
(2013) 06 BOM CK 0170

In the Bombay High Court

Case No : Cri. Appln. No. 951 of 2009 in Cri. Appeal No. 641 of 2008

Mohd. Imran Islam Salamani

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 12-06-2013

Acts Referred:

Citation : (2015) 2 MhLJCrI 75

Hon'ble Judges : V. K. Tahilramani and P. D. Kode, JJ.

Bench : Division Bench

Advocate : Ms. Rebecca Gonsalvez, Advocate, for the Applicant; Mrs. P. P. Bhosale, APP, for the State

Final Decision : Allowed

Judgement

Smt. V. K. Tahilramani, J. (Oral)—The appellant i.e original accused No. 2 had been convicted under sections 120-B and 364-A read with 34 of Indian Penal Code by judgment and order dated 19-3-2008 passed by 2nd Ad-hoc Additional Sessions Judge, Sewree in Sessions Case No. 213 of 2007. The appellant has preferred Cri. Appeal No. 641 of 2008 wherein he has challenged the said judgment and order of conviction. During pendency of the appeal, the appellant has preferred Cri. Application No. 951 of 2009 wherein he has stated that he was under 18 years of age at the time of the incident i.e. he was a juvenile in conflict with law, hence, he should be given benefit of Juvenile Justice (Care and Protection of Children) Act, 2000.

2. The incident in question took place on 9-12-2006. The case of the applicant/appellant is that he is an illiterate person and he does not have any school leaving certificate nor can he produce any birth certificate. By order dated 11-9-2009, the applicant/appellant was directed to be produced before the Court on the next date. Accordingly, on 16-11-2009, the applicant was produced before the Court. The applicant stated that he had no documentary proof regarding his date of birth, hence, he requested for subjecting him to medical examination so as to determine his age. Therefore, the Chief Medical Officer of Nasik Road

Central Prison was directed to take appropriate steps to get the applicant medically examined at the Civil Hospital, Nashik so as to determine his age on the date of the examination. Accordingly, Radiological examination was conducted on the applicant on 24-11-2009 and it was stated in the report that on the date of the examination, the age of the patient (appellant) was between 19 to 20 years.

3. On the request of learned APP, the applicant's case was referred to the Medical Board at J. J. Hospital to determine the age of the applicant. The report of the Medical Board reveals that on 30-12-2009, the applicant was 20 years of age. By order dated 29-3-2010, this Court asked for fresh opinion of the Medical Board. The fresh opinion of the Medical Board dated 30-4-2010 shows that the applicant could be between the age of 25 to 40 years. In view of these three reports, this Court directed the Registrar (Judicial) to forward the medical reports dated 24-11-2009, 30-12-2009 and 30-4-2010 along with all annexures to the learned Addl. Sessions Judge at Sewree. This Court directed that on receipt of the said report, the learned Addl. Sessions Judge, Sewree to record the oral evidence of the medical witnesses. After recording the evidence, the same was directed to be submitted to this Court through the Registrar (Judicial). Accordingly, the report has been submitted by the learned Addl. Sessions Judge, Sewree. Six witnesses were examined by the learned Sessions Judge.

4. The first witness was Dr. Yogita Patil (Medical Officer in the Civil Hospital at Nasik) who was working as a radiologist. Her evidence shows that two x-rays were taken out by her and on the basis of the x-rays, according to her, as on 24-11-2009, the age of the patient was 19 to 20 years. Thus, the evidence of this witness shows that on 24-11-2009, the age of the applicant/appellant was 19 to 20 years. The incident in question has occurred on 9-12-2006. In such case, the applicant would be below 18 years at the time of the incident.

5. Thereafter, Dr. Rangnath was examined as witness No. 2. He is master of Dental Surgery in subject of Oral Medicine and Radiology. This witness took out x-ray of both jaws of the applicant. From the evidence of this witness, it is seen that on the date of the examination i.e on 29-12-2009, the age of the patient could be between 18 to 25 years, however, from the cross-examination of this Doctor, it is seen that the third molar erupts in between 17 to 21 years. As per xray, third permanent molar was not completely erupted. This creates some doubt as to whether the applicant could be over 21 years of age on the date of his examination. Even otherwise this witness has stated that the lower age of the patient could be 18 years as on 29-12-2009, which means the applicant would be below 18 years of age at the time of the incident which occurred on 9-12-2006.

6. The third witness is Dr. Gutte who was an Asstt. Professor, Radiology in J. J. Hospital. Dr. Gutte took x-ray of left wrist and left elbow and pelvis with both hips on 29-12-2009. In the opinion of Dr. Gutte, the age of the patient was more than 20 years. The said report would be of no use because it does not give the

outer limit of age but only states that it can be more than 20 years. In this view of the matter, it can be said that the applicant was below 18 years of age at the time of the incident which took place on 9-12-2006.

7. Thereafter, witness No. 4 Dr. Benjamin has been examined. She was working in Government Dental College as Asstt. Professor and Radiologist. This doctor examined the applicant on 30-4-2010. in her personal report (Exh. 33), the Doctor has stated that the age of the applicant would be 18 to 25 years. She has stated before the Court that considering the individual variation from case to case, the possibility of the patient being above 25 years cannot be ruled out. This view is based only on dental examination. It is noticed that in her evidence before the Court, Dr. Benjamin has stated that the patient would be above 25 years and below 40 years. This averment militates against her personal report which is at Exh 33 which states that the age of the patient would be between 18 years to 25 years, hence, we are not inclined to rely on the evidence of this witness before the Court.

8. Witness No. 5 Dr. Marutirao has stated in his evidence before the Court that the patient would be above 25 years and below 40 years. We have already adverted to the evidence of witness No. 2 Dr. Rangnath where he has stated that the third molar erupts in between 17 to 21 years and as per x-ray, third permanent molar was not completely erupted which creates some doubt as to whether the applicant could be over 21 years of age on the date of his examination.

9. The evidence of witness No. 6 Dr. Jadhav shows that the case of the applicant was examined on 30-12-2009 and the age of the patient was determined at about 20 years. Dr. Jadhav stated that the upper age limit could not be ascertained. This shows that on the date of the incident, the applicant/appellant could be below 18 years of age.

10. Thus, on going through the evidence of these six witnesses except the evidence of witness No. 5, from the rest of the evidence, certainly it can be deduced that on the date of the incident, the applicant/appellant was below 18 years of age.

11. As far as witnesses No. 5 is concerned, in view of the other evidence on record of Witness No. 1 Dr. Yogita Patil, Witness No. 2 Dr. Rangnath, Witness No. 3 Dr. Gutte and Witness No. 6 Dr. Jadhav, we are of the opinion that it would be risky to rely on the evidence of witness No. 5. As stated earlier, the evidence of four witnesses i.e. 1, 2, 3 and 6 clearly shows that the appellant was below 18 years of age on the date of the incident.

12. In view of the evidence of witnesses Nos. 1 to 3 and 6, we would have to give benefit of doubt to the applicant/appellant and hold that the appellant was a juvenile in conflict with law at the time of the incident.

13. Ms. Gonsalvez, learned Advocate for the applicant/appellant stated that she

is not challenging the judgment and order convicting the appellant on merits but she has contended that the applicant/appellant was a juvenile on the date of the incident, hence, in view of section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000, the applicant/appellant is entitled to be released forthwith.

14. We have considered the evidence on record. In our opinion, the judgment and order holding that the appellant has committed the offence cannot be faulted. Besides, there is no challenge to the judgment and order on merits, however, the applicant is a Juvenile. Under section 15(g) of the Juvenile Justice Act, the maximum period for which a juvenile can be sent to a special home is three years. The applicant/appellant has already undergone 7 years of imprisonment. In these circumstances, we are inclined to set aside the judgment and order sentencing the appellant under sections 364-A and 120-B of Indian Penal Code.

15. The applicant/appellant be released from jail forthwith if not required in any other case.

16. Criminal Application and Criminal Appeal are allowed in above terms.