

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL APPLICATION NO. 425 OF 2016
IN
CRIMINAL APPEAL NO. 650 OF 1996

Iqbal Mohammed Mustafa SayyedApplicant

V/s.

The State of MaharashtraRespondent

Mr. Kartik Garg appointed Advocate for Applicant.

Mrs. A. A. Mane APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.

DATED : MAY 4, 2016.

PC :

1) Appellant in Criminal Appeal No. 650 of 1996 was original accused in Sessions Case No. 890 of 1995 wherein the Appellant was tried and convicted for offence punishable under section 376 of the Indian Penal Code and under Section 57 of Bombay Children's Act 1948 and is sentenced to suffer rigorous imprisonment for a period of 10 years and fine of Rs. 5,000/- in default to suffer simple imprisonment for one month. He was convicted for offence punishable under Section 57 of the Bombay Children's Act and sentenced to suffer rigorous imprisonment for six months. The delay in filing the appeal was condoned by the then Hon'ble Division Bench of this Court vide order

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dated 08/11/1996. The appeal was admitted and the Appellant was directed to be released on bail in sum of Rs. 2,000/- with one surety in the like amount.

2) The appeal was taken up for final hearing in the year 2016 and at the stage of final hearing, it was seen that the appellant had placed on record his school leaving certificate which was marked as Exhibit 28. The school leaving certificate issued by St. Aloysius High School, Bandra, Mumbai indicating the date of birth of the Appellant as 17/10/1977. The date of offence was 11/03/1995. On the day of the incident, the Appellant was only 17 years and 5 months old i.e. admittedly he had not completed 18 years of age and therefore was a juvenile in conflict with the Law.

3) That in fact, the Appellant had filed an application below Exhibit 8 along with his school leaving certificate and had prayed that he be dealt in accordance with Section 360 of the Code of Criminal Procedure, 1973. The said application was not taken to its logical end. The learned Sessions Judge had considered the age only to ascertain as to whether the appellant could be given the benefit of Section 360 of the Code of Criminal Procedure, 1973 i.e. whether an Order of release on Probation of good conduct or admonition can be granted in favour of the accused. The learned Sessions

Judge had rightly not considered the prayer under Section 360 of the Code of Criminal Procedure, 1973 in view of the fact that the said section was attracted only to a person who could be convicted of an offence with fine only or with imprisonment for a term of 7 years or less.

4) During the pendency of the appeal, there was an amendment to the Juvenile Justice (Care and Protection of Children) Act, 2000 (Hereinafter referred as “The Act”). The Proviso to Section 7 (A) of the said Act reads as follows:

“7-A. 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 order, and the sentence, if any, passed by a Court shall be deemed to have no effect.”

5) It is in view of this provision that although the issue was not raised in the appeal memo or in the course of hearing, this Court has taken notice of Exhibit 28 in the records and proceedings which is filed along with the school leaving certificate.

6) This Court has appointed the learned Advocate Shri. Kartik Garg and had requested him to espouse the cause of the appellant in the interest of justice. The learned counsel has placed reliance upon the Judgment of the Hon'ble Apex Court in the case of **Hari Ram Vs. State of Rajasthan and another [2010 (1) SCC (Cri) 987]** wherein the Hon'ble Apex Court has observed as follows.

“A male offender, who was being proceeded with in any Court/Authority initiated under the 1986 Act and had not completed the age of 18 years on 1.4.2001, would be governed by the provisions of Juvenile Justice Act, 2000.”

7) Rule 12 of the said Act contemplates a procedure to be followed in determination of age as follows:

“12. Procedure to be followed in determination of Age.— (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) **The court** or the Board or as the case may be, the Committee shall decide the juvenility or otherwise of the juvenile or the child or, as the case may be, the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(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.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board, or as the case may be, the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be

given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7-A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

8) The Rule contemplates that only in the absence of matriculation or equivalent certificate, the date of birth certificate from the school, other than play school attended or the birth certificate given by a Corporation, the medical opinion will be sought from the duly constituted Medical Board which will declare the age of the juvenile or child. **The inquiry is to be conducted by the Court before which the claim of juvenility has been raised.** The claim was firstly raised at the time of trial.

9) Sub Rule 6 of Rule 12 specifically contemplates that the provisions shall apply to those disposed of cases where the status of juvenility has been determined in accordance with the provisions contained in Sub Rule 3 of Rule 12 requiring disposition of the sentence under the Act for passing appropriate order in the interest of juvenile in conflict with the Law.

- 10) In the case of **Ramsuresh Singh V/s. Prabhat Singh @Chhotu Singh [2009 Cr.L.J. 3997]**, the Hon'ble Apex Court has held that :

*“The opinion of the Medical Board is to be preferred only when a date of birth certificate from the school first attended is not available. The condition laid down in Section 35 of the Evidence Act for proving an entry pertaining to the age of a student in a school admission register is to be considered for the purpose of determining the relevance thereof. An entry in a school register may not be a public document and, thus, must be proved in accordance with law, as has been held by this Court in the case of **Birad Mal Singhvi [A.I.R. 1988 SC 1796]**. That same standard is required to be applied for the purpose of Section 35 of the Evidence Act both in civil as also criminal proceedings”.*

- 11) In the case of **Ashwani Kumar Saxena Vs. State of M. P. [2012 (9) S.C.C. 750]** wherein the Hon'ble Apex Court has issued directions as follows:

*“We also remind **all Courts/J.J. Board and the Committees** functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate etc. mentioned in Rule 12 (3) (a) (i) to (iii). The courts in such situations act as a *parens patriae* because they have a kind of guardianship over minors who from their legal disability stand in need of protection”.*

- 12) In view of the above discussion, the matter is remanded to the Court of Sessions, Bombay.
- 13) The learned **Sessions Court** shall hold an inquiry into the genuineness of the school leaving certificate filed by the appellant along with the application below Exhibit 28. the learned Sessions Court shall call for the

records from St. Aloysius High School, Bandra, Mumbai and record evidence to that effect. The learned Sessions Judge to consider the application below Exhibit 28 along with school leaving certificate and conduct an inquiry into the same by recording evidence in accordance with Law. The learned Sessions Court is directed to conduct an inquiry as far as possible within 30 days from the date of receipt of this order.

14) It is made clear that the said inquiry is not to be construed as a trial of the offender/appellant and evidence be recorded only to inquire into the genuineness of the certificate.

15) The records of Sessions Case No. 890 of 1995 be remanded to the Court of Sessions, Mumbai.

16) Legal fees to be paid by the High Court Legal Services Committee to the appointed Advocate Shri. Kartik Garg is quantified at Rs. 5000/-. The same shall be paid within 3 months from today.

17) In view of the above directions, the application stands disposed of. Appeal is kept pending.

18) Office to communicate this order to the concerned Court, forthwith.

(SMT. SADHANA S. JADHAV, J.)