

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 298 OF 2016

Mr. Shailesh Sankatha Yadav. ... Petitioner.
Versus
The State of Maharashtra. ... Respondents.

Mr. Bhavesh M. Thakur, advocate for petitioner.

Ms. A.T. Jhaveri, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J
DATE : AUGUST 2, 2016

P.C.:

1 Heard the learned Counsel for the petitioner and the learned
APP for State.

2 Rule. Rule made returnable forthwith with the consent of the
parties.

3 In the present petition, the Petitioner is an accused in C.R. No.
21 of 2015 registered at Sewree Police Station, Mumbai and is
charge-sheeted for offence punishable under Section 363, 364, 302

read with Section 34 of the Indian Penal Code. The offence is registered in respect of an incident in which Ashraf Iqbal Muzawar @ Tilli had died homicidal death on 3rd March, 2015. After filing of the charge-sheet, the case was committed to the Court of Sessions and is registered as Sessions Case No. 468 of 2015.

4 The learned Counsel for the Petitioner submits that prior to framing of charge, the petitioner herein had filed an application before the learned Sessions Court and had raised the claim of being juvenile in conflict with law. It was subsequently stated by the petitioner that the date of his birth is 6/4/1998 and that he has attended the school at Ishwarpur-Azamgad. The learned Sessions Judge had rejected the application by an order dated 29/8/2015 after considering the medical certificate issued by J.J. Hospital. The learned Sessions Judge has placed implicit reliance upon the certificate issued by J.J. Hospital in respect of ossification test of the petitioner. The learned Sessions Judge on the basis of the ossification test had arrived at a conclusion that the copies of birth certificate

produced by the accused prima facie appeared to be doubtful. The report of the J.J. Hospital indicates that the Petitioner had informed the doctor that his date of birth is 6/4/1998. The Petitioner had also furnished photo copies of the birth certificate. It was specifically stated by the Petitioner that he is 17 years and 4 months. After conducting the ossification test, the Assistant Professor of the Department of Forensic Medicine, Grant Medical College, Mumbai had given the opinion as follows :

“After performing general, physical, dental and radiological examination, we are of the considered opinion that the age of this person is between Eighteen to Nineteen years old (18 yrs. to 19 yrs.) including the margin of error.”

5 Suffice it to say that the ossification test cannot be considered a conclusive proof of the age of the person, who is subjected to ossification test since it includes margin of error. The learned Counsel for the petitioner rightly submits that in such a case, what is contemplated by Juvenile Justice (Care and Protection of Children)

Act, 2000 is that the judge before whom an application is made raising claim of juvenality shall conduct an independent enquiry and therefore, the learned Judge ought not to have place implicit reliance upon the report of the ossification test. Section 7A of the said Act reads as under :

[7A. Procedure to be followed when claim of juvenility is raised before any court.—

(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be: Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall

forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect.]

6 To substantiate his contention the learned Counsel for the petitioner has also placed reliance upon the judgment of the Hon'ble Apex Court in the case of **Ashwini Kumar Saxena v/s. State of Madhya Pradesh, reported in AIR 2013 SC 553**. The Hon'ble Apex Court has observed as under :

“27. [Section 7A](#), obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under [the Code](#) of Criminal Procedure, but under the J.J. Act. Criminal Courts, JJ Board, Committees etc., we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per [the Code](#). Statute requires the Court or the Board only to make an ‘inquiry’ and in what manner that inquiry has to be conducted is provided in JJ Rules. Few of the expressions used in [Section 7A](#) and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. [Section 7A](#) has used the expression “court shall make an inquiry”, “take such evidence as may be necessary” and “but not an affidavit”. The Court or the Board can accept as

evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates etc. as evidence need not be oral evidence.”

7 It is a matter of record that in the present case, the learned Sessions Judge has not followed the mandatory provisions under Section 7A of the Juvenile Justice Act and therefore, the order dated 29/8/2015 passed by the learned Sessions Court in Sessions Case No. 468 of 2015 below Exh. 4 deserves to be quashed and set aside.

8 The learned Counsel for the Petitioner vehemently submits that what is contemplated under the Act is only an enquiry and prima facie conclusion to be drawn by Court considering the claim of juvenality. The learned Counsel submits that it would not be necessary to rely upon any other documents or record statement or evidence to ascertain claim of juvenality. This Court is in disagreement with the said submissions, since the Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 contemplates the procedure to be followed in determination of age. The Statute contemplates that the

court while passing an order in such a case, where claim of juvenility is raised, the court shall take into consideration such evidence, as may be available or the medical opinion, as the case may be, record finding in respect of his age and either of the evidence specified in any of the clauses (a)(i),(ii) and (iii) or in the absence whereof, clause (b) shall be conclusive proof of the age as regards such child or juvenile in conflict with law.

9 By inference, it can be said that Rule 12 sub-clause (3) contemplates as follows :

“12. Procedure to be followed in determination of Age.— (1)...

(2) ...

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the

juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year,

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a) (i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

10 The word “evidence” as defined in the Indian Evidence Act, 1872 is as follows :

“Evidence” .— “ Evidence” means and includes—

all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;

(1) [all documents including electronic records produced for the inspection of the Court],

such documents are called documentary evidence.”

No wider meaning can be given to the word “enquiry”. The Hon'ble Apex Court in the case of **Ashwini Kumar Saxena**(cited supra) has also considered that since the enquiry is to be completed within 30

days, the Court has to give a prima facie opinion. The claim of juvenality cannot be ascertained, determined or decided by the court only on the basis of documents produced before it for the purpose to decide the claim of juvenality. The findings recorded by the Court or conclusion drawn by the Court will have to be based upon some material and statements which are recorded before the court. The intention of the legislature in adding the word “evidence” in Rule 12 would make it sufficiently clear that substantive evidence needs to be recorded in order to substantiate the document brought on record.

11 In view of this, the order dated 29/8/2015 passed by the learned Sessions Court in Sessions Case No. 468 of 2015 below Exh. 4 is quashed and set aside. The matter is remanded to the Court of learned Sessions Judge and the learned Sessions Judge is directed to conduct an enquiry into the claim of juvenility of the present petitioner by recording necessary evidence. The learned Sessions Court shall not frame charge against the present petitioner till the completion of enquiry in respect of the claim of his juvenility. The

learned Sessions Judge is further directed to conclude the enquiry as far as possible within 30 days from the date of receipt of this order. The petitioner shall furnish original school leaving certificate before the Sessions Court, which may be further verified by seeking corroboration.

12 The Rule is made partly absolute on the above terms. The Writ Petition is disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)