

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

CRIMINAL WRIT PETITION NO.1658 OF 2018

Shaikh Azhar @ Shahrukh s/o Shaikh Shikur
Age : at present 19 yrs, Occu : Nil,
R/o. Panchsheel Nagar, Parbhani,
Dist. Parbhani.

.. Petitioner
(Orig. Accused No.2)

Versus

The State of Maharashtra
Through Police Station Officer,
Kotwali Police Station, Parbhani,
Dist. Parbhani

.. Respondent

...
Advocate for Petitioner : Shri Swapnil S. Rathi
APP for Respondent – State : Shri S.P. Sonpawale
...

CORAM : P.R. BORA, J.
Dated: December 14, 2018

ORAL JUDGMENT :

1. Heard Shri Rathi, learned Counsel appearing for the petitioner and Shri Sonpawale, learned APP appearing for the respondent – State.

2. The present petitioner is facing prosecution for the offences under Sections 376 (2)(i), 376(2)(n), 506 r.w. 34 of the Indian Penal Code and under Sections 3(1)(12), 3(2)(5) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act and under Section 4 of the Protection of Children

from Sexual Offences Act. It is the contention of the petitioner that, he is below the age of 18 years and as such, he must be tried as juvenile. The petitioner had, therefore, filed an application before the Juvenile Justice Board and the same came to be rejected by the said Board vide order passed on 03.11.2016. The petitioner though preferred Criminal Appeal No.66 of 2016 before the Sessions Court at Parbhani, the same has also been dismissed by Ad-hoc Additional Sessions Judge - 1 vide order passed on 15.12.2016.

3. The learned Counsel for the petitioner submitted that, the Courts below have manifestly erred in considering that the ossification test was suggesting the age of the present petitioner in between 18.5 to 19.5 on the date of his conducting the ossification test. The learned Counsel submitted that, the test was conducted after about one year of the occurrence of the alleged incident. The learned Counsel further submitted that, having regard to the fact as above, there is reason to believe that at the time of commission of offence, the petitioner was below the age of 18 years and was required to be treated as juvenile. The learned Counsel submitted that, the error of margin is to be

considered in such cases of two years and position which favours the accused has to be accepted. The learned Counsel submitted that, having regard to the settled law as above, the Courts below must have held the age of present petitioner below 18 years and must have accepted the application filed by him.

4. Learned APP Shri Sonpawale has opposed the application. The learned APP submitted that, the trial Court has passed the elaborate order and has rejected the application filed by the petitioner. The learned APP further submitted that, the contentions as were raised have been turned down by the Sessions Court also by recording sound reasons therefor. The learned APP pointed out that, both the Courts below have observed that, an attempt was made to file on record the fake school leaving certificate by the petitioner. The learned APP, therefore, submitted for rejecting the writ petition.

5. I have given due consideration to the submissions made by the learned Counsel appearing for the petitioner and the learned APP appearing for the State. I have perused the orders passed by the Courts below.

6. The Chief Judge of the Juvenile Justice Board, Parbhani has elaborately considered the entire evidence and has recorded its conclusion. Perusal of the order passed by the said Court reveals that, the medical evidence has been meticulously considered by the said Court. In para 16 and 17 of its Judgment, the Court has referred to the observations in the medical examination and applying the parameters which are ordinarily to be applied for the evidence in the form of ossification test, the Court has rejected the contention of the petitioner that at the time of the commission of the offence, he was below the age of 18 years.

7. The order passed by the Sessions Court reveals that, all legal submissions made in this regard and the Judgments relied upon have been duly considered by the said Court and thereupon the order passed by the Juvenile justice Board has been confirmed by the Sessions Court.

8. The entire thrust of learned Counsel Shri Rathi was

on the ossification test conducted of the petitioner – accused. The ossification test was conducted on 30.09.2016. On the said date, the age of the juvenile as per the ossification test was 18.5 to 19.5 years. It was the contention of Shri Rathi that, the alleged incident had allegedly occurred in the year 2015 approximately in the month of October - November 2015. It was, therefore, further contention of Shri Rathi that, on the date of commission of offence, the petitioner – accused was certainly below the age of 18 years.

9. I am, however, not convinced with the argument so made. It is true that, the opinion based on the radiological examination is a useful guiding factor for determining the age of a person, but it is not incontrovertible. Commenting on the evidentiary value of the opinion of a doctor, based on x-ray test, as to the age of a person, the Hon'ble Apex Court in the case of **Ramdeo Chauhan alias Raj Nath Vs. State of Assam [(2001) 5 S.C.C. 714]** had observed thus:

“.... An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact

date of birth of the person concerned. Too much of reliance cannot be placed upon text books, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitudes, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform.

It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.”

10. It was also contended that, the benefit of the margin of one year in the lower side be given to the petitioner – accused and if it is given the age of the petitioner – accused comes below the age of 18 years and consequently he has to be held as a juvenile. I do not find much substance in the aforesaid argument also. The bare perusal of rule 13 (3)(b) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 shows that the Court, Board, or the Committee making the enquiry for determination of age, may, if considered necessary, is to give the benefit to the child or juvenile while considering his or her age within a margin of one year on lower side, recording the reasons therefor. It is, thus, quite clear that it is not mandatory for the Court to give the benefit of margin of one year in the lower side

to every child or juvenile. The Court has to consider the case of a particular child or juvenile, to see whether such benefit can be given to him or her or not? In the present case, the Courts below, after taking into consideration the physical built of the petitioner has found that such benefit cannot be given to him.

11. As I noted herein above, the learned trial Judge has scrutinized the ossification test report. I have rarely seen a trial Judge scanning the ossification test report so methodically as has been done in the present matter. The reasoning recorded by the learned Trial Judge is very sound and shows that the petitioner was not below the age of 18 years on the date of alleged occurrence. I, therefore, do not see any irregularity in the order passed by the learned Trial Court denying the benefit to the petitioner considering his physical built. The learned Sessions Judge has concurred with the finding recorded by the Trial Court.

12. After having considered the entire material on record, I do not see any reason for causing interference in the

orders passed by the Courts below. Moreover, as has come on record, an attempt was made by the petitioner to place on record the false documents in respect of his date of birth. That is the additional ground, which weighed in the minds of the Courts below in rejecting his request to hold him juvenile. The petitioner has failed in substantiating his contention that, on the date of commission of offence, he was below the age of 18 years. The Courts below have in the circumstances allegedly rejected the request of the petitioner to hold him as juvenile. The writ petition being devoid of any substance deserves to be dismissed and is accordingly dismissed.

(**PR. BORA, J.**)

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