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Court : Madhya Pradesh

Decided On : Nov-15-2011

Judge : G.D. Saxena

Appeal No. : Criminal Revision No.720 of 2011

Appellant : Narayan Sharma

Respondent : State of Madhya Pradesh and Another

Judgement :

G.D. Saxena, J.

(1) This revision petition under Section 397/401 of the Code of Criminal Procedure 1973 preferred by the petitioner/accused is directed against an order dated 13th July 2011 in Special Sessions Case No. 111/2009 by the Special Judge (Atrocities), Bhind, rejecting thereby prayer of the accused that he is a Juvenile and below 18 years of age, at the time of commission of offence.

(2) Brief facts, just for the decision of this case are that the petitioner was shown as accused in case Crime No. 30/2009 registered by the Police Station Endori, district Bhind. The investigation was conducted by the CBI and after investigation, the charge-sheet was filed before the criminal court. After committal, the trial commenced before the Special Judge Bhind. As per the Investigating Agency, the age of the accused/petitioner was above 18 years and therefore he was arrested and committed in the Judicial custody. The petitioner by filling an application

contended that at the time of incident he was below 18 years, hence, he claimed himself to be a Juvenile. After detailed inquiry conducted by the trial Judge, it was concluded by the impugned order that the petitioner was not Juvenile. Being aggrieved by the said order, this revision has been submitted.

(3) The contention of the learned counsel appearing for the petitioner is that the petitioner on the date of incident was below 18 years of age. In support of his arguments, he filed copy of the Mark-sheet of the Board of Secondary Education, Madhya Pradesh Bhopal (10+2) 2006 in which the date of Birth of the petitioner was mentioned as 8th July 1991. Copies of the certificate-cum- Mark sheet of the Middle Examination 2003-2004, certificate-cum-Mark sheet of the Primary Certificate Examination 2000-2001 were also filed to demonstrate the date of birth of the accused as 8th July 1991. In the copy of horoscope, the date of birth of the petitioner is also shown 8th July 1991 (as per Hindu calender month Aashad Krishna11). Moreover, the examined witnesses Sarnam Singh Rajoria, who is the Head Master of Government Primary School Gohad, Smt. Shakuntala Sharma, mother of the petitioner, Pradeep Swami, an Astrologer also stated in their evidence about the said date of birth of the petitioner. To rebut the fact of date of birth, the CBI examined Smt. Saroj Jewde LIC Agent, who stated that the accused for the purpose of getting LIC Policy submitted the copy of Mark-sheet of Higher Secondary Examination 2006 (10+2), conducted by the Board of Secondary Education Madhya Pradesh Bhopal showing his date of birth as 8th July 1990.

(4) The contention on behalf of the accused/petitioner is that on perusal of the mark-sheet furnished by the CBI it clearly shows that the date of birth was manipulated by someone else. It is contended that the petitioner/accused for determination of his correct date of birth was medically examined and as per ossification test, the age was determined at 19 years on the date of examination, i.e., 20th July 2010. It is thus contended that by all means it is proved beyond all doubts that at the time of incident, the age of the accused/petitioner was below 18 years and consequently he was held to be juvenile. Therefore, it is prayed that by allowing the revision, the impugned order be set aside.

(5) The learned counsel appearing for the respondent No.2, on the other hand, opposed the prayer and prayed for dismissal of the revision.

(6) Heard the learned counsel appearing for the parties and also perused the documents and the evidence as adduced by the parties and the law applicable to the present case.

(7) The point for consideration before this court is whether or not the trial court had applied the correct parameters for determining the age of the accused, who is claiming to be juvenile on the date of occurrence and whether the findings recorded by the trial court are suffered from any illegality or perversity, warranting interference by this court in exercise of revisional jurisdiction?

(8) Determination of age of a delinquent, particularly in borderline cases, is rather a complex exercise. Hence, before considering the rival contentions of the parties, it would be profitable to set out the material provisions of the Juvenile Justice (Care and Protection) Act 2000.

Section 7-A. Procedure to be followed when claim of Juvenile is raised before any court.-

(1) Whenever a claim of Juvenility is raised before any court or a court is of opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry take such evidence as may be necessary but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child stating his age as nearly as may be;

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

(2) If the court finds a person to be juvenile on the date of commission of the offence under Sub Section (1) it shall forward the juvenile to the Board for passing

appropriate orders and the sentence, if any passed by a court shall be deemed to have no effect.

Section 49.- Presumption and Determination of Age.-

(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for purpose of giving evidence) is juvenile or a child, the competent authority shall make due inquiry as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not stating his age as nearly as may be.

(2) No order of the competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of the person so brought before it shall for the purpose of this Act, be deemed to be the true age of that person.

(9) The relevant provision of the Juvenile Justice (Care and Protection of Children) Rules 2007 about the procedure to be adopted in determining the age of the person by the competent authority is as follows :-

Rule 12.- Procedure to be followed in determination of Age.-

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these rules shall determine the age of such juvenile or a child or a juvenile in conflict with the laws within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the board or as the case may be the committee shall decide the juvenile or otherwise of the juvenile or a child or as the case may be the juvenile in conflict with the law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with the law ,the age determination inquiry shall be conducted by the court or the Board or as the case may be ,the Committee by seeking evidence by obtaining -

(A) (i) the matriculation certificate or equivalent certificate,if available and in absence whereof;

(ii) the date of birth certificate from the school (other than a school) first attended ; and in the absence whereof ;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat.

(B) and only in the absence of either (i),(ii), or(iii) of clause (A) above, the medical opinion will be sought from a duly constituted Medical Board which will declare the age of the juvenile, or a child. In case assessment of the age cannot be done, the court or the board or as the case may be the committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or the juvenile by considering his/her age on lower side within the margin of one year and while passing orders in such case shall after taking into consideration such evidence as may be available or the medical opinion ,as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clause (A) (i).(ii).(iii) or in the absence whereof, clause (B) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with the law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in Sub Section (3) the court or the Board or as the case may be the committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where ,further inquiry or otherwise is required inter alia in terms of Section 7-A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the board after examining and obtaining the

certificate or other documentary proof referred to in Sub Rule (3) of this Rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases ,where the status of juvenility has not been determined in accordance with the provisions contained in Subrule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

(10) In the case of Babloo Pasi Vs. State of Jharkhand (AIR 2009 SC 314) the Apex Court held:-

"it is clear that it merely provides that when it appears to the competent authority viz.,the Board, that the person brought before it is a juvenile, The Board is obliged to make an enquiry as to the age of that person; for that purpose it shall take evidence as may be necessary and then record a finding whether the person in question is a juvenile or not. Explaining the scope and purpose of Section 32 of the Juvenile Justice Act, 1986 which is almost *pari materia* with Section 49 of the Act in *Bhola Bhagat v. State of Bihar* (1997) 8 SCC 720 : (AIR 1998 SC 236) this Court had observed as under :-

".....when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard. Keeping in view the beneficial nature of the socially-oriented legislation, it is an obligation of the court where such a plea is raised to examine that plea with care and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions to an accused. The court must hold an enquiry and return a finding regarding the age, one way or the other."

Nevertheless, in *Jitendra Ram alias Jitu v. State of Jharkhand* (2006) 9 SCC 428 : (AIR 2006 SC 1993) the Court sounded a note of caution that the aforesaid observations in *Bhola Bhagat* (supra) would not mean that a person who is not

entitled to the benefit of the said Act would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit and each case has to be considered on the basis of the materials brought on record.

At this juncture, it is relevant to note that in exercise of power conferred by Section 68 of the Act, the State Government of Jharkhand has framed the Jharkhand Juvenile Justice (Care and Protection of Children) Rules, 2003. Rule 22 thereof lays down the procedure to be followed by a Board in holding enquiries and the determination of age. Sub-rule (5) of the said Rule which is material for the present case reads thus:-

"22. Procedure to be followed by a Board in holding inquiries and the determination of age.-

(1)

(5) In every case concerning a juvenile or a child, the Board shall either obtain.

(i) a birth certificate given by a corporation or a municipal authority; or

(ii) a date of birth certificate from the school first attended; or

(iii) matriculation or equivalent certificates, if available; and

(iv) in the absence of (i) to (iii) above, the medical opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board, (regarding his age and, when passing orders in such case shall, after taking into consideration such evidence as may be available or the medical opinion, as the case may be record a finding in respect of his age)."

Thus, as per Rule 22, in the absence of birth or matriculation certificates, in order to record a finding in respect of age of a person, the Board is required to obtain the opinion of a duly constituted Medical Board. It is clear from a bare reading of the Rule that although the Board is bound to obtain the opinion of the Medical Board but the opinion per se is not a conclusive proof of age of the person concerned. It is no more than an opinion. More so, when even the Medico-Legal opinion is that

owing to the variation in climatic, dietic, hereditary and other factors, affecting the people of different States in the country, it would be imprudent to formulate a uniform standard for the determination of the age. True, that a Medical Board's opinion based on the radiological examination is a useful guiding factor for determining the age of a person but is not incontrovertible. Commenting on the evidentiary value of the opinion of a doctor, based on x-ray tests, as to the age of a person, in *Ramdeo Chauhan alias Raj Nath v. State of Assam*(2001) 5 SCC 714: (AIR 2001 SC 2231)R.P. Sethi, J., speaking for the majority in a three-Judge Bench, had observed that :-

"...An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much of reliance cannot be placed upon text books, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitudes, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform."

It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence."

(11) On perusal of the provision as mentioned in Section 7 of the Act, it appears that when any Magistrate not empowered to exercise the powers of the board under this Act is of opinion that a person brought before him under any provisions of this Act (other than for purpose of giving evidence) is juvenile or the child, he shall without delay record such opinion and forward the juvenile or the child and record of the proceeding to the competent authority having jurisdiction over the proceeding. Then the competent authority shall hold the inquiry as if the juvenile or the child has been brought before it. It clearly indicates as soon as the trial court not having jurisdiction under the Act found prima facie that the accused present

before the court is juvenile, it shall forward the juvenile or the child alongwith the record of the proceeding to the board having jurisdiction under the Act for making an inquiry under Section 49 of the Act.

(12) In the case of Jitendra Ram alias Jitu Vs. State of Jharkhand (AIR 2006 SC 1933), the Apex court held:-

“We are, however, not oblivious of the decision of this Court in Bhola Bhagat v. State of Bihar [(1997) 8 SCC 720 : (AIR 1998 SC 236)] wherein an obligation has been cast on the court that where such a plea is raised having regard to the beneficial nature of the socially-oriented legislation, the same should be examined with great care. We are, however, of the opinion that the same would not mean that a person who is not entitled to the benefit of the said Act would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit. Each case has to be considered on the basis of the materials brought on records.

The provisions of a beneficial legislation should ordinarily be given effect to. However, we may notice that the appellant is literate. Presumably he attended some school. However, no certificate of his date of birth or any other proof as regard his date of birth is available on records. No other material apart from the estimate of the court has been brought to our notice. In the absence of any material on record, we cannot arrive at a definite conclusion that the appellant as on the date of commission of the offence was a child within the meaning of the said Act.”

(13) Further, in the case of Krishna Bhagwan Vs. The State of Bihar [(1989) PLJR 507 : (AIR 1989 Pat 217)] N.P. Singh, J., (as His Lordship then was), speaking for a Full Bench of the Patna High Court, opined :

"Section 32 vests power in the Juvenile Court to make due enquiry in respect of the age of the accused on the date of the commission of the offence and for that purpose such Court has to take evidence as may be necessary and to record a finding whether the accused in question was a juvenile. It need not be pointed out that it is not possible for this Court to determine the age of an accused on the date

of the commission of the offence because that has to be determined on the basis of the evidence to be adduced and other materials in support thereof being produced. This determination should not be based merely on written opinion of the doctors produced before this Court. Prosecution has right to cross-examine such medical or forensic experts who have given their opinion about the age of the accused in order to demonstrate that the accused was not a juvenile on the date of the commission of the offence. This is necessary because by the time the plea is taken before the appellate court in almost all the cases the accused concerned must have ceased to be a juvenile due to lapse of time making it more difficult for the appellate court as well as the Juvenile Court to determine as to what was his age at the time of the commission of the offence. In my view, in such a situation, the Courts including Juvenile Court should get the accused held guilty of serious offences, examined by a Medical Board and should determine the age of such accused on basis of the materials on the record including the opinion of the Medical Board. Once the legislature has enacted a law to extend special treatment in respect of trial and conviction to juveniles, the Court should be jealous while administering such law so that the delinquent juveniles derive full benefit of the provisions of such Act but, at the same time, it is the duty of the Courts that the benefit of the provisions meant for juveniles are not derived by unscrupulous persons, who have been convicted and sentenced to imprisonment for having committed heinous and serious offences, by getting themselves declared as children or juveniles on the basis of procured certificates. According to me, if the plea that the accused was a child or juvenile on the date of the commission of the offence is taken for the first time in this Court, then this Court should proceed with the hearing of the appeal, as required by section 26 of the Juvenile Act and should record a finding in respect of the charge which has been levelled against such an accused. If such an accused is acquitted, there is no question of holding any enquiry in respect of the accused being a child on the relevant date but, if the finding of the guilt recorded by the Court below is affirmed and this Court on the basis of materials on record is prima facie satisfied that the accused may be a child/juvenile within the meaning of the relevant Act on the date of the commission of the offence, it should call for a finding from the Children's Court/Juvenile's Court in accordance with section 32 of the Act. If the finding so received is accepted by

this Court, then this Court in terms of section 26 of the Juvenile Act should pass an order directing the Juvenile Court to pass orders in accordance with sections 21 and 22 of the Act." We with respect agree to the said approach."

(14) On perusal of the facts of the present case, it transpires that during inquiry for determining the age of the juvenile, relevant materials such as the horoscope in place of birth certificate of the juvenile, the certificates of matriculation examination and opinion of Medical Board constituted under the order of the court, were available on the record. The factum of date of birth was also found to be proved by the statements of the witnesses adduced by the juvenile. As per medical evidence of Dr. S.C. Gupta, it is gathered that on 20th July, 2010 this witness took out the X-ray of the accused on the instructions of the Medical Board with a view to determine the age and after examination he found that the Epiphysis of lower end of radius and ulna is fused which fuses at the age of 19 years. Therefore, as per the Radiological, the age of the accused is above 19 years on 20/7/10. At this juncture, the statements of Insurance Agents/officers, namely, Smt. Saroj Jewde and Rajendra Bhojewar will not be helpful to decide that the petitioner was juvenile at the time of incident because for getting issuance policy, the petitioner has submitted the copy of the Matriculation showing his date of birth as 8th July 1990. So, the conclusion drawn by the trial Judge does not find well support by legal and factual aspect as came out from the ocular and documentary evidence to hold that the age of the petitioner was above eighteen years.

(15) Consequently, by allowing the revision, the impugned order dated 13th July 2011 is set aside and the trial Judge is directed that the case of the petitioner be tried as per provisions of Juvenile Justice (Care of Children) Act 2003 by the Juvenile Justice Board.

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