
(2011) 03 BOM CK 0218
In the Bombay High Court
Case No : Criminal Appeal No. 423 of 2009

Chhotu @ Asif Istraeeel Shaikh

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 22-03-2011

Acts Referred:

Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 2(l)
Juvenile Justice (Care and Protection of Children) Rules, 2007 — Rule 12(3)
Maharashtra Juvenile Justice (Care and Protection of Children) Amendment Rules,
2011 — Rule 8G, 8G(5)
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2011) 03 BOM CK 0218

Hon'ble Judges : B.H. Marlapalle, J;A.M. Thipsay, J

Bench : Division Bench

Advocate : Yug Mohit Chaudhari, instructed by Tasneem E. Kanthawala, for the Appellant; A.S. Pai, APP, for the Respondent

Judgement

B.H. Marlapalle, J.—The Appellant was tried as accused No. 3 in Sessions Case No. 363 of 2005 and as per the judgment and order dated 10th August, 2006 the Appellant along with accused No. 4-Arjul Nepal Gazi and accused No. 5-Lambu @ Aminuru Ijul Gazi has been convicted and sentenced for the offence punishable u/s 302 read with Section 34 of I.P.C. and the said order of conviction and sentence is under challenge in this appeal.

2. Before the trial Court the Appellant's age was shown as 19 years and from the record it is clear that he is not treated to be a juvenile as defined under the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short "the Juvenile Justice Act, 2000). The appeal came to be admitted on 6th April, 2009 by this Court and it appears that during the pendency of this appeal he filed Criminal Miscellaneous Application No. 2156 of 2009 in Sessions Case No. 360 of 2005 before the learned Additional Sessions Judge at Thane. In the application it was stated that the Appellant was never admitted to any school and did not possess any document showing his date of birth. His father Mohamed Istraeeel

was examined along with himself and in the oral depositions it was claimed that the applicant was born in the year 1989.

3. By following the requirements of Rule 12(3) (b) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short Rules of 2007) the trial Court ordered ossification test to be carried out for determination of the Appellant's age and he was sent to the Civil Hospital at Thane. His ossification test was conducted on 10th April, 2010 and on the same day the Medical Officer gave his opinion that the age of the Appellant was between 20 to 25 years. The Court accepted the said opinion and having regard to the scheme of Rule 12(3)(b) of the Rules of 2007 it held by its order dated 21st January, 2011 that on the date of the offence i.e. on 3rd June, 2005 the Appellant was below the age of 18 years and, therefore, a juvenile in conflict with law. However, as the instant appeal has been pending in this Court the learned Additional Sessions Judge could not grant any further relief to the Appellant and has forwarded his findings under the letter dated 21st January, 2011 to the Registrar (Judicial) of this Court.

4. Dr. Chaudhari the learned Counsel appearing for the Appellant urged before us that the findings of the Additional Sessions Judge recorded in the order dated 21st January, 2011 in Criminal Misc. Application No. 215 of 2009 do not suffer from any error and are, therefore, required to be accepted.

5. Mrs. Pai, the learned A.P.P., on the other hand submitted that under Rule 12(3) (b) of the Rules of 2007 the ossification test was required to be undertaken by a Medical Board duly constituted by the State Government and not by any Medical Officer in the Civil Hospital. As per Mrs. Pai, the medical opinion recorded in favour of the Appellant and accepted by the trial Court is thus not in keeping with the requirements of Rule 12(3)(b) of the Rules of 2007 and, therefore, unless the age determination test is conducted by the Medical Board the case of the Appellant cannot be considered for his claim of being a juvenile in conflict with law.

6. In rebuttal Dr. Chaudhari has invited our attention to the Rules amended by the State of Maharashtra by its notification dated 11th January, 2011 published in the Government Gazette dated 13th January, 2011. The Government of Maharashtra published the Maharashtra Juvenile Justice (Care and Protection of Children) Amendment Rules, 2011 thereby amending the Maharashtra Juvenile Justice (Care and Protection of Children) Rules, 2002 and referred to in the notification as Principal Rules. Rule 8G of the amended Rules of 2011 deals with age determination and it would be appropriate to reproduce the said Rule as under:

8G. Age determination.--(1) In every case concerning a juvenile or child the Board or the Committee or any court shall determine the age of such juvenile or child within a period of thirty days from,-

(i) the date of first production before the Board or Committee, or

(ii) the date of filing of application before any court claiming that an accused or a person convicted of an offence is a juvenile, or

(iii) the date of raising the issue of age before any court that is seized of any proceeding relating to a child in need of care and protection, or

(iv) the date when any court initiates suo-motto action for determination of age.

(2) While conducting an inquiry for determination of age, the Board or the Committee or the court, shall seek proof of age by obtaining any of the following documents:

(i) a birth certificate issued by a local self Government.

(ii) a certificate issued by school reflecting the date of birth as recorded in the school register.

(3) In the event of doubting the authenticity of the above documents, the Board or the Committee or any court shall call upon the Special Juvenile Police Unit or Juvenile Welfare Officer of concerned police station to enquire the authenticity of any of the documents submitted as proof of age.

(4) on the basis of above documents, the Board or Committee or any court shall record a finding of age which shall be conclusive proof of age regarding that juvenile or child.

(5) If the documents mentioned in Sub-rule (2) are not available or the document submitted is not found to be authentic, the age of the person shall be determine by seeking the medical opinion of hospitals authorized by the Government. On the basis of the medical opinion, the Boards or the Committee or any Court shall record a finding of age, which shall be conclusive proof of age cannot be done, the Board or the Committee or any court for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

(6) In the event of doubting the bona-fides and integrity of the medical opinion, the Board or the Committee or any court may direct a second medical examination to ascertain the age of the juvenile or child. In the event of conflict between the two medical opinions, the Board or Committee or the court may examine the registered cri-app.423-2009 medical practitioners to determine the age of the juvenile or child.

(7) If necessary, the Board or the Committee or any court conducting an age determination inquiry may orally examine the parent or guardian or school authority or representative of hospital authorized by the Government.

(8) On completion of the age determination inquiry, the Board or the Committee or any court shall record a finding with regards to age by passing a written order recording the age and declaring whether the person in respect of whom the age inquiry was conducted is a juvenile or child for the purpose of the Act, and a

copy of such order shall be furnished to the juvenile or child or person concerned.

(9) The Board or the Committee shall not conduct an age determination inquiry if the juvenile or child has been produced before the Board or the Committee under the orders of any court which has conducted the age determination inquiry and found the concerned person to be a juvenile or child.

7. We are concerned with Rule 8G (5) of the amended Rules 2011 of the Government of Maharashtra. As per Dr. Chaudhari even though these Rules have come into force from the date of their publication i.e. 13th January, 2011 the order passed by the trial Court cannot be faulted with and even if the Appellant was required to be sent to the Medical Board, the learned A.P.P., who appeared before the trial Court appears to have accepted the ossification test conducted by the Civil Hospital at Thane. However, as of now in the State of Maharashtra the amended Rules of 2011 would prevail and as per Rule 8G (5) of the said Rules a medical opinion of the hospital authorised by the Government regarding the determination of age has to be accepted and it is not necessary that in every case the age determination has to be done by the Medical Board.

8. We, therefore, do not find any case made out to doubt or discard the opinion of the Medical Officer, Civil Hospital, Thane, determining the age of the Appellant as between 20 to 25 years as on 10th April, 2010.

9. Now coming to the determination of being a juvenile, the trial Court has considered the date of offence i.e. on 3rd June, 2005 and if the age of the Appellant was accepted to be 20 years (lower side) as on the date of the offence, his age would be 15 years and 2 months. In the alternative, if the age of 20 and 25 years is taken into consideration, the Appellant's age as on 10th April, 2010 would be 22 1/2 years (by average method) and thus as on the date of the offence his age would be 17 years and 8 months. By any of these alternative methods the Appellant would be a juvenile as on 3rd June, 2005 i.e. less than 18 years of age. Under Rule 12(3)(b) of the Rules of 2007 as framed by the Government of India as well as under Rule 8G(5) of the Rules amended in 2011 by the Government of Maharashtra the age of the juvenile could be terminated by giving margin of one year on the lower side and we have noted that even without giving such a margin the trial Court has recorded findings on both counts. We are, therefore, satisfied that the findings of the trial Court do not suffer from any infirmity and the opinion about the age of the Appellant being less than 18 years as on 3rd June, 2005 is required to be accepted. Dr. Chaudhari in this regard has rightly relied upon the decision of the Supreme Court in the case of Babban Rai and Another Vs. State of Bihar, .

10. Once we uphold the finding that the Appellant is a juvenile in conflict with law as defined u/s 2(l) of the Juvenile Justice Act, 2000 the order of sentence has to be set aside and so far as the order of conviction is concerned, Dr. Chaudhari seeks leave to withdraw the Appeal. The Appellant has by now crossed the age of 18 years and, therefore, there is no question of his being directed to

be produced before the Juvenile Board to undergo sentence and even otherwise, by now he has actually undergone the sentence of 5 years.

11. In the result, the order of sentence of life imprisonment awarded to the Appellant is set aside as the Appellant was a juvenile on the date of the incident i.e. 3rd June, 2005 and the appeal is partly allowed and for the challenge to the order of conviction the appeal is disposed as withdrawn. We direct that the Appellant be released forthwith unless required to be detained in any other criminal case.