

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Cr.M.P. No. 2719 of 2019
Order reserved on 14/02/2020
Order delivered on 19/02/2020

Ajay Yadav, son of Mantram Yadav, aged about 19 years, resident of Mopar, P. S. Suhela, District Baloda Bazar-Bhatapara, Chhattisgarh.

----- **Petitioner**

Versus

State of Chhattisgarh, through Station House Officer, Police Station Suhela, District Baloda Bazar – Bhatapara, Chhattisgarh.

-----**Respondent**

 For Petitioner : Mr. Satya Prakash Verma, Advocate
 For State : Mr. Ravi Bhagat, Dy. G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. This petition under Section 482 of Cr.P.C. is directed against the impugned order dated 06/12/2019 passed by learned Special Judge under the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred as "POCSO Act, 2012") whereby learned Special Judge has rejected the application filed by the petitioner/accused and declined to hold him juvenile on the relevant date.

2. Petitioner herein was arrested by the Police Station, Bhatapara on 05.11.2019 for offence punishable under Sections 363, 366, 376 of IPC and Section 6 of POCSO Act, 2012 and he was charge-sheeted accordingly. During the course of the trial, petitioner filed an application that on the relevant date, he was juvenile and therefore, he be tried by Juvenile Justice Board in accordance with law, and he relied upon his mark-sheet of Class-III, a copy of school leaving certificate as well as Aadhar Card in which his date of birth is recorded as 15.12.2000. The application was replied by the State Government holding that as per *Dakhil Khariz* register of school, petitioner's date of birth is 10.10.2000, as such, the application deserves to be rejected as he was not juvenile on the relevant date.

3. Learned Special Judge, by its order dated 06/12/2019, rejected the application holding that petitioner's date of birth is 10/10/2000 as per *Dakhil Khariz* register and he was not juvenile on the relevant date. Questioning the order impugned, this petition has been preferred by the petitioner.

4. Mr. Satya Prakash Verma, learned counsel for the petitioner would submit that learned Special Judge is absolutely unjustified in rejecting petitioner's application holding that he was not juvenile on the relevant date, therefore, the impugned order deserves to be set aside and petitioner be sent to Juvenile Justice Board for trying him in accordance with law.

5. Mr. Ravi Bhagat, learned State counsel would support the impugned order.

6. I have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the record with utmost circumspection.

7. The Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, 'the Act of 2015') came into force w.e.f. 01/01/2016 and the Juvenile Justice (Care and Protection of Children) Act, 2000 was thereby repealed. Section 9 of the Act of 2015 provides for procedure to be followed by a Magistrate who has not been empowered under this Act which states as under:-

"9. Procedure to be followed by a Magistrate who has not been empowered under this Act.-

(1) When a Magistrate, not empowered to exercise the powers of the Board under this

Act is of the opinion that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay, record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction.

(2) In case a person alleged to have committed an offence claims before a court other than a Board, that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence, the said court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly as may be:

Provided that such a claim may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such a claim shall be determined in accordance with the provisions contained in this Act and the rules made thereunder even if the person has ceased to be a child on or before the date of commencement of this Act.

(3) If the court finds that a person has committed an offence and was a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.

(4) In case a person under this section is required to be kept in protective custody, while the person's claim of being a child is being inquired into, such person may be placed, in the intervening period in a place of safety."

8.A studied perusal of sub-section (2) of Section 9 of the Act of 2015 would show that if a person

alleged to have committed an offence claims before a Court other than a Board, that he is a child or was a child on the date of commission of the offence, or if the Court itself is of the opinion that he was a child on the date of commission of the offence, the said Court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of that person. Proviso to subsection (2) of Section 9 prescribes the procedure to be followed by that Court by providing that such a claim shall be determined in accordance with the provisions contained in the Act of 2015 and the rules made thereunder, even if the person has ceased to be a child on or before the date of commencement of the Act.

9. Section 94 (2) of the Act of 2015 provides for presumption and determination of age by the Board which states as under: -

"94. Presumption and determination of age. - (1) * *** *****

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining -

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the

concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) *** ** *

10. Section 94 of the Act of 2015 requires the Court to make enquiry regarding determination of age of the person accused and the manner of holding enquiry is provided in Section 94 (2). Thus, the procedure to be followed in determination of age under the Act of 2015 has been provided under Section 94 (2) which is *pari materia* to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rule, 2007.

11. Thus, age determination contemplated under sub-section (2) of Section 94 of the Act of 2015 enables the Court to seek evidence and in that course, the Court has to undertake the process of age determination by seeking evidence by obtaining firstly, the date of birth certificate from the

school, or the matriculation or other equivalent certificate from the concerned examination Board, if available; and in absence thereof, secondly, the birth certificate given by a corporation or a municipal authority or a panchayat, and thirdly, only in the absence of documents mentioned in (i) and (ii) above, age shall be determined by an ossification test or any other latest medical determination test conducted on the orders of the Committee or the Board. Time limit for conducting age determination test has also been provided to be within fifteen days from the date of order in the above-stated provision.

12. Recently, the procedure prescribed in the Juvenile Justice (Care and Protection of Children) Rules, 2007 (enacted under the JJ Act, 2000) for determination of juvenility came to be considered by the Supreme Court in the matter of **Ashwani Kumar Saxena v. State of Madhya Pradesh**¹ wherein Their Lordships of the Supreme Court have held that a duty is cast on the courts/juvenile Boards functioning under the Act to seek evidence by obtaining the certificate mentioned in Rules 12(3) (a)(i) to (iii) of the Rules of 2007, and observed as

1 (2012) 9 SCC 750

under: -

"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."

13. In the later part of the judgment in Ashwani Kumar Saxena (supra), Their Lordships of the Supreme Court further held that Court or Board functioning under the Juvenile Justice Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, and observed as under: -

"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 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 need 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 above mentioned 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.

33. Once the court, following the above mentioned procedure, passes an order, that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in sub-rule (5) of Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of Rule 12. Further, Section 49 of the JJ Act also draws a presumption of the age of the juvenility on its determination.

34. Age determination inquiry contemplated under the JJ Act and the 2007 Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion, etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. But court, Juvenile Justice

Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination."

14. Similarly, the principle of law laid down in Ashwani Kumar Saxena (supra) has been reiterated and followed by Their Lordships of the Supreme Court in the matter of Kulai Ibrahim alias Ibrahim v. State Rep. by the Inspector of Police B-1 Coimbatore².

15. In the matter of Abuzar Hossain v. State of W.B.³, a three Judge Bench of the Supreme Court had summarised the legal position for determining the juvenility of an accused and held as under in paragraph 39.3 of the judgment: (SCC pp. 509-10)

"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

² 2014 AIR SCW 4022

³ (2012) 10 SCC 489

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 voter's 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*⁴ and *Pawan*⁵ these documents were not found prima facie credible while in *Jitendra Singh*⁶ 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."

16. Recently, in the matter of **Parag Bhati (Juvenile) Through Legal Guardian-Mother-Rajni Bhati v. State of Uttar Pradesh and another**⁷, the question for consideration before the Supreme Court was, when the date of birth mentioned in the matriculation certificate is doubtful, the ossification test can be the last resort to prove the juvenility of the accused and the Supreme Court noticed and relied upon **Ashwani Kumar Saxena** (supra) wherein it was held that only in cases where those documents or certificates are found to be fabricated or manipulated, the Court or the Board need to go for

4 *Akbar Sheikh v. State of W.B.*, (2009) 7 SCC 415

5 *Pawan v. State of Uttaranchal*, (2009) 15 SCC 259

6 *Jitendra Singh v. State of U. P.*, (2010) 13 SCC 523

7 (2016) 12 SCC 744

medical report for age determination, and held as under: -

"35. The benefit of the principle of benevolent legislation attached to the JJ Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue.

36. It is settled position of law that if the matriculation or equivalent certificates are available and there is no other material to prove the correctness of date of birth, the date of birth mentioned in the matriculation certificate has to be treated as a conclusive proof of the date of birth of the accused. However, if there is any doubt or a contradictory stand is being taken by the accused which raises a doubt on the correctness of the date of birth then as laid down by this Court in *Abuzar Hossain* (supra), an enquiry for determination of the age of the accused is permissible which has been done in the present case."

17. Similarly, in the matter of **Sri Ganesh v. State of Tamil Nadu and another**⁸, again the issue of juvenility came-up before the Supreme Court in which Their Lordships relying upon **Ashwani Kumar Saxena** (supra) with approval reiterated that the Court determining the juvenility has first to take

into consideration the documents contemplated in Rule 12 (1), (2) and (3) of the Rules of 2007 and only in absence of those documents, the Court has to determine the age by taking into consideration the medical evidence only in absence of documentary evidence, and observed as under :-

"12. In the present case the trial court took into account the documentary evidence as contemplated in the statutory provisions and returned a finding that the date of birth of the appellant was 19.10.1991. During the course of its judgment the High Court could not find such conclusion to be vitiated on any ground. In the face of the relevant documentary evidence, there could be no medical examination to ascertain the age of the appellant and as such the consequential directions passed by the High Court were completely unwarranted. Further, if the allegations of the prosecution are that the offence under Section 376 IPC was committed on more than one occasion, in order to see whether the appellant was juvenile or not, it is enough to see if he was juvenile on the date when the last of such incidents had occurred. The trial court was therefore justified in going by the assertions made by the victim in her cross examination and then considering whether the appellant was juvenile on that date or not."

18. Reverting to facts of the case in light of statutory provisions and the principles of law flowing from the judgments of the Supreme Court in above mentioned cases, it is quite vivid that as per *Dakhil Khariz* register 2006-07 of Government Primary School, Sendri the petitioner's date of

birth is 10/10/2000 and he was admitted in the school on 16/06/2006 on Class-I. This document is a statutory document in terms of Section 94(2)(i) of the Act of 2015 being the date of birth certificate from the school and therefore, this statutory document will prevail over the documents filed by the petitioner, therefore, the Special Judge is absolutely justified in holding that the petitioner was not juvenile on the date of alleged offence and thereby, rightly rejected the application which is neither perverse nor contrary to the record, as such, I do not find any merit in the present petition under Section 482 of the Cr.P.C. It is made clear that this order will not relieve the prosecution from proving the date of birth of the petitioner in accordance with law as the same has been disputed by the petitioner and observation made in this order is only for the purpose of adjudicating the dispute brought before this Court.

19. The judgments cited by learned counsel for the petitioner rendered by the Supreme Court in **Arnit Das v. State of Bihar**⁹, **Jitendra Ram alias Jitu v. State of Jharkhand**¹⁰ and **Mukarrab and Ors. v. State**

9 (2000) 5 SCC 488

10 (2006) 9 SCC 428

of Uttar Pradesh¹¹ are clearly distinguishable to the facts of the instant case and in view of the finding recorded herein-above.

20. This petition, being devoid of merits, deserves to be and is accordingly dismissed. No cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet