

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.870 of 2023

Arising Out of PS. Case No.-55 Year-2018 Thana- MAHILA PS District- Jehanabad

ABHISHEK KUMAR @ NANHAKA son of Ranvijay Prasad @ Nanhku
Village- Sri Bigha Po Ps- Sakurabad Dist- jehanabad

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur Ms. Vaishnavi Singh Mr. Ritwik Thakur Mr. Pranshu Singh
For the State		Mr. Abhimanu Sharma APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY)

Date : 22-01-2025

This appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure for setting aside the judgment of conviction 29.05.2023 and order of sentence dated 31.05.2023 passed by the learned 1st Additional Sessions Judge-cum-Special Judge Children's Court, Jehanabad, in Children Case No. 03 of 2019, arising out of Jehanabad Mahila P.S. Case No. 55 of 2018, whereby the appellant has been convicted and sentenced as



under:-

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
376(AB) of the IPC	RI for 20 years	50,000/-	RI for three months
4 POCSO Act	RI for 20 years	50,000/-	RI for three months

2. The victim is a minor girl of 7-8 years of the age. The allegation against the appellant, who himself is a juvenile, is that he committed rape/penetrative sexual assault upon the victim.

3. The maternal grand-father of the victim (PW-3) lodged FIR on 21.10.2018 at 8.50.pm, stating therein that on 21.10.2018 at about 2.00 p.m., the appellant who is his co-villager was requested to park a motorcycle in courtyard of the informant and thereafter to give the keys to his grand-daughter (the victim). The victim in order to take the keys, went there and the appellant committed rape with her.

4. The FIR was registered under Section 376 of the IPC and Section 4 of the POCSO Act. After the investigation, the charge-sheet was



submitted and cognizance was taken. The charges were framed on 23.09.2019 under Section 376(AB) of the IPC and Section 4 of the POCSO Act.

5. Eight prosecution witnesses including, the victim (PW-7), her mother (PW-4), her maternal grand-father (PW-3/informant), her maternal grand-mother (PW-1), the doctors who conducted the medical examinations (PW-5 and 6) have been examined on behalf of the prosecution.

6. The followings are the documentary evidences adduced on behalf of the prosecution.

Ext.1	Written application
P-2/PW5	Medical report of the victim
P-3/PW6	Medical report of the victim regarding age assessment
P-4/PW6	Signature of Dr. Ramadhar Sharma on the medical report of the victim
P-5/PW7	Signature of victim on the statement u/s 164 Cr.P.C.
P-6/PW8	Endorsement on the written report



P-7/PW8	Formal FIR
P-8/PW8	Forwarding letter
P-9/PW8	Arrest memo
P-10	Statement of the victim recorded under Section 164 Cr.P.C

7. No witness has been examined on behalf of the defense, nor any documentary evidence has been adduced on his behalf.

8. Assailing the judgment of conviction and order of sentence, Mr. Ajay Kumar Thakur, the learned counsel for the appellant has submitted that the appellant is a juvenile. Vide order dated 19.02.2018, the Children's Court assessed his age as 16 years 8 months. Similarly, the Juvenile Justice Board (hereinafter referred to as 'the Board') has also held enquiry and vide order dated 08.12.2021, the Board assessed the age of the appellant as 16 years six months and 14 days. Since the appellant was a juvenile, the preliminary assessment of the appellant was mandated by Section 15 of the Juvenile Justice (Care and Protection of Children Act), 2015 (hereinafter referred to as 'the Act, 2015'), for



assessing the mental and physical capacity to commit such offence and ability to understand the consequences of the offence and the circumstances, in which he committed the offence. The required preliminary assessment was not done by the Board, and without the preliminary assessment, the appellant was tried as an adult by the Children's Court. It has further been submitted that the failure to conduct preliminary assessment, as required under Section 15 of the Act, 2015, has prejudiced the interest of the appellant adversely, due to which the trial has vitiated.

Section 15 of the Act, 2015 is being extracted hereinbelow:-

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 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 (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.

9. The learned counsel has submitted that in case of **Ajit Gurjar Vs. The State of Madhya Pradesh (Cr. Appeal No. 3023 of 2023)**, the Hon'ble Supreme Court had set aside the order of conviction and sentence only because the mandatory provisions of Sections 15 as well as Section 19(1) of the Act were not complied with. Relying upon the decision of **Ajeet Gurjar** (supra), the Hon'ble Supreme Court in case of **Thirumoorthy Vs. State represented by the Inspector of Police Cr. Appeal, arising out of SLP. (Crl.) No. 1936 of 2023**), held that holding of an enquiry under Sections 15 and 19(1) of the Act, 2015 is mandatory; non-compliance whereof is a gross



violation of the mandate of the Act, 2015, and the entire proceeding is vitiated due to non-compliance of this mandatory provision. The Hon'ble Supreme Court has taken the similar view in case of **Shilpa Mittal Vs. State of NCT (AIR 2020 SC 405** and also the Division Bench of this Court in case of **Manoj Bhagat Vs. The State of Bihar Cr. Appeal (DB) No. 143 of 2018.**

10. The learned counsel for the appellant has submitted further that alongside this fatal defect, a number of contradictions are also there in depositions of the witnesses. It has also been submitted that the medical examination of the appellant was not conducted, thereby the mandatory provision of Section 53-A of the CrPC has been violated. It has also been submitted that except the interested witnesses, not a single independent witness has supported the case of the prosecution. It has also been submitted that the allegation of penetrative sexual assault is not corroborated by the medical



evidence, since there is no evidence, in this regard.

11. Per Contra, Mr. Abhimanyu Sharma, the learned APP for the State, has submitted that, as per medical report, the age of the victim is 7-8 years. Her hymen was found ruptured, which suggests that sexual penetrative assault/rape was committed against her. On her private part, abrasion and redness were found which corroborates the allegation. The victim has fully corroborated the allegation, which was confirmed by the other witnesses as well as by the medical evidence.

12. The informant (PW-3) is the maternal grand-father of the victim. He deposed that his wife/PW-1 asked the appellant to park the motorcycle in courtyard and to return the keys. The victim followed the appellant to *dalan*, where he committed rape upon her. She came weeping and told that the appellant had committed rape upon her. She was brought to Sakurabad Hospital, wherefrom she was referred,



without examination, to Sadar Hospital, Jehanabad. She was treated there. The information was transmitted to Mahila Police Station, whereafter the police arrived at the hospital and the informant lodged the FIR. He identified his signature on written application, which has been marked as exhibit-1.

During his cross-examination, this witness has stated that he had not mentioned in the FIR that his wife asked the appellant to park the motorcycle. This witness was not present in his *dalan*, rather he was present at his *darwaza*.

13. PW 2 is the mother of the victim. She deposed that the appellant gave five rupees to the victim for toffee and after kissing her, he committed the act after undressing her. The victim was crying and complaining about inflammation on her private parts while urinating. This witness also noticed injury on the private parts of the victim.

14. PW-5 is Dr. Renu Singh, who examined the victim. She found redness in



posterior part of vagina. Hymen was found to be ruptured. The victim was of the age of 7-8 years.

15. PW-6 is Dr. Binod Kumar Singh, who is one of the members of the Medical Board, which conducted the age determining examination of the victim and found her age between 7-8 years. The medical reports have been marked as Exts.P-3 and P-4.

16. PW-7 is the victim herself. she stated that her maternal grand-mother called the appellant and asked him to park the motorcycle in the courtyard. The grandmother also asked the victim to receive the keys from the appellant. The appellant gave some money to the victim for chocolates. When she went to the *dalan*, the appellant gave her chocolate. He, after kissing her thrice, inserted his hand into her pant. She felt pain and cried. The appellant commanded the victim not to disclose the incident to anyone. When she went to bathroom, she felt pain. She told about the entire occurrence to her mother whereafter she was brought to the hospital.



17. PW-8 is the Investigating Officer. On her statement, the FIR and endorsement thereon have been exhibited. She conducted the investigation and, after finding evidences, she submitted charge-sheet against the appellant.

18. We have perused the impugned judgment of the Trial Court and the materials available on record. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties.

19. It is an admitted fact that the age of the appellant has been determined by the Children's Court and the Board as 16 years 8 months.

Section 2 (35) of the Act, 2015, defines the word 'Juvenile' as a child below the age of 18 years.

20. The Act of 2015 was enacted after repealing the old special legislation regarding the inquiry for an offence committed by a juvenile, called as the Juvenile Justice (Care and Protection of Children) Act, 2000. The new legislation, the



Act, 2015 is a complete code, in which the entire process of enquiry regarding an offence committed by a juvenile has been provided. The provision for bail and the maximum punishment which can be awarded to a juvenile have also been provided in this Act. The preamble of the Act, 2015 declares the object of this enactment which is to provide care and protection to a child in conflict with law by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matter in the best interest of children. The preamble itself shows that the object of the enactment is the paramount consideration of the best interest of the child.

21. In the Act, 2015, a special provision has been made for trial/inquiry of a child in conflict with law, if he is above the age of 16 years and he commits a heinous offence.

22. Section 15 of the Act, 2015 says



that if a child in conflict with law, is above the age of 16 years and he commits a heinous offence, the Board shall conduct a preliminary enquiry for assessing the mental and physical capacity of the felony to commit to such offence as well as the ability to understand the consequences of the offence and also the circumstances, in which he committed the offence.

23. From bare perusal of Section 15 of the Act, 2015, it is clear that for compliance of the mandatory provision given therein, two pre-conditions must exist: (i) the person must be a juvenile above 16 years of the age and (ii) there must be allegation that he had committed heinous offence.

The word 'heinous offence' has been defined in Section 2(33) of the Act, 2015, which means that heinous offence is an offence which is punishable with the imprisonment for 7 years or more.

Section 2 (33) of the Act, 2015 is



being extracted hereinbelow:-

“2(33). “heinous offences” includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more.”

24. In the present case, the offence committed by the appellant is heinous within the definition of Section 2(33) of the Act, 2015 and the appellant is above 16 and below 18 years of the age, as determined by the Board as well as by the Children’s Court. As such, the preliminary assessment required under Section 15 of the Act, 2015, was necessary,

25. Section 18(3) of the Act, 2015 provides that if the Board, after preliminary assessment under Section 15, passes an order that the child should be tried as an adult, then the Board may pass an order for transfer of the trial of the case to the Children’s Court having jurisdiction to try such offence. This provision



shows that no case shall be tried by the Children's Court, unless it is transmitted by the Board after conducting the preliminary enquiry, required under Section 15 of the Act, 2015.

26. In the instant case, the Children's Court conducted the trial without the case being transmitted to it by the Board under Section 18(3) of the Act, 2015. In this way, the mandatory provisions of Sections 15 and 18(3) of the Act, 2015 have been violated.

27. The Hon'ble Supreme Court in cases of **Ajeet Gurjar** (supra), **Thirumoorthy** (supra) and **Shilpa Mittal** (supra), considered the effect of non-compliance of the mandatory provision of Sections 15, 18(3) and 19(1) of the Act, 2015 and held that non-observance of these provisions is fatal to the trial and the trial vitiates.

28. We are of the considered view that non-compliance of Sections 15 and 18(3) of the Act, 2015 has caused prejudice to the interest of the appellant, vitiating the entire trial.



29. On the basis of the above-mentioned observations, the judgment of conviction 29.05.2023 and order of sentence dated 31.05.2023 passed by the learned 1st Additional Sessions Judge-cum-Special Judge Children’s Court, Jehanabad, in Children Case No. 03 of 2019, arising out of Jehanabad Mahila P.S.Case No. 55 of 2018 is set aside.

30. Consequently, the appeal is allowed and the appellant is directed to be set at liberty, if not wanted in any other case.

(Nawneet Kumar Pandey, J)

(Ashutosh Kumar, ACJ)

HR/-

AFR/NAFR	NAFR
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