

GAHC010073362023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./98/2023

ABDULLAH
S/O ABDUL SALAM
VILLAGE NAGAJAN
PO AND PS KHARUPETIA
DIST DARRANG
ASSAM 784115

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY PP
ASSAM

2:SMTI SULTANA BEGUM
W/O LATE MUSTAFA ALI
RESIDENT OF VILLAGE NAGAJAN PO AND PS KHARUPETIA
DIST DARRANG
ASSAM 784115

Advocate for : MR H R A CHOUDHURY
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER(ORAL)

18.12.2023

(M. Zothankhuma, J)

Heard Mr. A. Ahmed, learned counsel for the appellant. Also heard Ms. B.

Bhuyan, learned Addl. P.P., Assam appearing for the State.

2. This appeal has been filed against the judgment dated 23.06.2023, passed by the Court of learned Special Judge, Darrang, Mangaldai in Special (POCSO) Case No.40/2020, by which the appellant has been convicted under Section 6 of the POCSO Act and sentenced to undergo rigorous imprisonment for 20(twenty) years with a fine of Rs.5,000/- (Rupees Five Thousand), in default, to suffer rigorous imprisonment for 6(six) months.

3. The brief facts of the case is that an FIR was submitted on 23.06.2020 by the mother of the victim before the O/C, Kharupetia Police Station, stating that the appellant had promised to marry the victim whose date of birth was 10.05.2007 and had raped her, due to which, she became pregnant.

4. Consequent to the FIR, Kharupetia P.S. Case No.238/2020 under Sections 417/376 IPC read with Section 4 of the POCSO Act, 2012 was registered. On completion of investigation, the investigating officer submitted the charge-sheet, on finding a *prima facie* case under Section 366 of the IPC read with Section 376(3) IPC and Section 4 of the POCSO Act. Charge was thereafter framed by the learned trial Court against the appellant under Sections 366/376(3) IPC read with Section 4 of the POCSO Act, to which he pleaded not guilty and claimed to be tried.

5. The learned trial Court after examining 8(eight) prosecution witnesses and the appellant under Section 313 Cr.P.C., came to a finding that the appellant was guilty of having committed the offence under Section 5 of the POCSO Act.

Accordingly, the charge under Section 4 of the POCSO Act was altered by the learned trial Court to Section 6 of the POCSO Act. The appellant was subsequently convicted under Section 6 of the POCSO Act and sentenced, as stated in the foregoing paragraphs.

6. The appellant being aggrieved filed the present appeal. During the pendency of the appeal, the appellant submitted a school Transfer Certificate dated 12.10.2019 issued by the Head Master, Pub Bholabari L.P. School, wherein it was indicated that his date of birth was 10.01.2003. On the other hand, the FIR had been lodged on 23.06.2020, which stated that the incident of rape had occurred about 5 months prior to the submission of the FIR. The stand of the appellant in the appeal was that on the date of occurrence of the incident of the alleged rape, the appellant was a minor, i.e., he was below the age of 18 years and as such, he could not have been tried, convicted and sentenced as an adult. In view of the appellant having taken the plea of juvenility on the date of occurrence of the offence, this Court vide order dated 10.05.2023, directed the learned Trial Court to cause an enquiry and submit a report with regard to the age of the appellant, on the date of occurrence of the offence of rape.

7. Subsequent to the order passed by this Court, the learned trial Court, i.e., the Special Judge, Darrang, Mangaldai, submitted an Enquiry Report dated 14.06.2023, which stated that as per the records, the date of birth of the appellant was 10.01.2003 and that as on 23.06.2020, the appellant was 17 years 5 months 13 days of age.

8. This Court did not accept the Enquiry Report dated 14.06.2023, as the

Student's Admission Register No.4 of Pub Bholabari L.P. School Ranipukhuri 18260327502 showed that that appellant had been admitted to the school on 03.01.2009, while he had apparently joined the school on 03.01.2009 in terms of the School Leaving Certificate dated 12.10.2019 issued by the school. As such, the records had implied that the appellant had passed his Class-I examination in the said school within 4 ½ months, i.e., on 20.05.2009.

Therefore, this Court directed that an ossification test should be conducted on the appellant, in terms of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'the 2015 Act'). The learned trial Court was accordingly directed, vide order dated 21.08.2023 passed by this Court to take steps for constitution of a Medical Board, to conduct the ossification test on the appellant and to submit the ossification test report thereafter. Subsequent to the above facts, the ossification test report No. MCH/23/2379 dated 08.09.2023 issued by the Superintendent, Mangaldai Civil Hospital has been forwarded to this Court, through forwarding letter No. DJ(D) 6616 dated 15.09.2023 issued by the learned District and Sessions Judge, Darrang, Mangaldai. The ossification test report dated 08.09.2023 shows that the age of the appellant was around 18-20 years.

9. In view of the above facts, it appears that the age of the appellant was below 18 years at the time of occurrence of rape.

10. At this stage, Mr. A. Ahmed, learned counsel for the appellant submits that the appellant is not making any challenge to his conviction. However, the sentence imposed upon the appellant cannot be sustained in view of the embargo provided in Section 9(3) read with Section 18(1)(g) of the 2015 Act,

which provides that a child can be sent to a special Home for a period not exceeding 3 years for providing reformatory services to the child.

11. Ms. B. Bhuyan, learned Addl. Public Prosecutor, submits that the issue has been settled by the Supreme Court in the case of ***Karan alias Fatiya Vs. State of Madhya Pradesh, reported in (2023) 5 SCC 504***, wherein it has been held that the conviction would remain, but the sentence would have to be set aside. She submits that the appellant may accordingly be taken before the Juvenile Justice Board, who shall take a decision on the future of the appellant in terms of Section 18(1)(g) of the 2015 Act.

12. We have heard the learned counsels for the parties.

13. In the case of ***Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir and Ors., reported in (1982) 2 SCC 538***, the Supreme Court has held that one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.

14. It is settled law that when two views are possible, the view in favour of the accused should be taken. In view of the above ossification test result and by taking into account the margin of error that can be considered by this Court, the appellant's age would have to be taken to be below 18 years at the time of the incident of rape. The question that now has to be answered is with regard to what further steps is required to be taken in a case of this nature, where conviction has been made by the learned trial Court and the age of the perpetrator of the crime has been found to be below 18 years at the time of the

occurrence of the incident, during pendency of the appeal in terms of Section 94 of the 2015 Act. The question is whether this Court would have the jurisdiction to interfere with the conviction and sentence of the appellant, as the appellant has been found to be a juvenile at the time of the occurrence of rape.

15. The impugned judgment has been passed by the learned trial Court on 23.06.2022 and as such, the appellant has been in prison as a convict, consequent to the impugned judgment, for 1 year 5 months 25 days as on today. At Paragraph No. 39 of the impugned judgment dated 23.06.2022, passed by the learned trial Court, it has been clearly stated that the appellant has been in jail since 30.06.2020. In view of the above facts, it is apparent that the appellant has been in jail for more than 3 years 5 months as on date.

16. In the case of ***Karan alias Fatiya(supra)***, the Supreme Court was to decide whether the Courts would have the jurisdiction to interfere with the conviction and sentence given to an accused, who had been found to be a juvenile during the pendency of the appeal. In this regard, it may further be mentioned that there had been conflicting decisions of the Supreme Court, with regard to whether the conviction against an accused who was subsequently found to be a juvenile, was sustainable. In the case of ***Union of India and Ors. Vs. Ramesh Bishnoi***, reported in ***(2019) 19 SCC 710***, the Supreme Court had held that the conviction should be obliterated so that there is no stigma attached upon a juvenile who commits a crime. However, in a subsequent judgment, ***Satya Deo @ Bhoorey Vs. State of U.P.***, reported in ***(2020) 10 SCC 555***, the Supreme Court had upheld the conviction and after setting aside the sentence of life imprisonment awarded to the appellant

juvenile, had directed the jail authorities to produce the appellant before the Juvenile Justice Board, whereupon the Juvenile Justice Board was to pass appropriate orders regarding the detention and custody of the appellant.

17. The Supreme Court in ***Kiran alias Fatiya(supra)***, considered the fate of the appellant juvenile who had been convicted under Section 302 and 201 IPC. In the above case, the appellant had chosen not to challenge the conviction and had only made a challenge to the sentence imposed. In the present case also, the challenge has been made only to the sentence awarded to the appellant and not to his conviction in terms of the impugned judgment passed by the learned trial Court.

18. The Supreme Court in the case of ***Karan alias Fatiya (supra)*** has held that the conviction of an appellant who was subsequently found to be a minor during the appeal proceedings, cannot be held to be vitiated in law, merely because an enquiry was not conducted by the Juvenile Justice Board. It is only the question of sentence for which the provision of the 2015 Act would be attracted and any sentence in excess of what is permissible under the 2015 Act would have to be accordingly amended, as per the provisions of the 2015 Act. A reading of the above judgment clearly shows that while the merits of a conviction upon an accused who is subsequently found to be a juvenile can be tested, the conviction does not automatically become vitiated just because the accused is a juvenile. The only thing that has to be automatically set aside is the sentence, if it is not in consonance with the 2015 Act. The question of whether the conviction was legal and valid would have to be decided in the appeal, on the touchstone of the evidence adduced by the learned Trial Court, if the same

is put to challenge. In the present case, there being no challenge to the conviction of the appellant, we uphold the impugned judgment passed by the learned Trial Court in convicting the appellant under Section 6 of the POCSO Act, 2012. However, as the appellant was a juvenile at the time of the occurrence of the crime, in terms of the ossification test dated 08.09.2023, the sentence awarded to the appellant could not have been made in terms of the 2015 Act, as it is not sustainable.

19. In Paragraph Nos. 35, 36 and 37 of *Karan alias Fatiya (supra)*, the Supreme Court held as reproduced below-

“35. The intention of the legislature was to give benefit to a person who is declared to be a child on the date of the offence only with respect to its sentence part. If the conviction was also to be made ineffective then either the jurisdiction of regular Sessions Court would have been completely excluded not only under section 9 of the 2015 Act but also under section 25 of the 2015 Act, provision would have been made that on a finding being recorded that the person being tried is a child, a pending trial should also be relegated to the JJB and also that such trial would be held to be null and void. Instead, under section 25 of the 2015 Act, it is clearly provided that any proceeding pending before any Board or Court on the date of commencement of the 2015 Act shall be continued in that Board or Court as if this Act had not been enacted.

36. Section 25 of the 2015 Act is reproduced hereunder:

*“25. **Special provision in respect of pending cases.** - Notwithstanding anything contained in this Act, all proceedings in respect of a child alleged or found to be in conflict with law pending before any Board or court on the date of commencement of this Act, shall be continued in that Board or court as if this Act had not been enacted.”*

37. Having considered the statutory provisions laid down in section 9 of the 2015 Act and also section 7A of the 2000 Act which is identical to section 9 of the 2015 Act, we are of the view that merits of the conviction could be tested and the conviction which was recorded cannot be held to be vitiated in law merely because the inquiry was not conducted by JJB. It is only the question of sentence for which the provisions of the 2015 Act would be attracted and any sentence in excess of what is permissible under the 2015 Act will have to be

accordingly amended as per the provisions of the 2015 Act. Otherwise, the accused who has committed a heinous offence and who did not claim juvenility before the Trial Court would be allowed to go scot-free. This is also not the object and intention provided in the 2015 Act. The object under the 2015 Act dealing with the rights and liberties of the juvenile is only to ensure that if he or she could be brought into the main stream by awarding lesser sentence and also directing for other facilities for welfare of the juvenile in conflict with law during his stay in any of the institutions defined under the 2015 Act.”

20. Section 9(3) of the 2015 Act states as follows-

*“**9(3)** If the court finds that a person has committed an offence and was a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.”*

21. Section 18 of the 2015 Act is reproduced hereinbelow as follows:-

*“**18. Orders regarding child found to be in conflict with law-**(1) Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit, -*

(a) allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;

(b) direct the child to participate in group counselling and similar activities;

(c) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;

(d) order the child or parents or the guardian of the child to pay fine:

Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not

violated;

(e) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years;

(f) direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years;

(g) direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformatory services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home:

Provided that if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to the place of safety.

(2) If an order is passed under clauses (a) to (g) of sub-section (1), the Board may, in addition pass orders to -

(i) attend school; or

(ii) attend a vocational training centre; or

(iii) attend a therapeutic centre; or

(iv) prohibit the child from visiting, frequenting or appearing at a specified place; or (v) undergo a de-addiction programme.

(3) Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences."

22. Section 9(3) of the 2015 Act provides that if a Court finds that a person has committed an offence and was a child on the date of commission of such offence, he shall forward the child to the Juvenile Justice Board for passing

appropriate orders and the sentence, if any, passed by the Court shall be deemed to have no effect. Section 18(1)(g) on the other hand, provides that where the Juvenile Justice Board is satisfied on enquiry that a child, who is below 18 years of age has committed a serious offence, the Juvenile Justice Board, if it so thinks fit, direct the child to be sent to a special Home for such period not exceeding 3 years for providing reformatory services. Provided that if the conduct and behavior of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to a place of safety.

23. In the present case, the appellant has already been convicted under Section 6 of the POCSO Act and it has now been revealed that he had not attained 18 years of age on the date of the incident of rape. As such, the sentence awarded by the learned Trial Court to the appellant, in excess of the provisions of the 2015 Act, would not be sustainable.

24. In view of the reasons stated above, the conviction of the appellant by the learned trial Court is not being interfered with in terms of the judgment of the Supreme Court in ***Karan alias Fatiya (supra)***. However, the sentence awarded to the appellant by the learned Trial Court, not being in consonance with the provisions of the 2015 Act, the same is set aside.

25. Section 15(1) of the 2015 Act provides that in case of a heinous offence committed by a child, who is above 16 years and below 18 years, the Juvenile Justice Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the

consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of Section 18(3) of the 2015 Act. Section 15(3) provides that where the Juvenile Justice Board is of the view that there is need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences. However, the appellant has already been tried by the learned trial Court and as the appellant has already undergone more than 3 years in judicial custody, this Court is of the view that the appellant cannot be put in judicial custody any longer.

26. Accordingly, the respondents are directed to release the appellant immediately from jail and thereafter produce him before the Juvenile Justice Board, Darrang, Mangaldai, who shall take a decision with regard to the future cause of action to be taken in terms of Section 18 of the 2015 Act.

27. The appeal is accordingly disposed of as indicated above.

28. Send back the LCR to the learned Trial Court immediately.

JUDGE

JUDGE

Comparing Assistant