

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 10.10.2019

+ **W.P.(CRL) 1543/2018**

NARDEV @ SONU

..... Petitioner

Versus

THE STATE & ANR

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Ms Vagisha Kochar, Advocate.
For the Respondents : Mr Rahul Mehra, Standing Counsel with
Mr Chaitanya Gosain and Mr Amanpreet
Singh, Advocates for State.
SI Pankaj Kumar, P.S. Khyala.
Ms Vidhi Gupta for Mr Saurabh Kaushal,
Advocate for R2/Complainant.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, praying that the trial of the case captioned '*State v. Nardev @ Sonu: FIR No. 448/2014*' under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereafter 'POCSO Act') and Section 376 of the Indian Penal Code, 1860 (IPC) be transferred from the Court of learned ASJ to the Juvenile Justice Board for its adjudication.

2. The present petition is founded on the petitioner's assertion that he was a minor on the date of the commission of the offence (that is, on 02.06.2014).

3. Briefly stated, the relevant facts are as under:-

3.1 The petitioner is accused of committing an offence under Sections 5(m) and 6 of the POCSO Act and Section 376 of the IPC. The said offence is alleged to have been committed on 02.06.2014. This was reported by the mother of the prosecutrix on 11.06.2014 and FIR No. 448/2014 under Section 376 of the IPC and Sections 5 and 6 of the POCSO Act was registered with P.S. Khyala. At the material time, the prosecutrix was aged five years.

3.2 The complainant – the mother of the prosecutrix – had reported that she along with her husband, three daughters and two sons were residents of JJ Colony, Raghubir Nagar, Delhi. The petitioner had been working with her husband and had been residing with them for the past eight years. She had stated that on the date of the incident, that is on 02.06.2014, she had taken two of her daughters to the market at around 09:00 p.m. At the material time, her husband (the father of the prosecutrix) was also not available at their home as he had left to visit his village (Sisarka in district Badaun, Uttar Pradesh). At the material time, the prosecutrix along with her two brothers and petitioner were at home. The complainant stated that she came back at around 09:30 p.m. and found her daughter crying. She pointed out towards her private area and stated that Sonu (the petitioner herein) had done “*gandi baat*” with

her. She had also stated that she saw blood stains in the said area. The complainant had reported that she washed her daughter and her clothes and waited for her husband to come back from the village. When he did not arrive, she went to the village herself. She and her husband came back from the village and on their return, lodged the aforementioned FIR on 11.06.2014.

3.3 After the registration of the said FIR, the prosecutrix was medically examined. Thereafter, her statement as well as statement of her mother were recorded under Section 164 of the Code of Criminal Procedure, 1973 (CrPC), before the concerned Magistrate. The petitioner was arrested on 12.06.2014. After investigation, on 09.07.2014, a chargesheet was filed against the petitioner charging him with the offence under Section 376 IPC and Sections 5(m) and 6 of the POCSO Act.

4. The petitioner had, thereafter, filed an application on 18.09.2014, under Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereafter the 'JJ Act, 2000'). The Trial Court had, after inquiry, determined the year of the petitioner's birth to be 1989/1990. The offence was alleged to have been committed on 02.06.2014 and since the age of the accused, as determined, was above eighteen years on the date of the alleged offence, the trial court rejected the petitioner's application by an order dated 08.01.2015.

5. The petitioner preferred a criminal revision petition (Crl. Revision Petition No. 308/2015) challenging the order dated

08.01.2015 before this Court. However, the same was dismissed in default and for non-prosecution on 23.11.2015. It is averred that the petitioner had filed another application under Section 7A of the JJ Act, 2000, claiming that he was a juvenile on the date of the alleged offence. The Trial Court was of the view that the said application was in effect, seeking a review of an earlier order dated 08.01.2015 and the Court did not have jurisdiction to review the said order. Consequently, the said application was also dismissed by an order dated 26.07.2016.

6. The petitioner had also moved an application, *inter alia*, praying that a bone ossification test be conducted. Although the petitioner's applications under Section 7A of the JJ Act 2000 had been dismissed, the Court had not disposed of the petitioner's application for conducting the said medical test. On the same being pointed out, the Trial Court considered the said application and by an order dated 21.12.2016, allowed the same.

7. Pursuant to the said order, the petitioner was medically examined on 16.01.2017 by the Age Determination Board at DDU Hospital, Hari Nagar. The medical report submitted pursuant to the aforesaid examination, *inter alia*, stated that '*the Estimated bone age is between 22 years to 30 years*'.

8. It is apparent from the above that the petitioner, essentially, seeks to challenge the orders dated 08.01.2015 and 26.07.2016, whereby his applications under Section 7A of the JJ Act, 2000 were rejected.

9. It is contended on behalf of the petitioner that the Trial Court had erred in rejecting the school leaving certificate issued by the Primary School, Sisarka, Badaun. The said certificate clearly recorded the petitioner's date of birth as 14.04.1999.

10. Ms Kochar, learned counsel appearing for the petitioner, contended that there was no doubt as to the genuineness of the petitioner's School Leaving Certificate. The Head Master of the said primary school was examined as CW-1 and had produced the admission register, which indicated that the petitioner was admitted to the Ist standard on 30.07.2005 and had studied at the school up to the Vth standard. She submitted that in terms of Rule 12(3) of the Juvenile Justice (Care and Protection) Rules, 2007 (hereafter 'the Rules'), the date of birth certificate from the school first attended was required to be given precedence over any medical report. She stated that only in the absence of any such certificate, the question of seeking a medical opinion would arise. She submitted that since in the present case, a school leaving certificate recording the petitioner's date of birth was available, there was no necessity for the Court to conduct any medical test. She relied upon the decision of the Supreme Court in **Ashwami Kumar Saxena v. State of M.P.: (2012) 9 SCC 750**, in support of her contention. She also referred to the decision of the Supreme Court in **Shah Nawaz v. State of Uttar Pradesh and Anr.: (2011) 13 SCC 751**.

11. Next, she submitted that the bone ossification test was conducted on 16.01.2017 and the report had indicated that the lower limit of the bone age to be twenty-two years. She stated that since the offence was

allegedly committed on 02.06.2014, the petitioner's age on the said date was approximately nineteen and a half years. She submitted that courts have, in various decisions, allowed for an error of two years; and if this aspect is factored in, the petitioner's age at the material time would have been seventeen and a half years. Consequently, the petitioner was required to be tried by a Juvenile Justice Board. She relied upon the decision of the Supreme Court in **Ram Suresh Singh v. Prabhat Singh: (2009) 6 SCC 681**; **Jaya Mala v. Home Secretary, Govt. of J&K: (1982) 2 SCC 538**; and **Jyoti Prakash Rai @ Jyoti Prakash v. State of Bihar: (2008) 15 SCC 233**, in support of her contention. She also referred to the decision of this Court in **Shweta Gulati and Anr. v. State of Govt. of NCT of Delhi: 251 (2018) DLT 667**.

12. Mr Mehra, learned Standing Counsel countered the aforesaid submissions. He referred to the decision of the Supreme Court in **Sanjeev Kumar Gupta v. The State of Uttar Pradesh and Anr.: Crl. Appeal No. 1081/2019 decided on 25.07.2019** and contended that in cases where there are doubts as to the correctness of the date of birth as reflected in the matriculation certificate or the certificate issued by the school, the Court is required to conduct an inquiry and it is not necessary that the school certificate be accepted as conclusive proof of the age of the applicant.

Reasons and Conclusion

13. At the outset, it is relevant to refer to Section 7A of the JJ Act, 2000. The same 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 order, and the sentence if any, passed by a court shall be deemed to have no effect.”

14. In terms of sub-section (1) of Section 7A of the JJ Act, 2000 whenever a claim of juvenility is raised, a Court is required to make an inquiry and to take such evidence as may be necessary to determine the age of a person. The Court is required to record a finding whether the person is juvenile or a child or not stating his age as nearly as may be. Rule 12 of the said Rules sets out the procedure to be followed in determination of age. The said Rule is set out below:-

“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 of 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.”

15. In **Ashwani Kumar Saxena** (*supra*), the Supreme Court had emphasised that Section 7A of the JJ Act, 2000 obliges the Court to make an inquiry and not conduct an investigation or trial under the provisions of the CrPC. The Court explained that such inquiry is required to be conducted as provided under the Rules. The Court had further observed as under:-

“29. The Code lays down the procedure to be followed in every investigation, inquiry or trial for every offence,

whether under the Penal Code or under other penal laws. The Code makes provisions for not only investigation, inquiry into or trial for offences but also inquiries into certain specific matters. The procedure laid down for inquiring into the specific matters under the Code naturally cannot be applied in inquiring into other matters like the claim of juvenility under Section 7-A read with Rule 12 of the 2007 Rules. In other words, the law regarding the procedure to be followed in such inquiry must be found in the enactment conferring jurisdiction to hold the inquiry.

30. Consequently, the procedure to be followed under the JJ Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. We cannot import other procedures laid down in the Code of Criminal Procedure or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the court exercising powers under Section 7-A of the Act. In many of the cases, we have come across, it is seen that the criminal courts are still having the hangover of the procedure of trial or inquiry under the Code as if they are trying an offence under the penal laws forgetting the fact that the specific procedure has been laid down in Section 7-A read with Rule 12.

31. We also remind all courts/Juvenile Justice Boards and the Committees functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate, etc. mentioned in Rules 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.

32. “Age determination inquiry” contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of

birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the abovementioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.”

16. However, the Supreme Court had also observed that in cases where documents or certificates are found to be fabricated, the Court, the JJ Board or the Committee was also required to examine the medical report for age determination. Thus, clearly, where the documents produced do not inspire confidence and there is reason to believe that the same do not correctly record the date of birth, the Court is not precluded from undertaking further inquiry in the matter. In ***Abuzar Hossain alias Gulam Hossain v. State of West Bengal: (2012) 10 SCC 489***, the Supreme Court observed as under:

“39.3. As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rules 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry Under Rule 12. The statement recorded Under Section 313 of the Code is too tentative and may not by itself

be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard-and-fast Rule can be prescribed that they must be prima facie accepted or rejected. In *Akbar Sheikh*: (2009) 7 SCC 415: (2009) 3 SCC (Cri.) 431] and *Pawan*: (2009) 15 SCC 259: (2010) 2 SCC (Cri.) 522] these documents were not found prima facie credible while in *Jitendra Singh*: (2010) 13 SCC 523: (2011) 1 SCC (Cri.) 857] the documents viz. school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the Appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the delinquent."

17. The decisions of the Supreme Court in *Ashwani Kumar Saxena* (*supra*) and *Abuzar Hossain* (*supra*) were considered by the Supreme Court in a later decision in *Parag Bhati (Juvenile) through Legal Guardian-Mother-Smt. Rajni Bhati v. State of Uttar Pradesh and Anr.*: (2016) 12 SCC 744. In its decision, the Supreme Court referred to Section 7A of the JJ Act, 2000 and Rule 12 of the Rules and observed as under:-

"16) From a reading of the aforementioned statutory provisions, it is clear that under Section 7A of the JJ Act, the court is enjoined to make an inquiry and take such evidence as may be necessary to determine the age of the person who claims to be a juvenile. However, under Rule 12, the Board is enjoined to take evidence by obtaining the matriculation certificate if available, and in its absence, the date of birth certificate from the school first attended and if it is also not available then the birth

certificate given by the local body. In case any of the above certificates are not available then medical opinion can be resorted to. However, if the Board comes to the conclusion that the date of birth mentioned in the matriculation certificate raises some doubt on the basis of material or evidence on record, it can seek medical opinion from a duly constituted medical board to determine the age of the accused person claiming juvenility.”

18. In a subsequent decision in *Sanjeev Kumar Gupta* (*supra*), the Supreme Court considered the earlier decisions and allowed the appeal against the decision of the High Court, accepting the claim of juvenility on the basis of a matriculation certificate. The Court noted that the date of birth recorded in the matriculation certificate was solely on the basis of a final list of students forwarded by the Head Master of the Secondary School. The Head Master of the said school had deposed that the date of birth of the students was noted down at the time of the admission as per the information given by the parents. The Court observed that there were several other documents on record including the Aadhar card and driving license, which indicated a different date of birth of the accused and considering the same, the accused was held not to be a juvenile on the date of the alleged offences.

19. It is clear from the above that Rule 12(3) of the Rules merely sets out the documents which are required to be accepted in the order of preference. If a matriculation or an equivalent certificate is available and there is no reason to doubt the same, the Court must accept the said certificate as proof of the date of birth of the accused. If an unimpeachable matriculation certificate is not available, the Court can

proceed to consider the date of birth certificate from the school first attended. And, if the same is also not available, the Court is required to rely on the birth certificate issued by a corporation, a municipal authority or a Panchayat. A medical opinion is required to be sought only if none of the aforesaid documents – matriculation or equivalent certificate, date of birth certificate from the school first attended; or the birth certificate by a corporation/municipal authority/Panchayat – are not available. It is implicit in Rule 12(3) of the said Rules that the said documents be of reliable quality. However, if it is found that the said documents are not reliable and there is a doubt as to the date of birth recorded therein, the Court would not be bound to accept the said documents as conclusive proof of the date of birth of the accused.

20. In the present case, the Head Master of the Primary School, Sisarka, Block Faizgaon, Badaun, Uttar Pradesh had produced the school admission register, which clearly indicated that the petitioner was admitted to the school in the Ist standard on 30.07.2005. His date of birth was recorded as 14.04.1999. The petitioner had studied up to Vth standard at the said school and was on the rolls of the school till 30.06.2009. The Head Master had also duly verified the school leaving certificate and there is no controversy with regard to its genuineness.

21. The petitioner's father had deposed that he was married in the year 1985 and the petitioner was born four-five years after his marriage. He had also stated that his daughter (the younger sibling of the petitioner) was born one year after the petitioner's birth. He had further stated that the petitioner was admitted to school by his wife. However,

he did not know the date of birth of any of his children. In his cross-examination, CW-2 had deposed that he did not know the date of his marriage but it could have been five years prior to 1985 or five years thereafter.

22. Clearly, the deposition of the petitioner's father regarding the date and year of his marriage is unreliable. In his deposition, he had stated that he was married in the year 1985. However, in his cross-examination, he had stated that he did not know about the date of his marriage and it could be either five years prior to 1985 or five years thereafter. Notwithstanding that no reliance could be placed on the testimony of petitioner's father regarding the date of his marriage, the Trial Court proceeded to fix the petitioner's date of birth on the assumption that the petitioner's parents were married in the year 1985. The petitioner was born four-five years after their marriage (as deposed by the petitioner's father – CW-2). The Court had also observed that the school leaving certificate was unreliable since the petitioner's date of birth had been recorded only on the information as provided at the time of his admission to the school, without securing any affidavit or any birth certificate.

23. This Court is unable to accept that the school leaving certificate could be rejected in the given circumstances. First of all, there was no material on record, which could lead the Court to doubt the said certificate. As noticed above, the Head Master of the School had produced the relevant records which clearly established that the petitioner's date of birth had been entered into the school register at the

time of his admission. As explained by the Supreme Court in **Ashwani Kumar Saxena** (*supra*), it is only in absence of a birth certificate from the school first attended (other than a play school) that the Court needs to proceed further to obtain a birth certificate from a corporation or a municipal authority. In the present case, the certificate from the school where the petitioner was first admitted had been produced on record and there was no other material on record indicating to the contrary. If, on inquiry, it is found that there were other documents or material which reflected a different date of birth or that the certificate of the date of birth was fabricated or manipulated, the court could proceed to reject the same. However, since there was no other material on record – apart from the testimony of the petitioner’s father – to doubt the petitioner’s date of birth as recorded in the school leaving certificate, the same ought to have been accepted. As noticed above, the testimony of the petitioner’s father could not be relied upon to determine the year in which he was married. In his cross-examination, he deposed that he was not aware of the year of his marriage and it could have been five years before or five years after 1985 and there was, thus, little basis for the Court to accept the petitioner’s year of birth as 1989/1990. Further accepting that the petitioner was born in the year 1989 would imply that he was about sixteen years old at the time of his admission in the Ist standard, which is difficult to accept.

24. The petitioner has also filed an application under Section 482 of CrPC, placing on record a copy of the school leaving certificate of his younger sister and copy of the LIC Policy dated 03.11.2011 along with

the premium receipt. The school leaving certificate of the petitioner's sister indicates her date of birth as 10.04.2000. The petitioner's father had deposed that the petitioner's sister was born one year after the petitioner's birth. Thus, the date of birth of the petitioner's sister, as recorded in the school leaving certificate, also supports the petitioner's claim that he was born on 14.04.1999. The LIC Policy also records the petitioner's date of birth as 14.04.1999. The date of proposal and commencement of the policy is 03.11.2011 and records the petitioner's age as on that date as thirteen years.

25. The petitioner had prayed that in view of the said evidence, the matter may be remanded to the Trial Court for a fresh consideration. However, the said prayer was not pursued and the learned counsel for the petitioner had requested that the additional documents be taken on record and a proper inquiry be conducted by setting aside the impugned order dated 08.01.2015. The said application was disposed of by an order dated 31.05.2019 and the additional documents were taken on record. The State was further directed to verify further documents and submit a status report. The status report since submitted, indicates that the said documents (school leaving certificate of the petitioner's younger sister, LIC policy and premium receipt) were verified and found to be genuine.

26. The medical report does not support the petitioner's claim that he was a minor on the date of the alleged offence. Although Ms Kochar, learned counsel for the petitioner, had contended that the Court had erred in directing that the bone ossification test be conducted, the same

is not open to the petitioner. This is so because the order dated 21.12.2016 directing that the bone ossification test be conducted was on the application filed by the petitioner. Clearly, the petitioner cannot be heard to contend to the contrary.

27. Nonetheless, the only question that falls for consideration by this Court is whether the medical report is required to be considered in view of the school leaving certificate produced by the petitioner.

28. Rule 12(3) of the said Rules makes it explicitly clear that recourse to a medical test can be taken only if the documents, as specified in Clause (a) of Sub-rule (3) of Rule 12, are unavailable. Since in the present case, a school leaving certificate from the school first attended by the petitioner is available and there is no allegation that the same has been fabricated and manipulated, the Court must accept the same as conclusive evidence of the petitioner's date of birth.

29. In view of the above, the petition is allowed. The trial in FIR No. 448/2014 under Section 376 of the IPC and Section 6 of the POCSO Act is directed to be transferred to the Juvenile Justice Board.

VIBHU BAKHRU, J

OCTOBER 10, 2019
RK