

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.23870 of 2014

Arising Out of PS.Case No. -10 Year- 2014 Thana -MALAYPUR District- JAMUI

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Bambam Rao @ Bambam Rawat S/o Bajrangi Rao @ Bajrangi Rawat R/o
At + Post Malaypur, P.S. Malaypur AND District - Jamui

.... Petitioner/s

Versus

The State of Bihar

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Ajit Kumar, Adv.

For the Opposite Party/s : Mr. Rajesh Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
C.A.V ORDER

4 16-09-2014

On account of disappearance of victim, Kusum

Kumari aged about 16 years since 02.04.2014, her father Jagnath Sao filed a written report on 12.04.2014. wherein it has been averred that during course of search of victim, he came to know that his neighbour Bambam Rao son of Bajrangi Rao has taken away his daughter. On query made from family members of Bambam Rao, they became enraged and said that Bambam took away his daughter, so do, whatever you wish.

2. While rejecting the prayer for bail the learned Sessions Judge, Jamui has taken into consideration the Registration Certificate whereunder the date of birth of victim happens to be 07.07.1998 and on account thereof, the victim was found to be minor. At the other end, Annexure-4 has been attached on behalf of petitioner which happens to be the order dated 06.05.2014 passed by learned Chief Judicial Magistrate, Jamui in connection with Malaypur P.S. Case No.10/2014 wherein the



learned Chief Judicial Magistrate has considered the photo copy of certificate issued by the Headmaster, Middle School, Malaypur showing her date of birth as 05.01.1994 calculating therefrom the victim happens to be 20 years and 3 months as well as her medical report wherein her age has been assessed as 19 years. The learned Chief Judicial Magistrate also took notice of Registration Certificate of victim issued by Bihar School Examination Board showing the date of birth as 07.07.1998 and calculating therefrom, the victim happens to be of 15 years and odd months wherein the CJM added three years in a way to come to the conclusion that she happens to be more than of 18 years, as such, major. Accordingly, the learned Chief Judicial Magistrate, Jamui was show-caused to explain the same vide order dated 14.08.2014. Although, the order dated 06.05.2014 (Annexure-4) does not contain reference of any judicial pronouncement made by this Court, however, in his show-cause referred the order dated 23.09.2010 passed in ***Cr.W.J. No. 991/2010 (Sahibi Khatoon @ Sahibi v. State of Bihar)*** (Habeas Corpus) wherein the case of ***Jaimala v. Home Secretary of Jammu & Kashmir*** as reported in ***AIR 1982 SC 1297*** has been relied upon observing permissibility of addition of three years in the age of the victim and referred the relevant paragraph, annexing the judgment, which is as follows:-

“ The petitioner being practically major, on account of her age being 16-17 years, and by adding three years as per the Judgment of the Apex Court in ***Jaimala v. Home Secretary, Govt. of Jammu &***

Kashmir reported in AIR 1982 SC 1297, her age should have been presumed to be 19 years which is the age of majority.”

3. As per medical jurisprudence, age ascertainment on the basis of radiological examination is found with variance of two years either side. That has been taken into consideration in the case of *Jaya Mala v. Home Secretary, Government of Jammu & Kashmir* as reported in (1982) 2 SCC 538 wherein at para-9 it has been observed:-

“ However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.”

4. That means to say, the finding so recorded by the Hon'ble Apex Court in case of *Jaya Mala* (supra) happens to be permitting variance of two years either side and not three years as incorporated and so, the learned Chief Judicial Magistrate, Jamui while sticking over his order dated 06.05.2014 as well as while submitting his show-cause was expected to see the aforesaid *Jaya Mala* case to the extent whether it permitted two years or three years as the variance of three years happens to be inconsistent with Modi Medical Jurisprudence, an authority on the subject as well as consistent view of the Hon'ble Apex Court.

5. In the case of *Vishnu v. State of Maharashtra* as reported in AIR 2006 SC 508, the Hon'ble Apex Court exponent

the issue as :-

21. It is urged before us by Mr. Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the Medical Officer is to assist the Court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact.

22. In the case of Madan Gopal Kakkad v. Naval Dubey and Anr. (1992) 3 SCC 204, this Court has considered a similar question and pointed out in paragraph 34 at page SCC 221 as under :

"34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character given on the basis of symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the Medical Officer but of the Court."

24. In the case of determination of date of birth of the child, the best evidence is of the father and the mother.

6. Therefore, the manner in which the learned Chief Judicial Magistrate, Jamui has filed his show-cause is deplorable and is not appreciated. Being so, the Chief Judicial Magistrate is directed to be cautious in future. For that, the office is directed to communicate upon the P.O. concerned through District &

Sessions Judge.

7. Now-a-days, court is flooded with a new trend of litigation cropped up on account of erotic, irresponsible behaviour leading to elopement/kidnapping of an adolescent and in likewise manner, on account of absence of proper procedure for ascertainment of age, basically court accepts the finding of medical board which is based upon radiological report, having the variance of two years either side. The Hon'ble Apex Court alced in the case of *Jernail Singh v. State of Haryana 2013 Cr.L.J. 3976* and concluded the same in its finality by laying down the procedure:-

“20. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforestated 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under :

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 child or a juvenile in conflict with law 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 juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with 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 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 or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play 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 child. In case exact 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 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 clauses (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 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-rule (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 7A, 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 any

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 off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule(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.

Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively

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determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.

(emphasis made by me)

8. The same issue has again come up before the Hon'ble Apex Court in the case of *Mahadeo v. State of Maharashtra* as reported in (2013) 14 SCC 637 wherein it has been held as follows:-

11. Though the learned counsel for the appellant attempted to find fault with the said conclusion by making reference to the evidence of PW 8, the doctor, who examined the prosecutrix and who in her evidence stated that on her examination she could state that the age of the prosecutrix could have been between 17 to 25 years, it will have to be held that the rejection of the said submission even by the trial court was perfectly in order and justified. The trial court has found that to rely upon the said version of PW 8, the doctor, scientific examination of the prosecutrix such as ossification test to ascertain the exact age should have been conducted which was not done in the present case, therefore, merely based on the opinion of PW 8, the age of the prosecutrix could not be acted upon.

12. We can also in this connection make reference to a statutory provision contained in the Juvenile Justice (Care and Protection of Children) Rules, 2007, where under Rule 12, the procedure to be followed in determining the age of a juvenile has been set out. We can usefully refer to the said provision in this context, inasmuch as under Rule 12(3) of the said Rules, it is stated that:

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

- (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
- (ii) the date of birth certificate from the school (other

than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;”

Under Rule 12 (3) (b), it is specifically provided that only in the absence of alternative methods described under Rules 12 (3) (a) (i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.

9. Therefore, estimation of age of victim contrary to the procedure laid down by the Hon'ble Apex Court in series of judgments as referred above should not be acknowledged as well as patronized. As such, Annexure-4, the order passed by learned Chief Judicial Magistrate, Jamui happens to be inconsistent with the law propagated by the Hon'ble Apex Court and is accordingly, deprecated.

10. From the order impugned, it is apparent that the learned Sessions Judge, Jamui has relied upon the Registration Certificate issued by the Bihar School Examination Board for concluding the victim to be a minor, is also not found based upon an enquiry which is required to be conducted for ascertainment of age of victim as held so by the Hon'ble Apex Court (supra).

11. Learned counsel for the petitioner submitted that victim has been examined under Section 164 Cr.P.C. wherein she has stated that she on her own married with Bambam Rao and she intends to live with him. She was in love with Bambam Rao for

the last two years and she on her own accord persuaded him to flee along with her. She has married with Bambam Rao in a temple. Now, she wants to go to her husband's house. Therefore, neither there was allurement nor threat. Hence, application of Section 366A is not attracted.

12. On the other end, the learned APP opposed the prayer for bail and submitted that the consent of the girl under age of 18 years is of no consequence.

13. Section 361 IPC defines kidnapping from lawful guardian and speaks as follows:-

361. Kidnapping from lawful guardianship.-
-Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.-The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

14. Therefore, where there happens to be consent, that consent has to be perceived in terms of Section 361 of the IPC and for that, in case the victim happens to be a female must be above 18 years of age. Where controversy arises on that very score, the Court has to come to a definite conclusion regarding the age of the victim where it happens to be up to 18 years or 18 years & upward.

15. Accordingly, the learned Chief Judicial Magistrate, Jamui is directed to conduct an enquiry regarding age of the victim after informing both the parties as well as directing the victim to be physically present for that purpose. In case, the victim is found above 18 years, then in that event, will release the petitioner on bail. Till then the victim, on account of considering her statement under Section 164 Cr.P.C., is to be kept at remand home so that she be out of influence of either of the party.

16. With the aforesaid observation, the instant petition is disposed of. Registry should circulate it amongst the concerned to avoid future complication.

(Aditya Kumar Trivedi, J)

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