

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

CRR 3792 of 2019

With

CRR 367 of 2020

Sagnik @ Rahul Mukherjee

Vs.

The State of West Bengal.

For the Petitioner : Mr. Debasish Roy
(in CRR 3792 of 2019) Mr. Avik Ghatak
Ms. Afreen Begum

For the Petitioner : Mr. Ranadep Sengupta
(in CRR 367 of 2020)

For the State : Mr. Saswata Gopal Mukherjee
Mr. Arijit Ganguly
Mr. Anand Keshari

Heard on : 03.08.2022

Judgment on : 28.09.2022

Ajoy Kumar Mukherjee, J.

1. Being aggrieved and dissatisfied with the order dated November 1st, 2019 passed by Learned District Judge, Nadia at Krishnnagore in connection with criminal appeal No. 5/2019 arising out of Tehatta police station Case No. 320 of 2018 dated 02.10.2018 under section 302/201/34 of the IPC, present

application under section 482 of the Code of Criminal Procedure has been preferred. By the impugned order learned appellate Court pleased to dismiss the criminal appeal, upholding the order dated 13.11.2018 passed by the learned principle Magistrate JJB Nadia at Krishnanagore in connection with JJB case No. 88/2018.

2. The genesis of the present case relates back to an information furnished with the Tehatta police Station, by one Bapi Sk alleging commission of offences punishable under sections 302/201/34 of the Indian Penal code which subsequently recorded as G.R. Case No. 977 of 2018 pending before Learned Additional Chief Judicial Magistrate in short ACJM, Tehatta, Nadia.

3. In the FIR it has been alleged that the son of defacto complainant namely Raj Sk, aged about 12 years and who was student of class VII went at his school in the morning of 01.10.2018 wearing school uniform, but he did not return to his house. On the next day i.e. 02.10.2018 at about 2p.m. his dead body was recovered from a bush, near Bagdoba 150 meters away from the school.

4. After completion of investigation police submitted charge-sheet under section 302/201/34 of the IPC against the present petitioner and another. The other petitioner preferred criminal revision being CRR 367 of 2022 being aggrieved by the self same order. As both the revisional applications involves similar questions of law and fact, so both the cases are taken up together for disposal, by this common order.

5. During the course of investigation on the basis of prayer made by the investigating officer, learned ACJM vide his order dated 7th October 2018 was

pleased to transfer this case before learned principle Magistrate JJB Nadia at Krishnanagore as the petitioners were juvenile in conflict with law at the relevant point of time.

6. However , on the basis of another prayer made by the investigation officer on 13th November, 2018, the principle Magistrate JJB Nadia at Krishnanagore has been pleased to transfer the said case for trial before the children court as at the relevant point of time, the petitioners of both revisional applications were within the age group of 16-18 years and as both of them were booked under allegation of commission of heinous crime.

7. Being dissatisfied with the aforesaid order passed by principle Magistrate Nadia at Krishnanagore dated 13.11.2018, the petitioner preferred aforesaid criminal appeal being criminal appeal no. 5 of 2019 and learned ADJ 2nd Court Nadia at Krishnanagore upon hearing both the parties was pleased to dismiss the appeal on contest and further pleased to affirm the order of transfer of the case before the children court for trial as ordered by the principle Magistrate JJB.

8. Mr. Debasis Roy learned advocate appearing on behalf of the petitioners submits that the petitioner of present CRR 3792/2019 was aged about 16 years 2 months and petitioner of CRR 367 of 2020 was aged about 16 years 5 months on of the date of the commission of the alleged offence and as such the petitioners should have been dealt with the manner prescribed under section 15 of the Act and three parameters of section 15 of the act for conducting the preliminary assessment to assess the mental and physical capacity of the juvenile in conflict with law for commission of heinous crime and also ability to

understanding the consequence of the offence and also the circumstances under which the petitioners allegedly committed offence, were not followed.

9. He further submits that before satisfying on the preliminary assessment it is to be considered the mental and physical capacity of the child to commit such offence, ability to understand the consequence of the offence and whole circumstances therein but in the present context preliminary assessment was conducted without assistance of experienced psychologists dealt with child affairs or psychosocial workers or other experts. Practically JJB did not follow the rule in assessing the mental capacity of juvenile. Infact learned principle Magistrate has totally failed to appreciate the provisions under section 15 of Act. He further submits that in the present case no material whatsoever was ever brought on record by the Board and the learned Magistrate without recording any satisfaction has dismissed the prayer made by the petitioner and transferred the case before children court and as such the impugned order suffers from total non application of judicial mind and the same is in derogation to the well-settled proposition of law and it was passed on the basis of irrelevant considerations. The issuance of proclamation order and attachment against the petitioner by the court is also required to be set aside as without being satisfied on the basis of the materials produced by the investigating agency, the magistrate issued proclamation and attachment against the petitioner though no materials whatsoever was brought on record by the investigating officer to substantiate the prayer for issuance of proclamation attachment against the petitioner.

10. Accordingly petitioner has prayed for setting aside and or quashing the aforesaid impugned order dated November 1st 2019 passed by the learned District Judge, Nadia at Krishnanagore.

11. Mr. S.G. Mukherjee appearing on behalf of the state submits that the offence alleged against the accused persons are very heinous in nature and the investigation reveals that the accused persons were very much aware about the consequence of the offence. He further submits that preliminary assessment was made on the basis of the two reports given by clinical psychologists. The petitioners tried to hide the dead body after committing murder which clearly suggests that they were well aware about consequence of the offence, and accordingly the order impugned does not call for any interference.

12. Before going to further details let me reproduce section 15 of the JJ Act, 2015 :-

“Preliminary assessment into heinous offences by Board

(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 sub-section (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(2 of 1974):

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.”

13. Rule 10A of the JJ model rules 2016 provides that for the purpose of conducting the preliminary assessment in case of heinous offences the board may take the assistance of psychologists or psycho social workers or other experts who have experience of working with children in difficult circumstances. Said rule further provides while making the preliminary assessment the child shall be presumed to be innocent unless proved otherwise and it further provides that when the magistrate of the court is of the view that there is a need for trial of the juvenile as an adult, it shall assign reason. It to be mentioned that in the present context the principle magistrate is the only member who constituted the board and had taken the decision. By the order dated 13.11.2018 learned Magistrate held that on perusal of materials available on record, particularly the report of the preliminary assessment, it appears that child in conflict with law (CCL) boys were capable enough to understand the consequence of alleged offence and that they were mentally fit on the alleged date of occurrence and also considering that the allegation is serious in nature, first of all refused to grant bail and then sent the CCL before the children court for trial. When the matter came up before appellate Court, the Appellate Court held that the CCL boys were clinically examined by psychologists of the District Hospital Krishnangore, Nadia who are experienced and expert persons to observe and to give opinion regarding physical ability and mental capability to understand the consequence of the offence and circumstances in which they allegedly committed the offence and

that report suggests that they were mentally fit at the time of commission of offence. So the appellate court found that order of Principle magistrate JJB Nadia, suffers no illegality and appellate court has no scope to interfere with the impugned order.

14. Before going to discuss further details let us consider report submitted by the clinical psychologists, basing upon which learned Magistrate and the appellate court passed the impugned order. The psychologist's opinion is that on clinical observation they did not find any gross psychopathology on person. The word psychopathology refers to scientific study of mental disorder. What section 15 read with rule 10A refers is not only the scientific study of mental disorder but the study of mental , physical capacity to commit the heinous offence as well as ability to understand the consequence of the offence and also the circumstances in which they allegedly committed the offence. The cryptic report of the psychologist as referred above is unable to satisfy the requirements under section 15(1) of JJ Act, 2015, as they have formed an opinion about mental illness/disorder for which they are skilled and not the "mental or physical capacity" of the child in respect of which they may not be competent to make comment. The report was not prepared in the light of neuro-development science, social science and fundamental qualities touching about human nature. In this context one should keep in the mind that the preamble of JJ Act 2015 refers to Article 15 (3)/39(e) and (f), 45 and 47 of the Constitution of India which casts an obligation on the state to ensure that all the needs of the children are met and that their basic human rights are protected. It is therefore, imperative that the board in order to conduct

preliminary assessment tests under section 15 of the Act must consider with regard to

- (a)** the mental Act
- (b)** physical capacity to commit a heinous offence within the meaning of section 2(33) of Act
- (c)** ability to understand the consequence of the offences and
- (d)** the circumstances in which CCL allegedly committed the offence.

15. In the aforesaid backdrop it is imperative in the context sub-rule (3) and (4) of Rule 10A of the central rules, that the child is presumed to be innocent and that the board before passing the order must assign reason for the same and during preliminary assessment tests the compulsory steps are to be necessarily followed by a board, once the child produced before it. The procedure enumerated in section 15 of the Act read with Rule 10A of the Rule of 2016 of the central rules makes it imperative for the board to scrupulously and religiously follow the fundamental rules in order to come up an independent decision of court on the aid of expert opinion. The crux is the formation of the opinion therefore will have to be made by the board himself and none else. The board cannot abdicate its essential judicial function. It is trite law that no decision making authority can abdicate its decision making power to another authority. Furthermore the decisions passed by the board himself, necessarily to be supported by reasons as assigning reasons is the best way to demonstrate the application of mind. In case the reason fails, as a consequence thereto the conclusion fails equally. An order under section 15 of the Act of 2015 need to demonstrate satisfaction regarding the mental and/or

physical capacity of child to commit heinous offence, the ability of the child to understand the consequence of the offence and the circumstances in which the alleged offence had occurred. It is to be kept in mind that just because this statute permits a child of 16 years and beyond to stand trial in a heinous offence as an adult, it means that the statute intends that all those children should be subjected to adult punishment. It is not default choice but conscious, calibrated one and for that the statutory criteria must be fulfilled.

16. In ***Barun Chandra Thakur Vs. Master Bholu and another*** reported in **2022 Live Law (SC) 593** it was held by the apex court in this context in paragraph 75 as follows:-

“75. It is to be noted that child psychology is a specialised branch of development psychology, its genesis is based on the premise that children and adults have a different thought process. The individualised assessment of adolescent mental capacity and ability to understand the consequences of the offence is one of the most crucial determinants of the preliminary assessment mandated by section 15 of the Act, 2015. The report of the preliminary assessment decides the germane question of transferring the case of a child between 16 to 18 years of age to the Children’s Court. This evaluation of ‘mental capacity and ability to understand the consequences’ of the child in conflict with law can, in no way, be relegated to the status of a perfunctory and a routine task. The process of taking a decision on which the fate of the child in conflict with law precariously rests, should not be taken without conducting a meticulous psychological evaluation.”

17. In view of above I have no other option but to conclude that the preliminary assessment has not been carried out by the board in this case as required under law. Board after considering limited material on record, hastily came to conclusion that the matter is required to be referred to the children court for trial. There was also denial of adequate opportunity to the CCL. In the above context the matter required reconsideration and for which it is

remanded to the board on the further direction to take additional evidence and also to afford adequate opportunity to the CCL boys before taking a fresh decision, keeping in mind the assessment regarding intelligence, maturity, physical fitness and as to how the child in conflict with law was in a position to know the consequence of the offence. The exercise is to be undertaken within a period of 8 weeks from the date of communication of the order and while taking preliminary assessment afresh, further opinion of the psychologist if required may be obtained. In the earlier report assessment was confined to study of mental disorder but by the afresh assessment the board to assess regarding mental act and physical capacity to commit a heinous crime, to understand the consequence and also the circumstances in which the alleged offence was committed.

18. CRR 3792 of 2019 and CRR 367 of 2020 are accordingly disposed of.

However there will be no order as to costs.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)