

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CR. WRIT PETITION NO.456 OF 2018

1. Tukaram Ramchandra Pawar)
Age: 55 years, Occ: Service)
Residing at Surya Complex,)
Building No. 7, 3rd Floor, Room No. 315,)
Kanjur Marg, Mumbai - 400078)
2. Mr. Chetan Ghanshyam Goyal)
Age: 38 years, Occ: Business)
Residing at : 1504, A Wing, Surya)
Apartment, Opp. Breach Candy Hospital)
Cumballa Hill, Mumbai - 26)
3. Mr. Sumeet Kumar Varma)
Age: 21 years, Occ: Service)
Residing at: Sheriar Building, Near S)
Bridge, Byculla (E), Mumbai)
Permanent resident of Sarvanpur Chobe,)
Silwa Bazar, Zilha Basti, Uttar Pradesh) ...Petitioners

Versus

The State of Maharashtra)
Through Byculla Police Station,)
Mumbai in C.R.No.94 of 2016) ...Respondent.

Ms Muazzama Ansari a/w. Adv. Nilesh S. Das for the Petitioners.
Smt. M. M. Deshmukh, APP for the Respondent-State.

**CORAM: NITIN W. SAMBRE &
R. N. LADDHA, JJ.**

DATE : 10th AUGUST, 2023

JUDGMENT (Per Nitin W. Sambre, J.)

1. The establishment namely 'Brijwasi Sons Sweet and Dry Fruit' was raided by the Social Services Crime Wing, Crime Branch, based on secret information/inputs as to the employment of child labour. During such raid on 29/03/2016, it was noticed that in all three child labours were employed by Petitioner No. 2, the proprietor of the establishment with whom Petitioner No. 1 was working as a Manager and Petitioner No. 3, an employee. As regards the evidence, the Birth Certificate of the employee namely Arjunprasad was not available and other two victims were subjected to medical/ossification test. It was noticed that the victim Sushilkumar was aged between 18 to 19 years whereas, another victim-Arjunkumar was aged between 15 to 16 years. During the investigation, having noticed that Petitioner No.3 - employee and Petitioner No.2 - owner, with the aid of the Petitioner No.1 - Manager were instrumental in trafficking child labour for the purpose of exploitation as referred to u/s. 370(1) of the Indian Penal Code (hereinafter referred to as "*the IPC*"), the Petitioners came to be charge-sheeted for offences punishable under Section 370(1) of the IPC and Sections 75 and 79 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "*the Juvenile Justice Act*").

2. During the investigation, Petitioner No.1 - Manager was arrested and subjected to custodial interrogation whereas Petitioners No. 2 - owner and Petitioner No. 3 - employee were released on pre-arrest bail.

3. All the three Petitioners, who are accused in the aforesaid criminal case, which is presently pending on the file of City Civil Court, Bombay, arising out of Crime No.94 of 2016 through this Writ Petition made prayer for quashing.

4. Learned Counsel for the Petitioners would urge that the prosecution case on facts and evidence collected during the investigation even if accepted as it is against the Petitioners, still no offence is made out, as neither necessary ingredients of Section 370(1) r/w. section 34 of the IPC are established nor the offence punishable u/s. 75 and 79 of the Juvenile Justice Act. So as to substantiate the aforesaid contentions, learned Counsel for the Petitioners would invite our attention to Section 370(1) of the Indian Penal Code, so as to claim that the exploitation, as referred to in sub-section (1) of Section 370 of IPC, can not be inferred from the accusations in the charge-sheet against the Petitioners. According to her, even the charge of trafficking can not be inferred against the Petitioners in absence of evidence of inducement as regards the

payment being offered in order to achieve the consent of the person having control over the person recruited i.e. the mother of the victim-Arjunprasad. Apart from above, Section 34 of the IPC ought not to have been invoked against the Petitioner Nos. 1 and 2 particularly when Petitioner No. 3 has not motivated the alleged child labour by using any force or criminal inducement etc.

5. Learned Counsel for the Petitioners would further urge that the definition of 'Child' is defined under sub-section (12) of Section 2 of the Juvenile Justice Act. According to her, clause (ii) of sub-section (14) of Section 2 of the Juvenile Justice Act provides for need and care to the child, if such child was found working in contravention of the provisions of the Juvenile Justice Act or labour laws for the time in force. According to her, definition of 'Child' under the Juvenile Justice Act provides a 'Child' means a person who has not completed eighteen years of age. According to her, in the prosecution story the victim child-Arjunprasad, even if alleged to have not completed the age of 18 years, the investigating agency has not made any efforts to place on record the documents i.e. Birth extract or school record of the said child in the form of documentary evidence so as to *prima facie* demonstrate that the victim child was below the age of 18. She would urge that, even if the statute provides medical examination of

the victim for the purpose of ascertaining the age, for maintaining the prosecution, same can not be relied on, so as to infer that alleged victim i.e. child is covered within the meaning of definition as provided under sub-section (12) of Section 2 of Juvenile Justice Act. Apart from above, by inviting attention of this Court to the provisions of the Child Labour (Prohibition and Regulation) Act, 1986, it is claimed that the said Act does not prohibit recruitment of a 'Child' who is above 14 years of age. So as to substantiate the said contention, our attention is invited to Clause (ii) of Section (2) of the said Act which provides that a 'Child' means a person who has not completed his fourteenth year of age or such age as may be specified in the "Right of Children to Free and Compulsory Education Act, 2009". Our attention is invited to the provisions of Clause (c) of Section 2 of 'The Right of Children to Free and Compulsory Education Act, 2009' which defines 'Child' means a male or female child of the age of six to fourteen years. As such, she would urge that if the victim- Arjunprasad's case is considered as per the Ossification Test, he can not be termed as 'Child' within the meaning of the aforesaid Act and as such, prosecution of the Petitioners can not be justified in law.

6. Apart from above, she would invite attention of this Court to

Sections 75 and 79 of the Juvenile Justice Act, 2015 so as to claim that the evidence as reflected in the investigation papers does not satisfy the case of the prosecution that the Petitioners were practicing cruelty on the alleged child labour or have exploited the child so as to attract the punishment as provided under the aforesaid provisions.

7. As such, it is claimed that even if the case of the prosecution is taken to be correct, still it does not establish *prima facie* the guilt of the accused/Petitioners. She would urge that even if material available on record is appreciated at its face value, the prosecution needs to be quashed and set aside as same is not satisfying the very ingredients of the Sections under which Petitioners are booked.

8. So as to substantiate the contentions that the medical/ossification test as is relied on by the prosecution can not be held to be binding on Court, reliance is placed on the following judgments:

1. Vinod Katara Vs. State of Uttar Pradesh¹

2. Ram Suresh Singh Vs. Prabhat Singh @ Chotu Singhj & Anr.²

9. Learned APP has resisted the contentions of the learned Counsel for the Petitioners while opposing the prayer for quashing. According to her, the statement of the mother of the victim Arjunprasad, namely

¹ AIR 2022 SC 4771.

² (2009)6 SCC 681.

Mainadevi, in categorical terms speaks of allurement shown by Petitioner No. 3 of providing employment and accordingly, she would urge that necessary ingredients of sub-section (1) of Section 370 of Cr.P.C. as regards trafficking can be very much inferred. According to her, there is no iota of evidence to infer that the victim child was paid money but for the statement of his mother. She would urge that it is for the Trial Court to appreciate the evidence about payment received by the parents of the victim-Arjunprasad towards labour work carried out by him. She would urge that the issue of the age of the victim can be looked into by appreciating the evidence of the doctor at proper stage of the trial.

10. We have considered rival submissions.

11. In the matter of prayer for quashing, it is a settled position of law that the Court cannot analyze the evidence but is required to accept the case of the prosecution as it is and find out whether the offence could be said to be made out for which the Accused are charge-sheeted.

12. In the case in hand the Complainant, a Police officer has claimed that upon visit to the shop of the Petitioners, it was noticed that the child labour namely Sushilkumar aged about 17 years and child named Arjunprasad aged about 17 years were employed in the

manufacturing of sweets and also cleaning activities.

13. It is claimed that the aforesaid minors were brought from the State of Uttar Pradesh, employed with the establishment of Brijwasi Sons Sweet and Dry Fruit and against the wishes of child labour they were compulsorily made to work, thereby exploiting them physically and mentally.

14. Based on the aforesaid, offence u/s. 370(1) r/w 34 of IPC and Sections 75 and 79 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "Juvenile Justice Act") came to be registered.

15. The victim Arjunprasad was examined by the medical officer at the police hospital and was subjected to x-ray of the elbow, shoulder and knee. The victim-Sushilkamar was also subjected to similar treatment. As far as victim-Arjunprasad is concerned the medical officer has opined his age between 15 to 16 years and that of victim-Sushilkamar between 18 to 19.

16. The aforesaid evidence is sought to be used against the Petitioners based on an ossification test.

17. Apart from above, the marksheet of Sushilkumar issued by the Secondary School speaks of his date of birth as 10/09/1996 and that being so his age on the date of raid was nearing 20 years.

18. As the age of the victim-Sushilkumar was above the age of child as prescribed under the provisions of the Juvenile Justice Act, prosecution of the Petitioners is not based on the said case.

19. It appears that the prosecution of the Petitioners is based on the act of the employment of Arjunprasad who was certified to be the aged between 15 to 16 years as per the ossification test.

20. The statement of the mother of the victim-Arjunprasad namely Mainadevi came to be recorded on 07/04/2016 u/s. 161 of Cr.P.C. In her statement, she has stated that her husband-Vishwambharnath expired in the year 2010 and she is blessed with 5 children. She has stated that her son-Arjunprasad is aged about 18 years and her elder son, Santosh aged 20 years works with her as agricultural farm labours. According to her, she sent her son Arjunprasad aged about 18 years on January, 2016 to Bombay for work with her neighbour by name Sumitkumar who was working in Bombay. She stated that her son started working from 01/02/2016 in the aforesaid establishment and the owner used to provide residential and food facility in addition to monthly remuneration of Rs.6,000/-. She has stated that out of the total remuneration of Rs.6,000/- victim-Arjunprasad used to send Rs.5,000/- for her family by keeping Rs.1,000/- for his own expenses.

21. The Juvenile Justice Act defines "Child" under sub-section (2) of

Section 14 to mean a person who has not completed 18 years of age. The fact remains that the victim-Arjunprasad as stated hereinabove, is above 18 years of age as could be inferred from the ossification test.

22. The Apex Court in the matter of ***Vinod Katara vs. State of Uttar Pradesh*** reported in ***AIR 2022 SC 4771*** had an occasion to consider the sanctity of the ossification test. The Apex Court has observed that the ossification test is to be conducted by the medical officer based on the scientific investigation like in the present case X-ray of various parts of the body. Such a test can be used to assist the Court in deciding the matters which fall under the ambit of medical expert opinion.

23. The medical expert's opinion coupled with the fact that Sushilkumar's documentary evidence speaks of his age above 18 years, sufficiently establishes that the case of the prosecution to justify the necessary ingredients in relation to victim-Sushilkumar cannot be said to be justified.

24. The Report of the ossification test by the medical officer can be considered by the Court in aid of drawing an appropriate conclusion.

25. The Apex Court in the matter of ***Vinod Katara (supra)*** has observed that ossification test by the medical officer is to assist the

Court and such opinion of the medical officer is advisory in nature and not binding. Such opinion has a guiding value and same has no mandatory effect. The bone ossification test is not an exact science which can provide the exact age of the person. In support of aforesaid observations, reliance can be placed on the judgment of the Apex Court in the matter of ***Ram Suresh Singh vs. Prabhat Singh***, reported in **(2009) 6 SCC 681**. The Apex Court has held that ossification test is not conclusive for age determination as it does not reveal the exact age of the person, but the radiological examination leaves a margin of two years on either side of the age range. The Apex Court in the matter of ***State of M.P. vs. Anoop Singh***, reported in **(2015), 7 SCC 773** has laid down that ossification test cannot be regarded as conclusive when it comes to ascertaining age of the person. In the matter of ***Ram Vijay Singh vs. State of U.P.***, reported in **(2021) SCC Online SC 142**, the Apex Court has held that the reliability of the ossification test remains vulnerable. As such, ossification test when it is under scanner, such test cannot be made basis to determine the age of the person concerned on the date of incident.

26. The fact remains that the victim-Arjunprasad is certified to be of the age of 15 to 16 years. The said boy was shown to have been

working in the sweet shop and entrusted with the work of making sweets and cleaning.

27. The statement of the mother of the victim-Arjunprasad namely Mainadevi in categorical terms speaks of she herself having sent her son-Arjunprasad to the work on the establishment of Brijwasi referred above. She has also stated that after the death of her husband, she was facing hardship to maintain a large family of 5 children and she was getting Rs.5,000/- per month from her son Arjunprasad who was paid remuneration by the Petitioners. As such, there is no element of exploitation as has been alleged or claimed by the prosecution against the Petitioners.

28. In the aforesaid background of the prosecution case, if we appreciate the very ingredients of the Section 370 Sub-section (1) of IPC, it is necessary that there should be an element of exploitation through the recruitment of a person who was induced by offering payment so as to achieve his consent, to have control over such victim.

As such, the necessary ingredients for inferring the offence against the person u/s 370(1) is recruitment, transport, harbour, transfer or receiving of a person. Exploitation is one of the important elements for inferring the offence u/s 370(1) of the IPC.

29. The other requirements are, use of the threat upon the victim, use of force or any other form of coercion upon the victim by abuse of power upon the victim or by inducement of the victim.

30. The perusal of the statement of the mother of the victim Arjunprasad in categorical terms speaks that she voluntarily sent her son to work in Mumbai who accordingly started not only to work on the establishment of the Petitioners but was also staying there. The victim was offered shelter, food and remuneration of Rs.6,000/- per month out of which Rs.5,000/- he was sending to his mother to support his family. As such, from the aforesaid statement of the victim's mother, the necessary ingredients of Section 370(1) of IPC cannot be inferred or said to be satisfied as there is no element of threats being given to the victim or his family or the force or any coercion practised to get the victim to Mumbai to work on the establishment. Neither the Petitioners are said to have trafficked the victim by taking or receiving any payment or benefit in order to achieve his consent. The mother of the victim-Arjunprasad has voluntarily consented for he being sent to Mumbai for working and that the victim was working on the establishment of the Petitioners was the fact known to her, she having in touch with him and receiving the major part of the monthly remuneration from him.

31. That being so, as claimed by the learned Counsel for the Petitioners the offence u/s 370 sub-section (1) cannot be said to be inferred against the Petitioners from the entire material available on record.

32. Apart from above, if we consider the offence as has been prescribed u/s 75 and 79 of the Juvenile Justice Act, the fact remains that it is not the case of the prosecution that the Petitioners at any time have assaulted, abandoned, abused, exposed or neglected the victim. Even if we consider the provision of Section 75, the allegations in the charge-sheet do not satisfy the ingredients thereof. Apart from above, the exploitation of the child Arjunprasad by way of bondage or withholding his earnings also cannot be inferred as neither the victim nor his mother has stated about such issue.

33. There is hardly any evidence to claim that the child was kept in bondage. Rather the statement of the victim's mother clearly speaks that he was enjoying sufficient freedom as he was sending regular money and provided shelter and food by the Petitioners.

34. In the aforesaid background, as rightly so pointed out by learned Counsel for the Petitioner, the offence even under the provisions of the Juvenile Justice Act cannot be inferred based on the available material on record.

35. As far as the offence u/s 370 of the IPC is concerned, the element of exploitation cannot be inferred from the available materials on record which is the soul of the offence to be made punishable u/s 370 of IPC.

36. Rather in our opinion, case of the Petitioners falls within the criteria provided by the Apex Court in the judgments of the ***State of Haryana and others vs Ch. Bajan Lal and Others*** reported in ***AIR 1992 SC 604***.

37. In this background, it will be appropriate in our opinion to allow the present Petition

38. The Petition stands allowed in terms of prayer clause (c).

(R. N. LADDHA, J)

(NITIN W. SAMBRE, J.)