

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION

Before:

The Hon'ble Justice Ananda Kumar Mukherjee

C.R.R. 212 of 2003

Chandan Ram

-Vs-

The State of West Bengal & Anr.

For the Petitioner: Mr. Karabi Roy, Adv.

For the State: Mr. Saswata Gopal Mukherjee, Adv.
Mr. Ashok Das, Adv.
Mr. Binay Panda, Adv.

Heard on : 08.03.2022.

Judgment on: 15.03 2022.

Ananda Kumar Mukherjee, J. :-

1. This revisional application under section 401 read with section 482 of the Code of Criminal Procedure has been filed by the petitioner assailing the judgment and order dated 21.09.2002 passed by Learned Sessions Judge, Nadia in Criminal Appeal No. 23 of 2002, whereby the appeal was allowed in part, maintaining the conviction, the sentence imposed by Learned Assistant Sessions Judge, 2nd Court, Krishnagar in Sessions Case No. 23(2) of 2001 was reduced from seven years to rigorous imprisonment for five years.

2. Brief fact of the case leading to this revision is that, on 10.06.1995 Smt. Shaila Mallick, the opposite party no. 2, a resident of Krishnagar Women's College Hostel Campus, lodged a written complaint at Krishnagar Kotwali Police Station stating that on 10.06.1995 at about 6:00 P.M. her younger daughter 'X' (name of the victim is not revealed) stood near the Hostel No. 1 of the College Hostel, when the petitioner along with two other persons namely Sankar and Madhai were found proceeding towards the date tree behind the College Hostel. The daughter of opposite party no. 2 also went to pluck dates. When opposite party no. 2 proceeded to the place behind the Hostel, she found the petitioner was committing sexual intercourse with her daughter. On seeing her the other two persons, Madhai and Sankar fled away. The petitioner pushed the opposite party and also fled away. On being asked the daughter of opposite party no. 2 disclosed to her about the incident that the petitioner committed rape upon her.

3. On the basis of the written complaint Kotwali Police Station Case No. 165 of 1995 was registered on 10.06.1995 under section 376 of the Indian Penal Code. In course of investigation police arrested the petitioner on 11.06.1995 and he was subsequently enlarged on bail. On completion of investigation police submitted charge sheet against the petitioner under section 376 of IPC. Cognizance of the offence was taken by Learned S.D.J.M, Krishnagar and the case was committed to the court of Learned Sessions Judge, Krishnagar. The case was then transferred to the court of Learned Assistant Sessions Judge, 2nd Court, Krishnagar for trial. Charge was framed against the petitioner and after

trail the petitioner was found guilty of the offence under section 376 of IPC. He was convicted and sentenced to rigorous imprisonment for seven years and a fine of Rs. 3,000/- in default to suffer rigorous imprisonment for three months.

4. Being aggrieved the petitioner filed an appeal against the judgment of sentence and conviction. The Criminal Appeal No. 23 of 2002 was heard by Learned Sessions Judge, Nadia. The conviction of the petitioner was affirmed but the appeal was allowed in part by way of reducing the period of sentence from seven years to five years. The petitioner thereafter preferred this revisional application challenging the legality of the judgment and order passed by the Learned Sessions Judge in Criminal Appeal No. 23 of 2002, on the grounds inter alia, that Learned Sessions Judge, Nadia has failed to appreciate the evidence on record and the facts elicited in cross-examination. It is also contended that Learned Sessions Judge has not taken into consideration the medical report of the victim girl and that due to strong enmity between the family of the petitioner and opposite party no. 2 the petitioner has been falsely implicated in this case. It is urged that Learned Sessions Judge was wrong in placing reliance upon the evidence of the victim as she had been tutored by her mother before making statement before the Learned Judicial Magistrate. According to the petitioner the investigating officer having failed to send the wearing apparel of the victim and the petitioner for chemical examination gives rise to adverse presumption against the prosecution case. It is contended on behalf of the petitioner that the finding is contrary to the evidence adduce by prosecution witnesses and the same is liable to be set aside.

5. During trial of the case and also at the stage of appeal the petitioner did not take any plea of juvenility. After two consistent judgments of conviction and sentence passed against the petitioner, he preferred a criminal revision before this court for setting aside the impugned judgment passed by the Appellate Court. However, there is no whisper in the revisional application or in the grounds stated therein that the impugned judgment was required to be set aside on the ground that the petitioner was a juvenile at the time of alleged occurrence.

6. On 05.02.2003 the petitioner was released on bail with one surety to the satisfaction of Learned Chief Judicial Magistrate Krishnagar.

7. For the first time on 05.07.2021 the petitioner claimed himself to be a juvenile on the date of occurrence and to that effect he filed an application bearing No. CRAN 1 of 2021 before this court. It has been claimed that on the basis of his school leaving certificate, his date of birth is 24.12.1981 and on the date of occurrence, that is on 10.06.1995 he was fourteen years and six months old. The petitioner prayed for sending down the record to the court below for holding an enquiry under the Juvenile Justice (Care and Protection of Children) Act 2015 in respect to Juvenility of the petitioner on the date of occurrence. The prayer of the petitioner was allowed by this court. On 23.08.2021, the Learned Assistant Sessions Judge, 2nd Court, Krishnagar, Nadia was directed to hold an enquiry and find out the juvenility of the petitioner/ offender at the time of occurrence, upon taking evidence on the issue of juvenility.

8. Learned Assistant Sessions Judge, 2nd Court, Krishnagar after holding enquiry submitted a report dated 28.01.2022 to the effect that the petitioner, 'Y' was aged thirteen to fourteen years and he was a juvenile on the date of occurrence on 10.06.1995. In arriving at such a decision the concerned court held enquiry under section 94 (2)(i) of Juvenile Justice (Care and Protection of Children) Act, 2015. The school admission registrar where the petitioner was first admitted in the primary school has been produced as exhibit 3. The date of birth of petitioner in the Admission Register appears as 24.12.1981 and the teacher in charge of the school was examine on oath.

9. After ascertaining the age of the petitioner by way of enquiry, there is no doubt that the petitioner at the relevant time was far below sixteen years of age. According to the definition of "Juvenile" under section 2 (35) of the Juvenile Justice Act 2015, the age of the child should be below the age of eighteen years.

10. Since the ground of juvenility was not canvassed in the application for revision, a supplementary affidavit has been filed by the petitioner on 24.02.2022 serving copy of the same upon the learned advocate for the State supported by an affidavit of service which were taken on record.

11. Learned advocate for the petitioner argued that since the petitioner was a juvenile on the alleged date of occurrence and the same has been established by an enquiry, he is not liable to undergo the sentence of imprisonment imposed against him in the impugned judgment. My attention has been drawn to the provisions under section 5 of Juvenile Justice (Care and Protection Act),

2015, wherein it has been laid down that “Where an inquiry has been initiated in respect of any child under this Act, and during the course of such inquiry, the child completes the age of eighteen years, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued by the Board and orders may be passed in respect of such person as if such person had continued to be a child.”. According to learned advocate for the petitioner the offender should be placed before the Juvenile Justice Board for the next course of action in this matter. It may be noted that no argument is advanced challenging the conviction of the petitioner for the offence.

12. Learned advocate for the respondent/state argued that by two consecutive decisions of courts it has been established that the petitioner is guilty of committing a heinous offence punishable under section 376 of the IPC. It is argued that there is no scope and reason for interfering with the order of conviction passed by Learned Assistant Sessions Judge, 2nd Court, Krishnagar in Sessions Case No. 23(2) of 2001 and thereafter affirmed by the First Appellate Court in Criminal Appeal No. 23 of 2002. It is submitted on behalf of the State that the plea of juvenility of the petitioner had not been raised on earlier occasion and even at the time of filing of the instant application for revision. It is submitted that the Juvenile Justice Act provides that such plea can be raised at any stage. Therefore, the respondent/ state have no objection regarding the time of raising such plea by the petitioner. It is argued that Learned Assistant Sessions Judge, 2nd Court, Krishnagar, has held

an enquiry under section 94(2)(i) of Juvenile Justice (Care and Protection of Children) Act 2015 and by order dated 28.01.2022 has determined the age of the offender as thirteen to fourteen years on the date of occurrence, that is on 10.06.1995. It is urged that under the provisions of section 8 (2) of Juvenile Justice (Care and Protection of Children) Act, 2015 this Court is empowered to exercise the powers conferred on the Board when proceedings come before this court under section 19 or in appeal, revision or otherwise. It is further argued that instead of placing the petitioner/ offender before the Juvenile Justice Board at the District after completion of the appeal, appropriate order may be pass by this court in respect of the petitioner in lieu of the sentence.

13. Heard learned advocates for the petitioner and the respondent, I have considered the impugned judgment in Criminal Appeal No. 23 of 2002 and the one passed in Sessions Case No. 23 of 2001 by the respective courts at Nadia. Perused the Enquiry report submitted regarding determination of age of the petitioner. In compliance with order dated 23.08.2021 and 07.12.2021 passed by this court learned Assistant Sessions Judge, 2nd court, Krishnagar, Nadia, held an Enquiry under section 94 (2)(i) of Juvenile Justice (Care and Protection of Children) Act 2015, for determination of the age of the petitioner. It is stated in his report dated 28.01.2022 that he has considered documents in support of the age of the petitioner, produced before him. The Admission Register of the Primary School first attended by the petitioner, which he marked as exhibit 3, the date of birth of the petitioner is recorded, as 24.12.1981. The same was produced by the Teacher-in-charge of the school who was examined on oath.

The petitioner was subsequently transferred and admitted at C.M.S St. John's High School. The Admission Register of the school has been produced as exhibit 1. In page 38 of the Register the date of birth of the petitioner appears at 24.12.1981. Learned Assistant Sessions Judge, in his report stated that he did not find any interpolation in the register produced by the Head master who was examined on oath. From the aforesaid documents and relying upon a decision of Hon'ble Apex Court in **Abuzar Hossain @ Gulam Hossain Vs. State of West Bengal AIR 2013 SC 1020**, and following the guideline laid down in section 94 of the Juvenile Justice (C.P.C) Act 2015, learned Assistant Sessions Judge, 2nd Court, Krishnagar arrived at a decision that the date of birth of the petitioner is 24.12.1981 and on the date of occurrence he was thirteen years and six months old. It is also stated that there is some discrepancy regarding the date of birth appearing in the Birth Certificate issued by the Krishnagar Municipality where his date of birth appears as 24.12.1980 and in the Admission Register his date of birth appears as 24.12.1981. Therefore, the petitioner at best could be fourteen years and six months old on the date of occurrence. I have no hesitation in accepting the Enquiry report submitted by the Assistant Sessions Judge 2nd Court, Krishnagar and on the basis of such report I find that the petitioner was between the age of thirteen to fourteen years on the date of occurrence, hence a Juvenile under the Act.

14. At this juncture it is apposite to take recourse to the principle laid down in the case of **Abuzar Hossain @ Gulam Hossain Vs. State of West Bengal**, where the Hon'ble Supreme Court held that "39.1. - A claim of juvenility may

be raised at any stage even after the final disposal of the case. It may be raised for the first time before this court as well after the final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not placed before the trial court and can be raised for the first time before this court though not pressed before the trial court and the appeal court.” Accordingly, the claim of the petitioner at this stage, in revision has been considered and on the basis of the enquiry held, it has been found that the petitioner was a juvenile in conflict with law on the date of occurrence. It is also found that he was below the age of sixteen years for which the sentence of imprisonment is not tenable against him.

15. Having considered the judgment passed in the Criminal Appeal. I find that nine prosecution witnesses were examined and relevant documents were produced. The victim has been examine as PW-6 and her mother, the de facto complainant as PW-5, the evidence of the victim regarding the offence committed by the petitioner has been clearly spelt out and the same has found corroboration from the evidence of her mother, an eye witness. It also appears that PW-2 Sankar Roy who had been accompanying the offender on the fateful afternoon has supported the prosecution story that the petitioner along with him and one Madhai had scaled the wall of the College Hostel for plucking dates from the date tree. The case had been argued on behalf of the defence on two scores. Firstly, it was contended that there was enmity between the petitioner and the family of the victim for which the petitioner has been falsely

implicated in the case. There was no material evidence to support the story of prior enmity between the petitioner and the de-facto complainant. The second facet of argument advanced on behalf of the petition was that the alleged victim was a consenting party to the act in question. Since the victim was a minor the question of consent has no bearing under the law and the same has not been accepted by the trial court and the appellate court. In the instant case the evidence adduced by the victim and her mother has clearly established the offence against the petitioner and non-production of the wearing apparels of the victim cannot destroy the prosecution case when there was better evidence and the medical evidence also supported the fact that there was some lacerated abrasion over the left arm of the victim.

16. Having considered the gamut of evidence adduced by prosecution witnesses, it appears that the same is cogent, consistent and succinct in nature, establishing the guilt of the petitioner beyond reasonable doubt. Therefore, there is no reason to interfere with the finding of the appellate court that the petitioner 'Y' was guilty of the offence under section 376 of the IPC.

17. Under section 18 (1)(e) of Juvenile Justice Care and Protection Act, "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,- (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 behavior and child's well-being for any period not exceeding three years". In the instant case the petitioner 'Y' is now 41 years old and no purpose would be served by releasing him on probation of good conduct. At this stage there is no scope for any reformation of a person who is above the age of 40 years. In view of the fact that the petitioner was a juvenile at the time of commission of the offence, no sentence can be imposed against him as such the sentence of rigorous imprisonment for five years and a fine of Rs. 3,000/- in default to rigorous imprisonment for three months as has been ordered in the impugned judgment is hereby set aside. However, the finding of the appellate court regarding the guilt of the petitioner and his conviction for the offence under section 376 of IPC calls for no interference.

18. Under section 24 of the Act the petitioner shall suffer no disqualification attached to such conviction of an offence under the law. The petitioner is hereby directed to appear before the Juvenile Justice Board in the District of Nadia within a month from the date of this order and the Board shall consider if the petitioner can be engaged in some suitable community service for one years under the supervision of the District Child Welfare Officer who shall report the performance of the petitioner before the Board on monthly basis.

Let a copy of the Judgment passed by the trial court and Appellate Court be placed before the Juvenile Justice Board, Nadia for appropriate order.

19. The revisional application is accordingly allowed in part and disposed of. Interim order if any stands vacated. Connected application are disposed of.

20. Let a copy of this judgment be sent to the court of Learned Sessions Judge Nadia, for information. Another copy of the judgment be send to the Principal Magistrate Juvenile Justice Board Nadia, for information and compliance.

21. Urgent Photostat certified copy of this order may be supplied to the parties expeditiously if applied for, maintaining all formalities.

(Ananda Kumar Mukherjee, J.)