

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION (APPCO) NO. 3 OF 2019
IN
CRIMINAL CONFIRMATION CASE NO. 1 OF 2017

Sandip Samadhan Shirsat @ Raghu Rokda ... Applicant

Versus

State of Maharashtra ... Respondent

Adv Ragini Ahuja i/by Dr. Yug M. Chaudhary for the applicant.

Smt. Aruna Pai, APP for the State.

**CORAM : B.P. DHARMADHIKARI &
SANDEEP K. SHINDE, JJ.**

RESERVED ON : 14/10/2019

PRONOUNCED ON : 22/10/2019

ORAL JUDGMENT (Per Dharmadhikari, J.) :

This application is taken out by the convicted accused no.2 contending that on the date of the incident i.e. on 09/05/2012, he was 16 years and 9 months old and therefore, a juvenile.

2. It is to be noted that the Additional Sessions Judge, Thane has vide judgment and order dated 11/05/2017 delivered in Sessions Case No. 599 of 2012 found the accused no.1 and the present applicant guilty of the offence punishable under section 302, 376(2)(g), 326 read with section 34 of Indian Penal Code. For the offence under section 302 read with section 34 IPC, they

have been sentenced to death while for the offence under section 376(2)(g) IPC, they have been sentenced to imprisonment for life for the remainder of life and for the offence under section 326 read with section 34 IPC, they are sentenced to RI for 10 years. In either case they have been sentenced to pay fine of Rs.5,000/- each and in default to suffer simple imprisonment for 5 years.

3. This court on 02/05/2019 after noticing that though an opportunity was given to State to look into the plea of juvenility, no specific stand was being taken, has made over the case to the convicting court to hold an enquiry into the plea.

4. Accordingly the Ad hoc District Judge-I and Additional Sessions Judge, Thane has by a confidential report dated 16/08/2019 pointed out that as per school leaving certificate, the date of birth of the applicant was 29/08/1995 and as per report of Government Hospital, Vashi the radio graphic bone age of the accused is more than 18 years at the time of committing of the offence and his present age on 01/08/2019 as per ossification test is more than 25 years. It is this report which is being looked into by this court today.

5. We have accordingly heard learned APP Smt Pai for the State and Advocate Ragini Ahuja for respondent no. 2 applicant.

6. Learned counsel for the applicant/accused no.2 has advanced arguments in the backdrop of the judgment of the Hon'ble Apex Court in the case of Ashwani Kumar Saxena Versus State of Madhya Pradesh reported at (2012) 9 SCC 750. She contends that the trial court has not recorded any definite finding on the question of date of birth or then about the juvenility of the said accused. She submits that the entry in the school records is not found to be tampered with and the date of birth reported on 27/06/2003 therefore ought to have been accepted. It is submitted that the opinion expressed by the radiologist of Navi Mumbai Municipal Council Hospital on 15/5/2012 is on the basis of x-ray reports and it is therefore, not determinative. The report of the Assistant Professor, Department of Forensic Medicine & Toxicology dated 1/8/2019 is again not a reliable document. She states that there can be error of two years on either side in these documents. Our attention is invited to section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 to submit that the date of the birth certificate from the school needs to be given primacy. In the absence thereof, birth certificate from the local body can be relied upon. When only these two options are not open, the determination by ossification test or any other medical age determination test can be looked into. She further points out

that such age is deemed to be the age for the purpose of 2015 Act.

7. Learned APP on the other hand invited our attention to the grave nature of the crime. She submits that in such matters, when there is no other option left, belatedly, defence of juvenility is taken. Such defence should not be entertained. The age was determined before commencement of the trial in the year 2012 itself and that determination was not questioned by the applicant. She points out that even on 01/08/2019 by applying the ossification test and looking into the other factors, the age has been worked out to be 25 years. It therefore, follows that in the year 2012, the applicant was above 18 years.

8. She submits that the date of birth recorded in the school leaving certificate is not available since it is recorded at the instance of the person who is not a real father of the applicant and that too on the strength of the affidavit given by him. She submits that even the local authority does not possess that record. In this situation in the absence of that record, the medical test relied upon on 15/05/2012 deserves to be given importance. It gets authenticated by the ossification test conducted on 1/8/2019.

9. She has placed strong reliance upon the judgment of the

Hon'ble Aepx Court in the case of Om Prakash Versus State of Rajasthan and another reported at 2012 (5) SCC 201 to buttress her submission & to explain perspective the courts must adopt.

10. There is no dispute between the parties in so far as legal provisions are concerned. The opinion by the radiologist dated 15/05/2012 is based upon x-ray report which shows that all the visualized Epiphysical centres have fused. Because of this finding, opinion given is radiographic bone age is above 18 years.

11. The opinion of Assistant Professor of Department of Forensic Medicine & Toxicology dated 1/8/2019 looks into five x-ray reports between the dates 29/07/2019 to 01/08/2019 and after recording the finding, the conclusion reached is from clinical and radiological examination, age as on 01/08/2019 is more than 25 years.

11. We have already mentioned supra the provisions of section 94 of the 2015 Act. The judgment of the Hon'ble Apex Court in the case of Ashwanikumar Saxena Vs. State of MP (supra) shows that the CJM court there felt that school records including marksheets could not be relied upon in support of the date of birth. That court had obtained report of ossification test and accepting that report, the application of juvenile was dismissed.

12. In criminal appeal, Additional Sessions Judge found that the best possible evidence was withheld by the appellant before it and the person who made entries in the school record was not examined. It therefore, dismissed the appeal. This order was confirmed by the High Court. It is in this backdrop that in paragraph 12, the Hon'ble Apex Court expressed its unhappiness with the mode and manner in which the issue was dealt with. Section 7A of Juvenile Justice Act, 2000 and Rule 12 of the 2007 Rules were not properly considered. In paragraph 13 Hon'ble Apex Court points out that if two views are possible on the age of the juvenile, the court should lean in favour of holding the accused to be juvenile in the border line cases. In paragraph 25 Hon'ble Apex Court explains that section 7A necessitates enquiry and not investigation or trial. In paragraph 26 Rule 12 has been considered. It is pointed out that such enquiry to determine the age needed to be completed within thirty days. In paragraph 31, Hon'ble Apex Court has observed as under :

"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."

13. In paragraph 32, it is pointed out that while seeking seeking

evidence the court can obtain the matriculation or equivalent certificate, if available. Only in the absence thereof, the court can obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of school record, the court can look for the birth certificate given by the Corporation or the municipal authority. The question of obtaining the medical opinion arises only if these documents are not available. It is further emphasized in paragraph 34 where it has again explained that the enquiry under the JJ Act and the 2007 Rules has got nothing to do with the enquiry under other legislations like entry in service, retirement etc. The Hon'ble Apex Court points out that there may be a situation where the entry made in the matriculation or equivalent certificate, the date of birth certificate from the school first attended or in the birth certificate issued by the local authority may not be correct. But court, Juvenile Justice Board or a committee functioning under the JJ Act, 2000 is not expected to conduct such a roving enquiry and to go behind such certificates to examine the correctness of the documents. We find that this observations hold good even qua section 94 of 2015 Act.

14. In Omprakash Vs. State of Rajasthan and Others (supra), the Hon'ble Apex court has taken a note of the difference in the

name of accused and the name mentioned in the certificate relied upon by him. Though accused Vijaykumar there contended that in the school records his date of birth was 30/6/1990, there was no dispute raised by him that his name was only Vijaykumar and not alias Bhanwar Lal. He did not urge that name of accused Vijaykumar was wrongly mentioned in police papers as Vijaykumar alias Bhanwar Lal. Thus without raising this dispute, the academic record of Vijaykumar @ Bhanwar Lal was produced. The complainant there had stated that the name of accused was Bhanwar Lal which was recorded in the Government Secondary school on 18/12/1993 and on 22/4/2996 where his date of birth was recorded as 12/12/1988.

15. It is in this backdrop that the observations of the Hon'ble Apex Court need to be appreciated. In paragraph 13, Hon'ble Apex Court has pointed out specific case of complainant that Bhanwar Lal and Vijaykumar in fact are one and same person and Jogaram has cooked up a story that he had another son named Bhanwar Lal whose date of birth was 12/12/1988 and who expired in 1995. This story is found false since Bhanwar Lal continued in the school upto 24/2/1996. The approach of the courts below in accepting the plea of juvenility in these facts is found unsustainable. The observations of the Hon'ble Apex Court

in paragraphs 22 and 23 of the judgment show obligation on the courts not to lightly accept such plea.

16. In the present facts, report submitted by the Ad hoc District Judge I and Additional Sessions Judge, Thane does not state that 29/8/1995 is not the date of birth of the accused no. 2. Rajendra s/o. Janardan Dhanuka headmaster of Zilla Parishad primary school, Kupta, Panchayat Samiti, Balapur, District Akola has stated that accused no. 2 was studying in his school in 4th standard and left it on 1/5/2007 after attaining majority. As per school records his father Samadhan gave affidavit and got him admitted in first standard. In that affidavit he has mentioned 29/8/1995 as the date of birth of his son.

17. The mother of accused no.2 stated that the accused was born to her from first husband in Saibai Mote Hospital, Shegaon. Her husband did not come to fetch her thereafter and she was staying with her parents. As her husband Sahebrao did not come back for 4/5 years, her parents got her married with Samadhan. She and accused no. 2 then started staying with Samadhan. In the year 2003, Samadhan got her son admitted in Zilla Parishad school. She was not in a position to give exact date of birth.

18. Saibai Mote Hospital at Shegaon is under the health department which gave certificate that the old records with it

were lying scattered and could not be traced out. As per law Municipal employee used to visit and collect the birth information every week and hence, the information should be obtained from the municipal hospital. The Registrar of Deaths and Births, Shegaon Municipal Council has on 31/7/2019 issued non availability certificate as that entry was not found in the records.

19. The admission record of Zilla Parishad school shows that the accused no.2 was admitted on 27/6/2003 and at that time his date of birth has been recorded as 29/08/1995.

20. The State Government or the police machinery could not bring on record any material to show that the accused no.2 was born prior to 29/08/1995. It could have attempted to find out the real father i.e. the first husband of the mother of accused no. 2.

21. The medical papers show that on the strength of ossification test or radiological test, the age on the date of offence is shown to be above 18 years. The exact age has not been worked out. If possibility of error on either side is kept in mind, it cannot be said that those medical papers established the age of accused no. 2 to be above 18 years on the said date. It cannot be concluded on the basis of these medical test reports that 29/8/1995 is not the date of birth of accused no. 2 .

22. In this situation, we find that the date 29/08/1995 as

mentioned in the school records on 27/6/2003 needs to be accepted and acted upon. Accordingly we find accused no. 2 to be a juvenile.

23. With the result, we discharge him from Sessions Case No. 599 of 2012 and quash and set aside the findings recorded against him in the judgment dated 11/5/2017 therein.

24. We direct the respondent State to produce him before the concerned Juvenile Justice Board for further process in accordance with 2000 Act.

25. Needless to mention that the proceedings before this High Court in Criminal Case No. 1 of 2017 shall continue as against accused no. 1.

26. Criminal Application No. 3 of 2019 is accordingly allowed and disposed of.

(SANDEEP K. SHINDE, J.)

(B.P. DHARMADHIKARI, J.)

* Corrected as per speaking to minutes of order dated 28/02/2020.