issued by Tinny Tots Public School, Ballabgarh, School Leaving Certificate of the prosecutrix, copy of admission and withdrawal register, affidavit executed by the father of the prosecutrix, aadhar card of the prosecutrix, at this stage, it prima facie appears that, the date of birth of prosecutrix is 10.08.2005.

9. There is ample documentary evidence on record with regard to the date of birth of the victim. Though the authenticity and veracity of the same is subject matter of trial, but, these documents, are sufficient for consideration and determining the age of the victim, at the time of passing of the final judgment.

10. Ossification test comes into picture only in the absence of date of birth certificate issued from any school and in the absence of birth certificate given by Corporation, Municipal Authority or Panchayat.

11. Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 is clear with regard to the statutory provision governing the age of a child and since there is no provision dealing with determination of age of prosecutrix, Section 94 of Juvenile Justice Act, 2015 will be applicable for determination of age of the prosecutrix.

12. Ossification test can definitely be conducted to determine age of prosecutrix, but, there is rider attached to it, that, ossification test will be conducted, only in the absence of birth certificate given by municipal authority and in absence of school certificate. However, in the case in hand, there are

prima facie on record, documents stated to be issued by Tinny Tots Public School, Ballabgarh, Faridabad and also aadhar card pertaining to the victim”.

(Emphasis added)

11. At the risk of repetition, from the above it therefore follows that even if the affidavit dated 4.4.2017 (Annexure P-2), submitted by the said Sudhir Sharma stating that the date of birth of the prosecutrix was 10.8.2005 were to be discounted, even then, there were numerous other documents on record in the shape of Student Admission Form, School Leaving Certificate, copy of admission-withdrawal register of the prosecutrix issued by Tinny Tots Public School, Ballabgarh, which also testify to the fact that the date of birth of the prosecutrix is 10.8.2005. Besides the above, there is also the Aadhaar card of the prosecutrix as per which too, the date of birth of the prosecutrix is 10.8.2005. As such, I find no merit in the arguments raised on behalf of the petitioner.

12. Even in the reply/status report dated 18.02.2023 filed by way of affidavit of Munish Sehgal, HPS, Assistant Commissioner of Police, Ballabgarh, District Faridabad it has been stated as under:-

“12. That the petitioner moved an application before the Ld. Additional Sessions Judge, Faridabad, for ossification test of the prosecutrix from B.K. Hospital, Faridabad on 02.06.2022 but vide order dated 30.08.2022 (Annexure P-5) said application has been dismissed by Ld. Additional Sessions Judge/Fast Track Court, Faridabad, after considering the records on file in the shape of documents i.e. Student Admission Form, School Leaving Certificate, copy of admission withdrawal register of the prosecutrix/victim issued by Tinny Tots Public School, Ballabgarh and the affidavit executed by the father of the

prosecutrix/victim and Aadhar card of the prosecutrix, which are depicting the date of victim as 10.08.2005, are an ample evidence on record with regard to the date of birth of the victim”.

13. As regards contention of the petitioner that the prosecutrix is major as she is working at Bansal Medical Store Aanaz Mandi, Ballabgarh, District Faridabad, the said argument is on the face of it flimsy and misplaced and deserves to be outrightly rejected.
14. Accordingly, I find no error in the impugned order dated 30.08.2022 (Annexure P5).
15. Present petition accordingly stands **dismissed**.
16. Pending application(s) if any also stand(s) disposed of.

13.02.2024
Sunena

(Nidhi Gupta)
Judge

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No