

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

115

CRR-422-2024(O&M)

Date of order: 18.03.2024

Abhishek

.....Petitioner(s)

Vs.

State of Punjab

.....Respondent(s)

CORAM: HON’BLE MS. JUSTICE NIDHI GUPTA

Present:- Ms. Geeta Singhwal, Advocate and
Mr. M.L. Singhwal, Advocate
for the petitioner.

Mr. Kunwarbir Singh, AAG Punjab.

Nidhi Gupta, J.

CRM-12559-2024

This is an application under Section 482 Cr.P.C. for permission to place on record copy of FIR No.83 dated 26.08.2022 as Annexure P1 and also exemption from filing certified copy of Annexure P1.

After going through the contents of the application, which is supported by affidavit of the applicant/petitioner, the same is allowed subject to all just exceptions, and Annexure P1 is taken on record.

MAIN CASE

Challenge in the present petition is to judgment dated 2.2.2024 passed by the Judge, Special Court, SAS Nagar, Mohali, dismissing the appeal filed by the petitioner/juvenile-in-conflict with law against the

order dated 19.12.2023 passed by the Principal Magistrate, Juvenile Justice Board, SAS Nagar, Mohali (hereinafter 'PMJJB'), vide which the petitioner has been considered to be adult and the inquiry in regard to the offences has been ordered to be transferred for trial to the Children's Court, in case FIR No.83 dated 26.08.2022 under sections 376(2) (n), 363, 366, 506 of IPC and section 6 of POCSO Act, registered at P.S. Dhakoli.

2. Brief facts of the case as per the complaint filed by the victim are that the prosecutrix is a domestic help. The petitioner and the prosecutrix became friends about 3 years prior to registration of the FIR. Thereafter, the petitioner lured the prosecutrix into a relationship with the promise that he would marry her. Under the guise of said false allurement and pretext, he took her to a hotel in Peer Mucchalla and made physical relations with her on 1.1.2021. It is further alleged that the petitioner started blackmailing the prosecutrix to continue with the physical relations and ultimately she got pregnant and gave birth to a baby girl. About 1½ months after the delivery of the child, the victim lodged a complaint on the basis of which a Zero FIR was lodged on dated 16.02.2022 initially at Panchkula but later on, the matter was transferred to PS Dhakoli and an FIR No.83 dated 26.08.2022 under sections 376(2) (n), 363, 366, 506 of IPC and section 6 of POCSO Act was registered at P.S. Dhakoli.

3. Ld. Counsel for the petitioner submits that in pursuance to the registration of the FIR, the petitioner was arrested on 22.08.2022 by the Investigating Officer without considering the fact that at the time of alleged offence, the petitioner was only 17 years 10 months and 7 days old.

Thereafter, the petitioner remained in judicial custody in Patiala Jail for

more than 3 months, from where the petitioner got bail from this Court under section 167(2) of Cr. P.C. on 30.11.2022.

4. Ld. Counsel submits that thereafter, the petitioner filed the application, praying that the petitioner is liable to be treated and tried as a juvenile/child under the Juvenile Justice Act, 2015 (hereinafter 'JJ Act'). Pursuant to which, the said case was transferred on 8.8.2023 from the Court of Judge, Special Court, SAS Nagar to the court of Ld. Principal Magistrate Juvenile Justice Board, Mohali and the matter was tried by the juvenile court. It is submitted that the petitioner was then sent to PGIMER Chandigarh for clinical assessment/ IQ test in the department of Psychiatry on 17.10.2023 and the PGIMS submitted its report as per which, the petitioner was found to have *"average level of intellectual functioning."*

5. Learned counsel submits that on the basis of above said report, learned trial Magistrate, vide impugned order dated 19.12.2023, held that the petitioner deserves to be tried as an adult. Against the said order, the petitioner went in appeal before the Judge, Special Court, however, the petitioner's appeal was also dismissed vide impugned order dated 02.02.2024.

6. Learned counsel contends that learned Courts below failed to appreciate that the clinical assessment/IQ test of the petitioner was conducted on 17.10.2023, i.e., after a gap of 2 years 9 months and 17 days, by which time the petitioner had attained majority. It is submitted that as per the provisions of Juvenile Justice Act, 2015, the said clinical assessment/IQ test should have been conducted within 60 days. If the said

test would have been conducted within the stipulated period then the IQ level of the petitioner would not have been found as above.

7. Learned counsel further states that the Courts below have failed to appreciate that the petitioner's clinical assessment/IQ test has been done by the learned Magistrate after the petitioner had been in judicial custody for more than 3 months, which is enough time for a child-in-conflict with law to start thinking as a mature person or an adult. It is contended that even the preliminary clinical assessment/IQ report of the petitioner has been misinterpreted by the learned Courts below. Moreover, the investigation in the present case is unfair as no DNA test has been conducted.

8. It is further submitted that the allegations made in the FIR are absolutely false and fabricated and that the petitioner has been falsely implicated in the matter. It is prayed that accordingly, the impugned orders deserve to be set aside and the petitioner should be tried as a minor and may be tried by the learned Principal Magistrate, Juvenile Justice Board, SAS Nagar, Mohali for the criminal case bearing FIR No.83 dated 26.08.2022 registered under Sections 376(2)(n), 363, 366 and 506 IPC and Section 6 of the POCSO Act at Police Station Dhakoli, District SAS Nagar, Mohali, Punjab.

9. In support, learned counsel relies upon judgment of the Hon'ble Supreme Court in **"XXX Vs. The State of Rajasthan & Another"** Law Finder Doc ID # 2255747; and of this Court in **"Suraj Vs. State of Haryana"** Law Finder Doc ID # 2279185.

10. Learned State Counsel on instructions has informed that FSL and DNA reports of the case have come positive, as per which the petitioner is the biological father of the child born to the complainant/victim.

11. No other argument is made on behalf of the parties.

12. I have heard learned counsel for the parties and perused the case file in detail.

13. Perusal of record of the case shows that FIR No.83 dated 26.08.2022 was registered on the basis of statement dated 16.6.2022 of the victim herself and reads as under:-

“The brief of the facts are like this. Sir, the contents of complaint are like this. To, SHO Police Station, Sector 5, Women Police Station, Panchkula. Sir. I, Kajal 18 years D/o Sarvesh, am resident of Peer Muchhala now resident of Mata Mandir and do the domestic/ household work. About three years ago, I have meet the boy namely Abhishek in Peer Muchhala. With the passage of time, we have slowly started to meet and talking to each other and we have become good friends. On dated 1st January 2021 he took me a hotel in Peer Muchhala namely Vasudev under the guise of false promise to solemnize the marriage with her and made the physical relations with her forcibly and asked me not tell about this to any one otherwise | shall killed to you. If you will continue to meet me like this then I shall solemnize the marriage with you. Thereafter he has used to call her by blackmailing at his house in the absence of his other family members and used to engage in physical relations with her forcibly. Thereafter I have come to know that I have become pregnant and I have asked him to marry with her but Abhishek and his family members, have

refused to recognize her and do not keep any relationship with her and used to give the threatening to her. I have a birth to child from Abhishek who is about 1-1/2 months old. Now I do not know where I should go with her new born baby girl and what to do now. Kindly get the justice with me. The legal action be taken against Abhishek and his family. Sd/- Kajal. Panchkula Sector 20 Shiv Nagar Mob No. 8427574631"

14. The main thrust of the arguments on behalf of the petitioner is that on the date of alleged offence, the petitioner was minor and therefore, he should be tried as a minor. As per the FIR, the date of first incident is 01.01.2021. The date of birth of the petitioner, as per birth certificate and school certificate placed on record by the petitioner, is 25.02.2003. Thus, age of the petitioner as on first commission of offence i.e. on 1.1.2021, was 17 years 10 months and 7 days old. Even as per averments made in Para 3 of the present petition, petitioner has stated that on the date of commission of alleged offence, the age of the petitioner was 17 years 10 months and 7 days.

15. However, before proceeding further with the matter it will be useful to appraise the background in which JJ Act, 2015 came to be enacted in its present form. As per the JJ Act 2000 as it previously existed, 'juvenile' was defined under Section 2(k) of the Act of 2000 as: "*juvenile or child means a person who has not completed 18th year of age*"; and as per Section 2(l) "*juvenile in conflict with law means a juvenile who is alleged to have committed an offence and has not completed 18th year of age as on the date of Commission of such offence*". However, as a fall out of the infamous 'Nirbhaya' case where the victim was raped by 7 persons

including a 17-year-old juvenile, a need was felt to revisit the Act of 2000; especially as a trend was noticed pointing to increased commission of 'heinous offences' as defined in Section 2 (33) of the JJ Act, by juveniles in the age bracket of 16 to 18 years. Accordingly, the JJ Act was amended to its present form. Under the existing framework, a child between the age of 16-18 years, alleged to have committed a heinous offence, may be transferred to an adult criminal court known as 'Children's Court', to be tried as an adult, *or* by the Board itself treating him to be a child. The said determination has to be made as per the provision of Section 15 of the JJ Act, 2015 which reads as follows:

“15. 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”.

16. Upon such preliminary assessment, if a report is returned that the child in conflict with law has the (i) mental capacity to commit offence (ii) physical capacity to commit offence (iii) ability to understand the consequences of the offence and (iv) the circumstances under which the offence was allegedly committed, he shall be tried as an adult. Further, “45.... ... *There are two major consequences provided in the Act, 2015, if the child is tried as an adult by the Children's Court. First, that the sentence or the punishment can go up to life imprisonment if the child is tried as an adult by the Children's Court, whereas if the child is tried by the Board as a child, the maximum sentence that can be awarded is 3 years. The second major consequence is that where the child is tried as a child by the Board, then under section 24(1), he would not suffer any disqualification attached to the conviction of an offence, whereas the said removal of disqualification would not be available to a child who is tried as an adult by the Children's Court, as per the proviso to section 24(1). Another consequence, which may also have serious repercussions, is that as per section 24(2), where the Board or the Children's Court, after the case is over, may direct the police or the registry that relevant records of such conviction may be destroyed after the period of expiry of appeal or a reasonable*

period as may be prescribed. Whereas, when a child is tried as an adult, the relevant records shall be retained by the relevant Court, as per the proviso to section 24(2).” (Reference Barun Chandra Thakur vs. Master Bholu(SC) : Law Finder Doc Id # 2012149).

17. These provisions have been incorporated in the JJ act with the express intention to deter this new breed of delinquents aged between 16 to 18 years. And it is in this background, that the petitioner seeks to be tried as a minor/ child, and not an adult.

18. The petitioner has been charged for commission of offence under Sections 376(2)(n), 363, 366 and 506 IPC and Section 6 of POCSO Act, 2012, which fall under the category of ‘heinous offence’ as defined under Section 2(33) of the JJ Act. Section 2(33) of the Juvenile Justice Act, 2015, provides the definition of **“Heinous offence”** which is as under:-

““Heinous Offences” includes the offences for which the minimum punishment under the IPC or any other law for the time being in force is imprisonment for 7 years or more”.

19. In compliance of the above statutory mandate, preliminary assessment of the petitioner was duly conducted on 17.10.2023 under Section 15 of the Juvenile Justice Act to assess his capacity to commit and understand the consequences of the offence. As per the Report received from the PGIMER, it was assessed as follows: -

"Behaviour Observation.- The juvenile came for Psychological Assessment and he was accompanied by his father (Sh. Lacchman Shah). He was cooperative and communicative. He was oriented to time, place and person.

Identification mark.- Sear mark on the right Cheek.

Test Administered. - The IQ score as per main scale list was 96. It was held that the juvenile had average level of Intellectual functioning.”

20. On the basis of the above said report, the Board held the petitioner to possess the (i) mental capacity to commit offence (ii) physical capacity to commit offence (iii) ability to understand the consequences of the offence; and the capacity to understand (iv) the circumstances under which the offence was allegedly committed. Accordingly, the PMJJB held that the petitioner shall be tried as an adult; which assessment was upheld in Appeal by the Id. Judge, Special Court.

21. The only grounds on which the petitioner has assailed the abovesaid assessment is that that a) on date of alleged offence i.e. 1.1.2021, the petitioner was a minor; and b) prior to the assessment made by the Board on 17.10.2023, the petitioner had spent 3 months in jail which is enough time for a child-in-conflict with law to start thinking as a mature person or an adult, and therefore, the assessment made is vitiated/inaccurate.

22. I find no merit whatsoever in the arguments raised on behalf of the petitioner. As per the complaint dated 16.6.2022/FIR dated 26.8.2022, the first incidence of rape occurred on 1.1.2021. The date of birth of the petitioner is 25.02.2003. Thus, age of the petitioner as on *first* commission of offence i.e. on 1.1.2021, was 17 years 10 months and 7 days old i.e. he was one month and 21 days short of attaining the age of majority.

23. In these circumstances, reference may be made to judgment of **Barun Chandra Thakur** (supra) wherein a student of Class II was murdered by slitting his throat in the school washroom. The accused was Bholu, a Class IX student of the same school. As Bholu was over 16 years old and had committed a heinous offence, accordingly, the Board conducted a preliminary assessment as per which it was directed that the accused-juvenile be tried as an adult on the ground that the juvenile had sufficient maturity and ability to understand the consequences of his action.

24. Reference may also be made to the judgment of this Court in **“Vikram @ Vikcy @ Gonder Vs. State of Haryana & Ors.” Law Finder doc ID # 1765048**, wherein, even though the accused therein was 16 years 11 months and 2 days old on the date of incident yet, he was treated as an adult for the purpose of trial on the basis of the report submitted by the concerned Principal Magistrate Juvenile Justice Board.

25. Judgment of the Hon’ble Supreme Court rendered in case of **“Master Bholu (Imaginary Name) Vs. Central Bureau of Investigation & Anr.” Law Finder Doc ID # 2051947**, is also relevant wherein too, the accused was 16 years and 4 months old at time of commission of crime and was tried as an adult on the basis of the order passed by the Juvenile Justice Board. As such, minor shortage of majority would not stand in the way of being tried as an adult subject to the assessment made under Section 15 of the JJ Act.

26. The said argument on the part of the petitioner is even otherwise not tenable in view of the fact that the petitioner had attained majority on 25.2.2021. As per the complaint dated 16.6.2022, the victim had given birth '1 ½ months' prior to the complaint i.e. on or around 1.5.2022. Thus, the victim was impregnated on or around 1.9.2021. Thus, clearly, there was repeated commission of offence/ rape of the victim after the petitioner had attained majority on 25.2.2021, till 1.9.2021. Therefore, a larger part of the offence was allegedly committed by the petitioner after he had attained majority. Thus, the petitioner cannot claim that he should be tried as a minor.

27. The petitioner has further argued that the preliminary assessment itself is vitiated as the same was made on 17.10.2023 after the petitioner had spent more than 3 months in jail, during which time he had acquired sufficient maturity. It has also been stated that the inquiry/assessment was conducted 2 years 9 months and 17 days after the petitioner became an adult. The said argument is fundamentally flawed. There is no denying that the petitioner was already major when the FIR was registered on 26.8.2022; as also when he was taken into custody thereafter, in August 2022. After his release on 30.11.2022, the petitioner was partly tried before the Id. Special Court before he moved an application to prove his juvenility. Thereafter, the petitioner was declared juvenile by the Special Court vide order dated 8.8.2023; and ultimately preliminary assessment was made by the Board on 17.10.2023. Thus, it is a non-sequitur to suggest that the petitioner was minor or that the assessment is vitiated on account of the above factors.

28. The said arguments of the petitioner deserve to be rejected also in view of the ratio of a Division Bench judgment of this Court in case of **Suraj vs. State of Haryana IOIN-CRM 8027 of 2021 in CRA-D-856-DB-2017 decided on 2.8.2023**. In the said case, in almost identical facts, the accused-juvenile therein was 17 years, 8 months and 2 days old on the date of occurrence; and was 17 years, 10 months and 6 days old on the date of registration of FIR; and had been charged with commission of heinous offence under Section 452 read with Section 34 of the IPC, 376-D and 506 of the IPC and Section 6 of the POCSO Act. The prosecutrix therein was 12 years old and was found pregnant and as per FSL and DNA reports, the involvement of the accused therein, in the offence was established. During the trial the juvenile-accused had moved an application to declare him juvenile but the said application was dismissed. As such, he was tried as an adult by the Additional Sessions Judge; and was subsequently convicted as charged and sentenced to rigorous imprisonment for 20 years under section 376-D IPC apart from the sentence awarded under section 452 read with section 34 IPC and section 506 IPC. At the stage of Appeal, the juvenile-convict therein filed an application praying for referring the matter to the Board for holding an inquiry and declaring the applicant as a juvenile. Vide detailed order dated 11.1.2023 ("**Suraj Vs. State of Haryana**" **Law Finder Doc ID # 2279185**), the matter was remitted back to the Id. Trial Magistrate for determination of the juvenility of the applicant-appellant therein. Pursuant thereto an inquiry was conducted and report dated 30.1.2023 was received as per which the appellant was reported to be a juvenile/child in conflict with law on the date of occurrence, as also on the

date of registration of the FIR. The question then posed before the Division Bench was whether the conviction and sentence of the appellant were liable to be set aside on account of the fact though he was a juvenile at the time of the commission of the offence, but had not been tried as per the provisions of the JJ Act and was tried by the regular Court of Additional Sessions Judge. Upon deep and detailed consideration of the matter after examining the entire case law, the Division Bench concluded that the conviction and sentence of the appellant were not liable to be set aside. It was held that:

“38. Keeping in view of the peculiar circumstances of this case, we are of the considered opinion that the appellant who was 17 years, 10 months and 2 days, at the time of occurrence, it cannot be said that he was not having the mental and physical capacity to commit the offence or that he was not having the ability to understand the consequences of the offence. Throughout the proceedings, the appellant has not set up any such circumstances from which an inference could be drawn that the appellant was not having the mental and physical capacity to commit the offence or that he was not having the ability the consequences of the offence.

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40. Keeping in view the peculiar facts and circumstances of the case which on the face of it requires no further assessment or inquiry, as such there is no need to remand the matter to the Juvenile Justice Board for conducting a preliminary assessment under Section 15 of the Act of 2015 at this stage, as it would frustrate the ends of justice and no purpose would be served.”

29. Thus, in the said case, in almost identical circumstances, even though no inquiry/ preliminary assessment was made under Section 15 of the JJ Act, the Hon'ble Division Bench upheld the conviction and sentence of the appellant therein on the ground that *"the appellant who was 17 years, 10 months and 2 days, at the time of occurrence, it cannot be said that he was not having the mental and physical capacity to commit the offence or that he was not having the ability to understand the consequences of the offence. Throughout the proceedings, the appellant has not set up any such circumstances from which an inference could be drawn that the appellant was not having the mental and physical capacity to commit the offence..."* The present case is on a better footing inasmuch as, besides the fact that there is nothing whatsoever on record to suggest that the petitioner did not possess the mens rea (physical or mental capability) to commit the heinous offence, or to understand the consequences of his actions, in addition there is the report of the Board under Section 15 of the JJ Act certifying to the maturity of the petitioner.

30. Judicial assessment cannot be divorced from reality. It is well settled that judicial approach must be realistic and based in ground realities. (Ref. **Mahesh vs. State of Rajasthan & others, (SC) : Law Finder Doc Id # 1000186**).

31. It is relevant that as per the school record of the victim produced by PW1-Shallu Rani, Incharge, Government Primary School, Peer Muchhalla, SAS Nagar, Mohali, the date of birth of the victim was recorded as 02.04.2007. As such, although the victim has stated in the FIR that she was 18 years of age, however, on date of first incident it appears that she

was only 13 years and 8 months old. Be that as it may, it is not disputed that the victim belongs to lower strata of the society as she is working as domestic help. The victim and her daughter have been deserted. The FSL and DNA reports are positive.

32. There is sufficient material on record to indicate that the petitioner was mature enough to understand the consequences of his action. As per law, the Board is required to conduct the preliminary assessment regarding 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 after such assessment, pass an order in accordance with Section 18 (3). The said requirements of law have been complied with in the present case. If the Board is of the opinion that the child needs to be tried as an adult, then the case is transferred to the Children's Court having jurisdiction to try such offence. Otherwise the Board itself will proceed to try the matter as a summons case under the CRPC. In the present case, as per the report of the PGIMER, as also the assessment of the Board, the petitioner was found to be mature enough to understand the consequences of the acts and actions committed by him. As such, no ground is made out as to why the petitioner should not be tried as an adult in accordance with the provisions of the JJ Act.

33. In view of the case law cited hereinabove, the petitioner can derive no benefit from the judgments relied upon by counsel for the petitioner as the same are distinguishable on facts and law.

34. As such, in view of the foregoing discussion, I find no ground is made out that warrants interference with the impugned orders. The present petition is accordingly **dismissed**.

35. Pending application(s) if any also stand(s) disposed of.

36. However, nothing stated hereinabove shall be construed to be an expression of opinion on the merits of the matter.

18.03.2024

Sunena

Whether speaking/reasoned

Whether reportable

(Nidhi Gupta)

Judge

Yes/No

Yes/No