

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 09th July, 2019

+ CRL.REV.P. 985/2018 & CrI.M.A.47265/2018

CCL LK @ LKP

..... Petitioner

versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr.Harsh Prabhakar and Mr.Anirudh Tanwar,
Advocates.

For the Respondent : Mr.Hirein Sharma, APP with SI Rajpal,
P.S.Khayala.

CORAM:-

HON'BLE MR. JUSTICESANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J.

1. The present petition raises important question of law.
2. The question of law that arises is as to whether under Section 19 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as the JJ Act), once a preliminary assessment report has been received from the Juvenile Justice Board under Section 15 of the JJ Act, the Children's Court is obliged to accept the report and proceed further for trial of the child as an adult or has to take a decision as to whether there is need for trial of the child as an adult or not as stipulated under Section 19(1)(i) and Section 19(1)(ii) of the JJ Act.

3. The contention of the learned counsel for the petitioner is that it is mandatory for the Children's Court under Section 19(1) of the Act, on receipt of preliminary assessment report, to take a decision as to which of the two courses provided by Section 19(1) i.e. 19(1)(i) 19(1)(ii) of the Act is to be adopted.

4. Subject FIR No. 310/2016 has been registered under Section 342/376 of the Indian Penal Code (IPC for short) and Section 6 of the Protection of Children from Sexual Offences (POCSO) Act 2012 , Police Station Khayala, alleging that the petitioner had tied the hands of the victim and gagged her mouth with a piece of cloth and thereafter committed penetrative sexual assault upon her.

5. On 15.07.2016, the petitioner was arrested. On 31.08.2016 final report was filed before the Juvenile Justice Board.

6. By order dated 16.11.2016, the Juvenile Justice Board concluded the preliminary assessment in terms of Section 15 of the JJ Act and held that the petitioner was required to face trial as an adult and therefore the case was transferred to the concerned Children's Court for trial.

7. By order dated 04.09.2018, impugned herein, the Children's Court framed charges against the petitioner under Section 342/376 IPF and Section 6 POCSO.

8. Subject petition has been filed contending that the Children's

Court has failed to comply with the mandatory requirement of Section 19(1) of the JJ Act of deciding as to whether there was need to trial the petitioner as an adult or not and as such the impugned order on charge and the consequent proceedings held thereafter are vitiated and liable to be quashed..

9. Section 15 of the JJ Act reads as under:

“15. (1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of subsection (3) of section 18:

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts. Explanation.— For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973:

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14.”

10. In terms of Section 15 of the JJ Act in the case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of 16, the Board is obliged to conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, his ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence and thereafter passed an order in accordance with Section 18(3) of the JJ Act.

11. Section 18(3) of the JJ Act *inter alia* reads as under:

“Section 18(3)

(1) *****

(2) *****

(3) *Where the Board after preliminary assessment under section 15 passes an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children’s Court having jurisdiction to try such offences.”*

12. In terms of Section 18(3) of the Act where the Board after the preliminary assessment under Section 15 forms an opinion that there is need for trial of the said child as an adult, the Board is empowered to transfer the trial of the case to the Children’s Court having jurisdiction to try such offences.

13. Section 19 of the JJ Act enumerates the powers of the Children's Court. Since Section 19 (1) of the JJ Act is in issue with the present case, only Section 19(1) of the JJ Act is extracted herein after. It reads as under: -

“19. (1) After the receipt of preliminary assessment from the Board under section 15, the Children's Court may decide that—

(i) there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 and pass appropriate orders after trial subject to the provisions of this section and section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere;

(ii) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of section 18.

*(2) ***** ”*

14. In terms Section 19(1) of the Act after receipt of the preliminary assessment from the Board under Section 15, Children's Court is to decide; (1) as to whether there is need for trial of the child as an adult as per the provisions of Cr. P.C. and/or (2) there is no need for the trial of the child as an adult, in which case, it shall conduct an inquiry as a Board and to pass orders in accordance with Section 18 of the Act.

15. The question that arises for consideration is as to whether the provisions of Section 19 are mandatory or is the Children Court

merely to follow the recommendations of the Board, made under Section 15 of the Act read with Section 18(3) of the Act?

16. The expression used in Section 19(1) is '*may decide*'. The expression '*may*' used in section 19 does not give an option to the Children's Court *to decide or not to decide* in terms of section 19, but the expression '*may decide*' is an option to the Children's Court to chose between option (1) and option (2) i.e. as to whether there is need for trial of the child as an adult or there is no need for trial of the child as an adult.

17. This also becomes clear when Rule 13 of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (framed by the Central Government in exercise of powers conferred by provision of sub-Section (1) of Section 110 of the Act) (hereinafter referred to as the Rules) are examined.

18. Rule 13 of the Rules reads as under:-

"13. Procedure in relation to Children's Court and Monitoring Authorities.-

(1) Upon receipt of preliminary assessment from the Board the Children's Court may decide whether there is need for trial of the child as an adult or as a child and pass appropriate orders.

(2) Where an appeal has been filed under sub-section (1) of section 101 of the Act against the order of the Board declaring the age of the child, the Children's Court shall first decide the said appeal.

(3) *Where an appeal has been filed under sub-section (2) of section 101 of the Act against the finding of the preliminary assessment done by the Board, the Children's Court shall first decide the appeal.*

(4) *Where the appeal under sub-section (2) of section 101 of the Act is disposed of by the Children's Court on a finding that there is no need for trial of the child as an adult, it shall dispose of the same as per section 19 of the Act and these rules.*

(5) *Where the appeal under sub-section (2) of section 101 of the Act is disposed of by the Children's Court on a finding that the child should be tried as an adult the Children's Court shall call for the file of the case from the Board and dispose of the matter as per the provisions of the Act and these rules.*

(6) *The Children's Court shall record its reasons while arriving at a conclusion whether the child is to be treated as an adult or as a child.*

(7) *Where the Children's Court decides that there is no need for trial of the child as an adult, and that it shall decide the matter itself:*

(i) *It may conduct the inquiry as if it were functioning as a Board and dispose of the matter in accordance with the provisions of the Act and these rules.*

(ii) *The Children's Court, while conducting the inquiry shall follow the procedure for trial in summons case under the Code of Criminal Procedure, 1973.*

(iii) *The proceedings shall be conducted in camera and in a child friendly atmosphere, and there shall be no joint trial of a child alleged to be in conflict*

with law, with a person who is not a child.

- (iv) When witnesses are produced for examination the Children's Court shall ensure that the inquiry is not conducted in the spirit of strict adversarial proceedings and it shall use the powers conferred by section 165 of the Indian Evidence Act, 1872 (1 of 1872).*
- (v) While examining a child in conflict with law and recording his statement, the Children's Court shall address the child in a child-friendly manner in order to put the child at ease and to encourage him to state the facts and circumstances without any fear, not only in respect of the offence which is alleged against the child, but also in respect of the home and social surroundings and the influence to which the child might have been subjected.*
- (vi) The dispositional order passed by the Children's Court shall necessarily include an individual care plan in Form 7 for the child in conflict with law concerned, prepared by a Probation Officer or Child Welfare Officer or recognized voluntary organisation on the basis of interaction with the child and his family, where possible.*
- (vii) The Children's Court, in such cases, may pass any orders as provided in sub-sections (1) and (2) of section 18 of the Act.*
- (8) Where the Children's Court decides that there is a need for trial of the child as an adult:*
 - (i) It shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 of trial by sessions and maintaining a child friendly atmosphere.*

- (ii) *The final order passed by the Children's Court shall necessarily include an individual care plan for the child as per Form 7 prepared by a Probation Officer or Child Welfare Officer or recognized voluntary organisation on the basis of interaction with the child and his family, where possible.*
- (iii) *Where the child has been found to be involved in the offence, the child may be sent to a place of safety till the age of twenty-one years.*
- (iv) *While the child remains at the place of safety, there shall be yearly review by the Probation Officer or the District Child Protection Unit or a social worker in Form 13 to evaluate the progress of the child and the reports shall be forwarded to the Children's Court.*
- (v) *The Children's Court may also direct the child to be produced before it periodically and at least once every three months for the purpose of assessing the progress made by the child and the facilities provided by the institution for the implementation of the individual care plan.*
- (vi) *When the child attains the age of twenty-one years and is yet to complete the term of stay, the Children's Court shall:*
 - (a) *interact with the child in order to evaluate whether the child has undergone reformatory changes and if the child can be a contributing member of the society.*
 - (b) *take into account the periodic reports of the progress of the child, prepared by the Probation Officer or the District Child Protection Unit or a social worker, if needed*

and further direct that institutional mechanism if inadequate be strengthened.

(c) After making the evaluation, the Children's Court may decide to:

(ca) release the child forthwith;

(cb) release the child on execution of a personal bond with or without sureties for good behaviour;

(cc) release the child and issue directions regarding education, vocational training, apprenticeship, employment, counselling and other therapeutic interventions with a view to promoting adaptive and positive behaviour etc.;

(cd) release the child and appoint a monitoring authority for the remainder of the prescribed term of stay. The monitoring authority, where appointed shall maintain a Rehabilitation Card for the child in Form 14.

(vii) For the purpose of sub-rule (vi) (c) (cd) of this rule:

(a) A Probation Officer or Case Worker or Child Welfare Officer or a fit person may be appointed as a monitoring authority.

(b) The District Child Protection Unit shall maintain a list of such persons who can be engaged as monitoring authorities which shall be sent to the Children's Court along with bi-annual updates.

- (c) *The child shall for the first quarter after release, meet with the monitoring authority on a fortnightly basis or at such intervals as may be directed by the Children's Court. The monitoring authority shall fix a time and venue for such meetings in consultation with the child. The monitoring authority will forward its observations on the progress of the child on a monthly basis to the Children's Court.*
- (d) *At the end of the first quarter the monitoring authority shall make recommendations regarding the further follow up procedure required for the child.*
- (e) *Where the child, after release is found to be indulging in criminal activities or associating with people with criminal antecedents, he shall be brought before the Children's Court for further orders.*
- (f) *If it is found that the child no longer requires to be monitored, the monitoring authority shall place the detailed report with recommendations before the Children's Court which shall issue further directions either terminating the monitoring or for its continuation.*
- (g) *After the first quarter, the child shall meet the monitoring authority at such intervals as may be directed by the Children's Court based on the recommendations made by the monitoring authority at the end of the first quarter and the monitoring authority shall forward its report to the Children's Court which shall review the same every quarter."*

19. Though, once again the expression used in Rule 13(1) is that the Children's Court *may decide*, however, Rule (6) uses the expression '*shall*' and mandates the Children's Court to record its reasons while arriving at a conclusion whether the child is to be treated as an adult or as a child.

20. Rule 13(7) stipulates that in case the Children's Court decides that there is no need for trial of the child as an adult, then it shall decide the matter itself. It is thereafter to conduct an inquiry as if it was functioning as a Board and follow the procedure for trial in summon cases under Cr. P.C.

21. Rule 13(8) stipulates that in case the Children's Court decides that there is need for trial of the child as an adult, it is to follow the procedure prescribed by Cr. P.C. or trial by Sessions.

22. Reading of Rule 13 in conjunction with Section 19 of JJ Act clearly shows that it is obligatory on the part of the Children's Court to take a decision after receipt of the preliminary assessment report from the Board as to whether there is need for trial of the child as an adult or as a child. Appropriate speaking order recording reasons for arriving at the conclusion is to be passed by the Children's Court.

23. In the present case, once the preliminary assessment report was received from the Board opining that the child should be treated as an adult, record does not reveal any application of mind or an

independent decision taken by the Children's Court in terms of Section 19 read with Rule 13(1) and 13(6). The Children's Court has thereafter proceeded on to frame charges by the impugned order.

24. Perusal of the record further shows that the testimony of the child victim has already been partly recorded before the trial court.

25. No doubt, the Children's Court has not passed an order under Section 19, independently taking a decision as to whether the petitioner is to be tried as an adult or as a child, the same in my opinion would not vitiate the proceedings, thereafter undertaken but, would be an irregularity which would be curable.

26. The reason for holding so, is that in both eventualities, i.e. trial as an adult and trial as a child, the proceedings have to continue before the Children's Court.

27. In terms of Rule 13 (7) in case the Children's Court decides that there is no need for trial of the child as an adult, then, it (Children's Court) has to conduct an inquiry as if it were functioning as a Board and following the procedure for trial of the summon cases.

28. In case the Children's Court decides to try the child as an adult, then, it (Children's Court) has to conduct the trial following the procedure of trial by Sessions Court.

29. In either eventuality, charge/notice which is to be framed on the same set of facts, would not be altered in so far as the offence is

concerned. The only difference is as to the procedure to be followed by the Children's Court for trial.

30. Even the absence of a charge has been held by the Constitution Bench of the Supreme Court in *Willie (William) Slanley Versus State of Madhya Pradesh (1955) 2 SCR 1140* to be a curable irregularity unless prejudice is caused.

31. In the present case, the Children's Court has framed charges against the Petitioner deeming it to be a Sessions triable Case. So no prejudice is caused to the Petitioner.

32. The Supreme Court in *Supdt. and Remembrancer of Legal Affairs v. Anil Kumar Bhunja, (1979) 4 SCC 274* has held that trial of a summons case as a warrants case does not amount to an illegality but is a mere irregularity that does not vitiate trial, unless there is prejudice.

33. In the present case, there is no prejudice, even alleged to have been caused to the petitioner. No submission has been made that the procedure followed or proceedings held thereafter have caused any prejudice to the petitioner.

34. In view of the above, there is no ground to set aside the impugned order on charge dated 04.09.2018 or any proceedings conducted thereafter.

35. However, since the Children's Court has not passed any order

in terms of Section 19 of the JJ Act read with Rule 13(1) and Rule 13(6) of the Rules, the Children's Court is directed to pass an order in terms thereof.

36. In case the Children's Court opines that there is no need for trial of the child as an adult; it shall follow the procedure as prescribed under Rule 13(7) and in case it holds that there is need for trial of the child as an adult it shall follow the procedure as prescribed under Rule 13(8).

37. In either eventuality, the proceedings that have so far been conducted and the evidence that has already come on record would be saved.

38. The petition is, accordingly, disposed of with the above observations, directing the Children's Court to decide in terms hereof within a period of three months.

39. List the matter before the Children's Court for directions on 22.07.2019.

40. Order *Dasti* under signatures of the Court Master.

SANJEEV SACHDEVA, J

July 09, 2019
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