

(2023) 06 BOM CK 0101

In the Bombay High Court

Case No : Criminal Revision Application No. 32 Of 2020

Mustafa Khan Jabbar Khan

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 28-06-2023

Acts Referred:

Juvenile Justice (Care And Protection Of Children) Model Rules, 2016 — Rule 10A, 10(5)
Indian Penal Code, 1860 — Section 34, 354D, 376(3), 376DA, 376(2)(j)(n), 504, 506
Protection Of Children From Sexual Offences Act, 2012 — Section 6, 8, 10, 12
Information Technology Act, 2000 — Section 67A, 67B, 67E
Juvenile Justice (Care And Protection Of Children) Act, 2015 — Section 2(33), 3, 3(iii), 3(xvi), 7(3), 8(3)(a), 8(3)(e), 14, 14(2), 14(3), 15, 15(3), 18(3)

Citation : (2023) 06 BOM CK 0101

Hon'ble Judges : G. A. Sanap, J

Bench : Single Bench

Advocate : Parvez W. Mirza, A. R. Chutke, R. M. Daga

Final Decision : Partly Allowed

Judgement

G. A. Sanap, J

1. RULE. Rule made returnable forthwith. Heard finally by consent of the learned advocates for the parties.

2. In this revision application, challenge is to the judgment and order dated 13.01.2020, passed by learned Additional Sessions Judge/Children's Court, Darwha, whereby learned Additional Sessions Judge dismissed the appeal filed by the applicant/accused against the order dated 01.04.2019 passed by the Juvenile Justice Board, Yavatmal (hereinafter referred to as "the J.J.B." for short) below application (Exh.52).

3. The facts relevant for disposal of this revision application can be summarized as follows :

A crime bearing No. 737/2018 for the offences punishable under Sections

376(3), 376DA, 376(2)(j)(n), 354D, 504, 506 read with Section 34 of the Indian Penal Code, under Sections 6, 8, 10, 12, 14, 15 of the Protection of Children from Sexual Offences Act, 2012 and under Sections 67A, 67B and 66E of the Information Technology Act, 2000, was registered pursuant to the report lodged by the informant/non-applicant no.2, the father of the minor girl who was subjected to sexual assault. In this crime, there are nine accused. Out of nine accused, initially four accused below 18 years of age were separately tried before the J.J.B. The informant, father of minor girl, on 03.12.2018 made an application (Exh.52) before the J.J.B. for conducting necessary inquiry under Section 15 read with Section 18(3) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "the J.J. Act" for short) and to try the juveniles in conflict with law (hereinafter referred to as "the JCLs" for short), namely Mustafa Kha Jabbar Kha and Gaurav Raju Pardhi, accused nos. 1 and 5, respectively, as an adult. Pursuant to this application (Exh..52), by order dated 11.03.2019 the J.J.B. partly allowed the application and issued summons to JCL no.1 and JCL no.5, for recording their appearance before the J.J.B. on 22.03.2019. The J.J.B. by the said order referred the JCLs to the Psychiatrist, Government Hospital, Yavatmal for assessment of their mental and physical capacity and ability to understand the consequences of alleged offence. Similarly, the J.J.B. directed the Probation Officer to conduct the necessary inquiry and submit report to the J.J.B.

4. The J.J.B. received the Social Investigation Report (SIR) from the Probation Officer on 22.03.2019. The J.J.B. received the report of the Psychiatrist on 01.04.2019. The J.J.B. passed final order on 01.04.2019 and directed that the aforesaid two JCLs be tried as an adult with the remaining adult accused in the crime. The JCL/accused no.5 did not challenge this order passed by the J.J.B. The JCL/accused no.1 challenged this order by filing an appeal before the Additional Sessions Judge/Children's Court at Darwha. The learned Judge dismissed the appeal. Therefore, the JCL/accused no.1 is before this Court in revision.

5. I have heard Mr. Parvez W. Mirza, learned advocate for the applicant/accused no.1, Mr. Amit R. Chutke, learned Additional Public Prosecutor for non-applicant no.1/State and Mr. R. M. Daga, learned advocate for non-applicant no.2/informant. Perused the record and proceedings.

6. Learned advocate Mr. Parvez Mirza, relying upon Section 3 of the J.J. Act submitted that during the proceeding, the right of participation of JCL was denied inasmuch as they were not granted an opportunity to effectively and meaningfully deal with the application and the material ultimately relied upon by the J.J.B. for the purpose of passing the order. Learned advocate further submitted that the principles of natural justice to ensure basic procedural standards of fairness were not followed. In this connection, reliance is placed on Section 3, sub-clauses (iii) and (xvi) of the J.J.B. Act. Learned advocate submitted that there was violation of provisions of Section 8, Sub-section (3), clauses (a) and (e) of the JJ Act. The J.J.B. did not ensure informed participation

of the JCLs in this entire process. The timeline for undertaking social investigation as provided under clause (e) of Sub-section (3) of Section 8 of the J.J. Act, was also not appropriately followed and met. Learned advocate further submitted that there was gross violation of provisions of Section 14, sub-sections (2) and (3) of the J.J. Act. Learned advocate submitted that the inquiry contemplated under sub-section (2) of section 14 within the prescribed timeline was not conducted. Similarly, the preliminary assessment, which is required to be made in case of heinous offence for the purpose of Section 15, was not made within the timeline of three months from the date of first production of the child before the Board. Learned advocate submitted that in this case, there was gross-violation of Section 15 of the J.J. Act.

7. Learned advocate submitted that the record and proceedings of the J.J.B. does not reflect that the copy of application, copy of social investigation report (SIR) and the certificate of the Psychiatrist was provided to the JCLs. Learned advocate submitted that the order was passed without concrete material and that too without granting sufficient opportunity to the JCLs before passing the order to try two JCLs as adult. Learned Advocate submitted that in this case there was non-compliance of Rule 10, sub-rule (5) of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (hereinafter referred to "the J.J. Rules" for short). Learned advocate submitted that initially, the J.J.B., in gross violation of the mandate and provisions of the JJ Act and the JJ Rules, passed the order to try the JCLs as an adult. Learned advocate submitted that learned Additional Sessions Judge/Children's Court, in appeal, has also brushed aside all these aspects. Learned advocate further submitted that the J.J.B. had no right to entertain the application made by the informant after the timeline prescribed for the inquiry under the J.J. Act and the J.J. Rules. Learned advocate further submitted that the informant had no locus-standi to make an application under Section 15 read with Section 18(3) of the J.J. Act. Learned advocate submitted that learned Additional Sessions Judge/Children's Court has glossed over all these aspects and came to a wrong conclusion.

8. Learned Additional Public Prosecutor submitted that in this case, the provisions of Rule 10, sub-rule (5) of the J.J. Rules would not be applicable. It is submitted that therefore, the arguments based on Rule 10, sub-Rule (5) deserves rejection. Learned APP placed heavy reliance on Rule 10-A of the J.J. Rules and submitted that for the purpose of inquiry under Section 14(3) and enquiry under Section 15 read with Section 18(3), Rule 10-A of the JJ Rules would be applicable. Learned APP further submitted that the order passed by the J.J.B. is based on proper consideration of the social investigation report submitted by the Probation Officer as well as the report submitted by the Psychiatrist. Learned APP submitted that under the law, the J.J.B. is empowered to pass order under Section 14 sub-section (3), Section 15 read with Section 18(3) of the J.J. Act. Learned APP submitted that the right of the informant to request the J.J.B. to conduct necessary inquiry and assessment and to try the juvenile as an adult, has not been expressly taken away. Learned APP further

submitted that the timeline provided under the law for conducting the inquiry by the J.J.B. is a procedural part and therefore, the Court has to take a holistic view of the matter and see that the proceeding ensures a fair opportunity and trial to the victim, informant and to the accused. Learned APP further submitted that if the Court comes to a conclusion that there was breach of some of the provisions, then in that event, by setting aside the impugned order, the matter may be remanded back to the J.J.B. with a direction to conduct necessary inquiry and to decide the matter afresh, within particular time frame.

9. In order to appreciate the submissions, I have gone through the record and proceedings, particularly, the orders passed by learned Additional Sessions Judge and the J.J.B. On the basis of the available material, the J.J.B. has come to a conclusion that the JCLs are above 16 years of age. The J.J.B., therefore, came to a conclusion that considering the fact that the crime is of heinous nature, subject to application of other parameters provided under the law, they can be tried as an adult. It is pertinent to mention that the applicant/accused no.1 (JCL) was kingpin in commission of the crime. By applying any standard, the crime committed has to be termed as a heinous crime. It is to be noted that the offence in this case is a heinous offence. The J.J.B., as per the provisions of Section 15 of the J.J. Act, on its own, was required to conduct the preliminary assessment with regard to the mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which the offence was committed by the JCLs. This inquiry by the J.J.B., in terms of Section 14, sub-section (3) of the J.J. Act, has to be conducted within the prescribed timeline. In this case, it appears that the J.J.B. has failed to discharge its duty to make the preliminary assessment as provided under Section 14, sub-section (3) of the J.J. Act. Section 2, clause (33) defines "heinous offences". The said definition is extracted below :-

"2. Definitions :-

(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."

10. It is to be noted that the minor victim was subjected to sexual assault. The persons involved in the crime are facing serious charge of gang rape. In my view, considering the nature of crime and keeping in mind the definition of heinous offences provided above, it was the bounden duty of the J.J.B. under the J.J. Act to conduct the preliminary inquiry and assessment. The J.J.B. has failed to discharge its duty in accordance with law. The father of the victim made an application at Exh.52 and called upon the J.J.B. to conduct preliminary assessment/inquiry and try the JCLs i.e. accused nos.1 and 5 as an adult with the remaining five accused. On behalf of the JCLs, an objection has been raised that the inquiry contemplated under Section 15 of the J.J. Act, after prescribed timeline, neither can be conducted by the J.J.B. nor an application for such an inquiry can be entertained at the behest of the informant or the victim. In my

view, this submission can not be accepted for more than one reason. Learned Additional Sessions Judge has dealt with this aspect in great detail. I record my concurrence with the observations made by the learned Judge on this point. It is to be noted that the timeline has been prescribed under the J.J. Act for conducting the inquiry by the J.J.B.

11. The J.J.B. consists of a Metropolitan Magistrate or Judicial Magistrate, First Class and two other members. The J.J. Act does not bar the right of the victim or the informant to invoke the provisions in case of failure of the J.J.B. to discharge its duty under the law. It is to be noted that to try the JCLs as an adult in case of heinous crime and where the age is above 16 years, is an exception to the general rule of trying the child below 18 years of age as a juvenile. It is to be noted that there is no express provision under the J.J. Act, whereby substantial right of the victim or the informant to put the law into motion and apply to the J.J.B. to comply the mandate of the J.J. Act, is debarred or taken away. Therefore, in my view, in this case on the ground of procedural lapse on the part of the J.J.B., the right of the informant to apply before the J.J.B. even after prescribed timeline cannot be taken away. I record my agreement with the finding recorded by learned Additional Sessions Judge as well as by the J.J.B. on this point.

12. The next important aspect that needs to be gone into and considered is, as to whether the inquiry and preliminary assessment conducted by the J.J.B. to pass final order under Section 18 sub-section (3) of the J.J. Act to try the JCLs as an adult, is sustainable in law ? In order to satisfy myself, I have gone through the Roznama maintained by the J.J.B. The Roznama relevant for the purpose of this proceeding is from 04.12.2018 to 01.04.2019. It is to be noted that the roznama is maintained to record the summary of the proceeding undertaken before the Court on the given date. On 04.12.2018, the informant made an application at Exh.52 under Section 15 read with Section 18 of the J.J. Act and prayed to try the JCLs (accused nos.1 and 5) as an adult. Perusal of the roznama of the proceeding from 04.12.2018 to 1. 04.2019 would show that there is no mention of providing a copy of the application either to the JCLs or their advocates. Similarly, there is no mention of providing copy of the SIR submitted by the Probation Officer either to the JCLs or to their advocates. The report of the Psychiatrist was received by the J.J.B. on 01.04.2019. The order in question was passed on 01.04.2019. There is no mention in the Roznama that a copy of the report of the Psychiatrist was provided to the JCLs or to their advocates. It is to be noted that the inquiry to arrive at a conclusion to try the child as an adult, has to be conducted in a transparent and fair manner. The record of inquiry maintained by the Court in this regard must not leave any scope to doubt the reasonable and fair approach of the Board. It is to be noted that in the roznama, there is no mention of presence of the advocates for the JCLs and presence of JCL nos.1 and 5, on some dates. It is to be noted that the object behind calling SIR through the Probation Officer and the report of the Psychiatrist, is to arrive at a final decision on the point of trial of the JCLs as an adult. Section 15 of the

J.J. Act provides for preliminary assessment in case of heinous offence alleged to have been committed by a child, who has completed or is above the age of 16 years. The Board is required to conduct a preliminary assessment with regard to his mental and physical capacity to commit the offence, ability to understand the consequences of the offence and the circumstances in which the alleged offence is committed. The Board, in the process of assessment, may take assistance of experienced Psychiatrists or psycho-social workers or other experts. In this case, the J.J.B. called SIR from the Probation Officer and also report from the Psychiatrist to decide the application (Exh.52) made by the informant, father of the victim, to try the JCLs as an adult in view of heinous offence committed by them.

13. It is to be noted that in the process of this preliminary assessment, the J.J.B. on its own, in exercise of the powers under Section 14 of the J.J. Act or on the application of the victim or the informant, is required to ensure the effective and meaningful participation of the child. The Board has to follow the general principles laid down under Section 3 of the J.J. Act for proper administration of the Act. The inquiry conducted under Section 15 of the J.J. Act must display the adherence to the basic procedural standards of fairness. The child in this process is required to be given fair and unbiased hearing.

14. In this case, the J.J.B. did not conduct the inquiry and preliminary assessment as provided under Sections 14 of the J.J. Act.

The J.J.B. on the application made by the informant, father of the minor victim, started preliminary assessment as provided under Section 15 of the J.J. Act. It is to be noted that the J.J.B. was required to display fairness and unbiased approach in the entire process. The J.J.B. was required to act strictly in accordance with the provisions of the J.J. Act and ensure transparency and fairness in the proceeding. The roznama of the J.J.B. produced on record does not indicate that the J.J.B. ensured active participation of the JCLs in the inquiry proceeding. It needs to be stated that the final order passed by the J.J.B. to try the JCLs as an adult with such a half-hearted inquiry, has caused prejudice not only to the JCLs, but to the informant and the victim. In this case, the J.J.B. has not followed the procedure laid down under the J.J. Act and the J.J. Rules while conducting preliminary assessment of the JCLs to try them as an adult. It has caused prejudice not only to the JCLs, but also to the informant and the victim. The trial of the child below 18 years of age before the J.J.B. is a rule and trial of the child above 16 years of age before the regular Court as an adult, is an exception. The exceptional circumstances must exist and must be proved within the parameters of Section 15 of the J.J. Act to try the child as an adult in case of heinous offences. In this case, the J.J.B. has not followed the procedure prescribed under the J.J. Act and the J.J. Rules. The order passed by the J.J.B. and confirmed by learned Additional Sessions Judge/Children's Court, therefore, has caused prejudice not only to the JCLs, but also to the informant and the victim. The orders are, therefore, required to be quashed and set aside.

15. The J.J.B. consists of Metropolitan Magistrate or Judicial Magistrate, First Class with at least three years experience and two social workers selected by following the procedure. Section 7 of the J.J. Act provides the procedure to be followed by the J.J.B.. Section 7, sub-section (3) and the Proviso to sub-section (3) of the J.J. Act is required to be considered in the context of the question involved before this Court. Sub-section 3 provides that a Board may act notwithstanding the absence of any member of the Board and the order of the Board shall not be invalid by the reason only of the absence of any member during any stage of proceedings. Proviso to sub-section (3) of the J.J. Act is applicable to the proceeding where the order is with regard to the final disposal of the case or in making the order under sub-section 3 of Section 18. It provides that at the time of final disposal of the case or in making order under sub-section (3) of Section 18, at least two members including the Principal Magistrate, must be present for the said purpose. Perusal of the relevant roznama does not indicate presence of remaining two members of the Board. Even the order passed by the J.J.B. does not make a reference about presence of the remaining two members. The order is required to be authored by the Principal Magistrate. However, in the order, there must be a mention of the presence of remaining members of the Board. In this case, neither in the roznama, nor in the final order, there is mention of presence of the remaining two members. It is to be noted that this mandatory procedural compliance is required to be strictly met. In such serious matter, casual or mechanical approach cannot be adopted. On this count also the order passed by the J.J.B. cannot be sustained.

16. Undisputedly, the JCLs are below 18 years of age. However, as per the evidence on record, it has been demonstrated that they are above 16 years of age. JCL No.1 is the prime accused in this crime. The victim is a minor girl. It is the case of the prosecution that JCL No.1 established intimacy with 14 years old victim girl. He made phone calls to the victim and developed intimacy with her. In this process, he even gave chocolates to the victim girl. He took the girl to lonely places and committed sexual assault. He sexually abused the victim girl in the darkness. The investigation further revealed that JCL no.1 would call his friends and other JCLs and the adult friends to participate in the act of sexual abuse of the victim girl.

17. In the backdrop of the above stated serious nature of the crime committed in this case and JCL No.1 being the kingpin, in my view, the application made to try JCL No.1 and JCL No.5 as an adult, is required to be taken to a logical conclusion by strictly following the procedure laid down under the J.,J. Act and the J.J. Rules. In my view, therefore, the orders passed by the J.J.B. and the order passed by learned Additional Sessions Judge/Children's Court, are required to be set aside and the matter is required to be remitted back to the J.J.B. for fresh inquiry and the preliminary assessment in terms of Section 15 of the J.J. Act.

18. (i) Accordingly, the judgment and order dated 13.01.2020, passed by learned Additional Sessions Judge/Children's Court, Darwha, in Appeal No. 18/2019, is

quashed and set aside. Similarly, the order dated 01.04.2019 passed by the Juvenile Justice Board, Yavatmal in J.J. Case No. 120/2018, is also quashed and set aside.

(ii) The application (Exh.52) is restored to the file of Juvenile Justice Board, Yavatmal. The Juvenile Justice Board, Yavatmal is directed to decide the application (Exh.52) afresh within a period of one month from the date of receipt of copy of this order.

(iii) The Juvenile Justice Board, Yavatmal shall provide the copy of application (Exh.52), copy of social investigation report (SIR) submitted by the Probation Officer and the report of the Psychiatrist, to the JCLs .

(iv) The Juvenile Justice Board would be free to call any other report as required and permitted under the J.J. Act for completion of preliminary assessment. The Board shall ensure actual and effective participation of the JCLs in the course of inquiry. The inquiry be conducted in fair manner.

(v) The prosecution as well as the accused namely JCL Nos.1 and 5 shall extend the fullest cooperation to the J.J.B. The person conducting the proceeding on behalf of the State, the advocates for JCL nos.1 and 5 and JCL Nos.1 and 5, shall attend the J.J.B. in terms of the order passed by the J.J.B.. If there is non-cooperation by the person conducting the proceeding on behalf of the State before the J.J.B., the advocates for the JCL Nos. 1 and 5 and JCL Nos.1 and 5, then the Board shall make note of the same in the proceeding. In case of non-cooperation by anyone concerned, the J.J.B. may pass an appropriate order in accordance with law, including cancellation of bail granted to the JCLs.

(vi) Since, the valuable time is lost in this proceeding, it is made clear that if there is appeal after the decision of the J.J.B. one way or the other, the Appellate Court shall decide the said appeal within a period of one month from the date of presentation of the said appeal by either of the parties.

(vii) With these directions, the revision is partly allowed and disposed of. Rule accordingly.