

MANU/BH/2076/2018

IN THE HIGH COURT OF PATNA

Criminal Appeal (SJ) No. 1716 of 2018

Decided On: 18.09.2018

Appellants: **Rajiv Kumar**

Vs.

Respondent: **The State of Bihar**

Hon'ble Judges/Coram:

Ashwani Kumar Singh, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Samrendra Kumar Jha, Advocate

For Respondents/Defendant: Sujit Kumar Singh, A.P.P.

Case Note:

Criminal - Bail - Sections 34,363 and 365 of Indian Penal Code,1860 (IPC) and Section 12 of Juvenile Justice (Care and Protection of Children) Act, 2015 - Appeal filed against rejection of application under Section 12 of Act in FIR registered under Sections 34,363 and 365 of IPC - Whether Appellant made out case for grant of bail - Held, in absence of minimum punishment of imprisonment for 7 years or more for offences alleged to have been committed by Appellant, Board could not have resorted to special provisions made under Act to tackle child in age group of 16-18 years - Since Appellant had not been alleged to have committed any 'heinous offence', Board could not have conducted preliminary assessment with regard to his mental and physical capacity to commit such offence - Order impugned passed by Children's Court was not sustainable - Children's Court was directed to remit record back to Board and Board proceed with case of Appellant in accordance with law - Appeal disposed of. [42], [44], [46]

JUDGMENT

Ashwani Kumar Singh, J.

1. Heard Mr. Samrendra Kumar Jha, learned Advocate for the appellant, Mr. Sujit Kumar Singh, learned Additional Public Prosecutor for the State and Mr. Vijay Kumar Sinha, learned Advocate for the informant.

2. The present appeal under Section 101(5) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short 'the Act of 2015') has been filed to challenge the order dated 07.03.2018 passed by the learned Additional Sessions Judge-I-cum-Children's Court, Patna (for short 'Children's Court') in Special (Child) Case No. 22 of 2018 arising out of Parsa Bazar P.S. Case No. 73 of 2016 dated 30.04.2016 registered under Sections 363 and 365 read with 34 of the Indian Penal Code (for short 'IPC') whereby the application filed by the appellant under Section 12 of the Act of 2015 for grant of bail has been rejected.

3. Mr. Samrendra Kumar Jha, learned Advocate appearing for the appellant submitted that the Children's Court failed to appreciate that when an application for bail to a

child in conflict with law, who is being tried as an adult, is considered, the approach has to be different. He submitted that it erroneously came to the conclusion that the appellant has already fallen in bad company and, if released on bail, he may commit much graver offence after being associated in bad company. He contended that there was nothing to suggest that release of the appellant would put him in physical or psychological danger. He pleaded that while considering the bail application the court below erred to appreciate that the appellant and his father have been made accused for the reason that the daughter of the informant was having affair with the appellant. Even the alleged victim did not utter a word either in her statement recorded under Section 161 or 164 Cr.P.C. alleging that the appellant sexually exploited her.

4. Per contra, Mr. Sujit Kumar Singh, learned Additional Public Prosecutor appearing for the State submitted that the offence alleged is quite serious. The victim has supported the allegations made in the First Information Report (for short 'FIR'), in her statement made under Section 164 of the Code of Criminal Procedure (for short Cr.P.C.). He contended that the impugned order passed by the Children's Court does not suffer from any illegality or irregularity.

5. Mr. Vijay Kumar Sinha, learned advocate appearing for the informant submitted that the case was initially registered for the offences punishable under Sections 363 and 365 read with 34 of the IPC, but on completion of investigation, charge-sheet was submitted under Sections 363/34 and 366/34 of the I.P.C. He contended that the court had assessed the age of the victim to be 14 years only on the date of commission of the offence. He pleaded that the victim was forcibly abducted by the appellant and two others and was taken to Nepal where she was confined in a room and beaten by the accused persons. He has urged that since the offences alleged are heinous in nature, the Children's Court has rightly rejected the application for grant of bail to the appellant. He has also contended that the charges have already been framed under Section 363/34 and 366/34 of the IPC by the court below and the trial has commenced.

6. On query made by the Court as to whether the offences under which the appellant is being prosecuted would come within the category of 'heinous offences' as defined under clause (33) of Section 2 of the Act of 2015, learned Advocate for the State as well as learned advocate for the informant submitted that since the offence punishable under Section 363 of the IPC prescribes punishment, which may extend to rigorous imprisonment for 7 years and Section 366A of the IPC prescribes punishment with imprisonment, which may extend to 10 years, they would certainly come within the category of 'heinous offences' as defined under the Act of 2015. When the same question was put to the learned advocate for the appellant, he also admitted that since the offences under which the appellant is being prosecuted is punishable with imprisonment for 7 years or more they could come within the category of 'heinous offences' as defined under clause (33) of Section 2 of the Act of 2015.

7. Being not satisfied with the answer given by the learned advocates appearing for the parties, this Court vide its order dated 10.09.2018 while admitting the appeal called for the records of the case from the Children's Court.

8. Upon examination of records, the Court has noticed that initially the FIR was instituted under Sections 363 and 365 read with 34 of the Indian Penal Code on the basis of a written report submitted by one Rakesh Kumar Yadav to the Officer-in-Charge, Pars a Bazar Police Station, Patna on 30.04.2016 in respect of an occurrence

of offence which had taken place on the night intervening between 29.04.2016 and 30.04.2016. In the written report, the informant has alleged that he along with his family members had gone to Sumeri Tola, Parsa Bazar, Patna to attend the marriage ceremony in the family of his brother-in-law. After the ceremony was over, he came to know that his daughter aged about 14 years is missing since the night intervening between 29.04.2016 and 30.04.2016. He tried to locate her whereabouts, but could not get any clue. He has further alleged that the appellant along with some other boys used to tease his daughter for which complaints were made in the past to the police. Hence, he suspected that the appellant along with co-accused Bipin Kumar, Jiwach Kumar and their family members in conspiracy with each other might have abducted his daughter.

9. It would further appear from the record that the appellant surrendered in the court of A.C.J.M., Patna on 12.12.2017. He raised claim of juvenility before the court of A.C.J.M. After hearing the parties and perusing the certificate issued from the school last attended by the appellant, the learned A.C.J.M., Patna transferred his case to the Juvenile Justice Board (for short 'the Board'). The Board vide its order dated 13.12.2017 took the appellant in custody and directed to put him in observation home. When a plea of juvenility was taken before the Board, it held an enquiry and after getting his matriculation marks-sheet verified from the Bihar School Examination Board vide order dated 07.02.2018 passed in JJB Case No. 672 of 2017 determined his age as 17 years 8 months and 19 days on the date of commission of the offence in exercise of its power conferred under Section 94 of the Act of 2015 and declared him to be a juvenile in conflict with law. By a subsequent order, on the same day, the Board declared him to be a child in terms of clause (12) of Section 2 of the Act of 2015 and transferred his case to the territorial Children's Court. In its order, the Board held that the offences committed by the appellant were heinous in nature. It further held that as no psychologist is appointed for assessing the mental capability of the appellant, it was of the opinion that for early disposal of the case, the same was required to be transferred to the Children's Court under Section 18(3) of the Act.

10. I further find from the record that Children's Court received the record from the Board on 16.02.2018. In the meantime, the police had already submitted charge-sheet against the appellant vide charge-sheet No. 15/18 dated 10.02.2018 under Sections 363 and 365 of the I.P.C. Vide order dated 06.03.2018 the Children's Court after going through the charge-sheet and the case diary took cognizance of the offences under Sections 363 and 365 of the I.P.C.

11. The record would further reflect that an application for bail was filed on behalf of the appellant on 27.02.2018. The same was pressed on 07.03.2018 and the Children's Court vide impugned order rejected the application for bail of the appellant on the ground that from the order of the Board it would be evident that the appellant was capable to understand the consequences of the offence, which was serious in nature and his release would put him in moral, physical and psychological danger. It further held that on being released there was possibility that in association with anti social elements he may commit much more graver offence.

12. After rejection of bail of the appellant, the Children's Court framed charges against the appellant on 26.04.2018 under Sections 363/34 and 366A/34 of the I.P.C.

13. In the background of the facts noted above, two issues arise for consideration before this Court. They are:-

(i) Whether the order impugned passed by the Children's Court is sustainable in law; and

(ii) Whether the offences alleged against the appellant would fall within the ambit of 'heinous offences' as defined under the Act of 2015?

14. In order to examine the aforesaid twin issues, it would be essential to look into the relevant provisions of the Act of 2015.

15. The Act of 2015 came into force with effect from January 15, 2016 as the Parliament intended to tackle child offenders committing 'heinous offences' in the age group of 16-18 years by legislating new laws. It repeals Juvenile Justice (Care and Protection of Children) Act, 2000.

16. Para 4 of the statement of object and reasons of the Act of 2015 reads as under:-

"Further, increasing cases of crimes committed by the children in the age group of 16-18 years in the recent years makes it evident that the current provisions and system under the Juvenile Justice (Care and Protection of Children) Act, 2000 are ill-equipped to tackle the matter. The data collected by the National Crime Records Bureau (NCRB) establishes that crimes by children of age group of 16-18 years have increased specially in certain categories of heinous offences".

17. The Act of 2015 classifies offences in three categories. They are 'petty offences', 'serious offences' and 'heinous offences'.

18. Clause (45) of Section 2 of the Act of 2015 provides that the 'petty offences' include offences for which the maximum punishment under the IPC or any other law for the time being in force is imprisonment up to 3 years.

19. Clause (54) of Section 2 of the Act of 2015 provides that the 'serious offences' include offences for which the maximum punishment under the IPC or any other law for the time being in force is imprisonment between 3 to 7 years.

20. Clause (33) of Section 2 of the Act of 2015 provides that the 'heinous offences' include offences for which the minimum punishment under the IPC or any other law for the time being in force is imprisonment for 7 years or more.

21. Section 14 of the Act of 2015 provides for enquiry by Board regarding child in conflict with law. Clause (1) of Section 14 provides that where a child alleged to be in conflict with law is produced before the Board, the Board shall hold an inquiry in accordance with the provisions of this Act and may pass such orders in relation to such child as it deems fit under sections 17 and 18 of the Act.

22. Clause (2) of Section 14 of the Act of 2015 provides that the inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension.

23. Clause (3) of Section 14 of the Act of 2015 provides that a preliminary assessment in case of 'heinous offences' under section 15 shall be disposed of by the Board within a period of three months from the date of first production of the child

before the Board.

24. Clause (4) of Section 14 of the Act of 2015 provides that if inquiry by the Board under sub-section (2) for 'petty offences' remains inconclusive even after the extended period, the proceedings shall stand terminated. The Proviso to this Section provides that for 'serious' or 'heinous offences', in case the Board requires further extension of time for completion of inquiry, the same shall be granted by the Chief Judicial Magistrate or, as the case may be, the Chief Metropolitan Magistrate, for reasons to be recorded in writing.

25. Under Section 15 of the Act of 2015, special provisions have been made to tackle child offenders committing 'heinous offences' in the age group of 16-18 years. The Board has been given option to transfer cases of 'heinous offences' to the Children's Court after conducting preliminary assessment.

26. Section 15 of the Act of 2015 reads as under:-

"15. Preliminary assessment into heinous offences by Board.

1. In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18:

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Explanation: for the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

2. Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973:

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14."

27. Clause (1) of Section 18 of the Act of 2015 provides that where the Board is satisfied on enquiry that a child irrespective of his age has committed a 'petty offence', or a 'serious offence', or a child below the age of sixteen years has committed a 'heinous offence', then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, has brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit:-

- a. allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;
- b. direct the child to participate in group counselling and similar activities;
- c. order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;
- d. order the child or parents or the guardian of the child to pay fine:

Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;

- e. direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behavior and child's well-being for any period not exceeding three years;
- f. direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behavior and child's well-being for any period not exceeding three years;
- g. direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformatory services including education, skill development, counselling, behavior modification therapy, and psychiatric support during the period of stay in the special home:

Provided that if the conduct and behavior of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to the place of safety.

28. Clause (2) of Section 18 of the Act of 2015 provides that if an order is passed under clauses (a) to (g) of sub-section (1), the Board may, in addition pass orders to--

- i. attend school; or
- ii. attend a vocational training centre; or
- iii. attend a therapeutic centre; or
- iv. prohibit the child from visiting, frequenting or appearing at a specified place; or
- v. undergo a de-addiction programme.

29. Clause (3) of Section 18 of the Act of 2015 provides that where the Board after preliminary assessment under Section 15 of the Act pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of

the case to the Children's Court having jurisdiction to try such offences.

30. Further, in all such cases, in which the Board can refer a child to the Children's Court after preliminary assessment under Section 15 of the Act, the Children's Court is required to decide whether the child should be subjected to a judicial system as an adult under Section 19 of the Act of 2015.

31. Section 19(1)(ii) of the Act of 2015 provides that the Children's Court should take a re-look and determine whether the child has to be tried as an adult or not.

32. From a reading of the aforesaid provisions of the Act of 2015, it would be evident that under Section 15 of the Act in case of 'heinous offences' 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 assessment, ability to understand the consequential circumstances in which he allegedly committed the offences and, thereafter, it may pass an order that there is a need for trial of the said child, as an adult and transfer his case to the Children's Court having jurisdiction to try such offences. Such a preliminary assessment cannot be made by the Board into offences which are not covered within the definition of 'heinous offences'.

33. The prayer for bail of the appellant in the present case was rejected on 07.03.2018. Prior to that date FIR was instituted against the appellant under Sections 363 and 365 of the IPC and charge-sheet was also submitted by the police under those offences. Even the cognizance was taken by the Children's Court under Sections 363 and 365 of the IPC only. However, after rejection of bail charges were framed under Sections 363/34 and 366A/34 of the IPC against the appellant. For the offences under Sections 363 and 365 of the IPC punishment prescribed under the statute is imprisonment, which may extend to seven years. So far as Section 366A is concerned, the same is punishable with imprisonment, which may extend to ten years.

34. Under the Act of 2015, offences have been classified into three categories. They are 'petty offences', 'serious offences' and 'heinous offences'. As seen above, 'petty offences' include the offences for which maximum punishment is imprisonment up to 3 years, 'serious offences' include offences for which punishment is imprisonment between 3 years and 7 years and 'heinous offences' are those for which the minimum punishment is imprisonment for 7 years or more. Hence, the category between 'serious offences' and 'heinous offences' is missing. The Act of 2015 has not classified or defined the offences for which punishment under any statute is imprisonment for more than 7 years, but no mandatory minimum punishment of imprisonment for 7 years or more has been prescribed. However, the same would not justify inclusion of all offences under which the offender child can be ordered to undergo sentence of imprisonment for more than 7 years in the category of 'heinous offences'.

35. The legislature has consciously classified the offences under different categories in order to achieve the object of the Act. The children, who have committed 'petty offences', 'serious offences' and 'heinous offences' are not treated alike under the provisions of the Act of 2015.

36. The term 'heinous offences', as defined under Section 2(33) of the Act of 2015, cannot be interpreted in a way, which may be less beneficial for the child, who is alleged to have committed an offence falling between the category of 'serious

offences' and 'heinous offences', as the Act of 2015 treats all the children below 18 years equally except in the age group of 16-18 years, who has committed 'heinous offences'.

37. The children under the age group of 16-18 years may have different mental capabilities, as development of brain takes place at different stages in different individuals. The gravity or extremity of the crime may also differ, thus, indicating different level of maturity.

38. The Act of 2015 provides under Section 18(3) that if after a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, if the juvenile is found to have committed a 'heinous offence' and is above the age group of 16 years then the Board may transfer the case to a Children's Court.

39. At this stage, it would be relevant to note that the Juvenile Justice (Care & Protection of Children) Act, 1986 was replaced with a new Act in 2000. The 1986 Act defined the term 'Juvenile' as a boy not having attained 16 years of age or a girl not having attained the age of 18 years. The 2000 Act defined 'Juvenile' as a person, who has not completed 18 years of age. This issue came up for consideration before the Constitution Bench of the Supreme Court in the case of Pratap Singh Vs. State of Jharkhand [(MANU/SC/0075/2005 : 2005 (3) SCC 551)]. The Bench looked into the object of the Act and held that it is a beneficial legislation aimed at making available the benefit of the Act to the neglected or delinquent juveniles. It further held that the interpretation of the statute of beneficial legislation must be to advance the cause of legislation for the benefit of whom it is made and not to frustrate the intendment of the legislation. On the said interpretation the Bench held that the 2000 Act would be applicable in a pending proceeding in any court/authority initiated under the 1986 Act and is pending when the 2000 Act came into force and the person had not completed 18 years of age on 01.04.2011.

40. The Act of 2015 like the Act of 1986 and 2000 is a beneficial statute, which seeks to confer benefit on class of persons by relieving them of stringent provisions of penal law. The established principle in the interpretation of a beneficial legislation is that there should not be any narrow interpretation. According to the statute, 'heinous offences' include offences for which minimum punishment under the IPC or any other law is imprisonment for 7 years. Any other interpretation whereby an offender child, who is alleged to have committed an offence, which would not fall within the definition of 'heinous offences' and would fall within the definition of 'petty offences', 'serious offences' or the offences falling in between the 'serious offences' and 'heinous offences' is subjected to preliminary assessment by the Board in terms of Sections 14(3) or 15 of the Act of 2015 and the trial of his case is transferred to the Children's Court in terms of Section 18(3) of the Act of 2015 would amount to depriving the class of persons for whom the beneficial statute has been enacted and frustrate the very object of the Act of 2015.

41. Having discussed the relevant provisions of the Act of 2015, when I look to the facts of the present case, I find that the FIR was instituted under Sections 363 and 365 of the I.P.C. The charge-sheet was also submitted by the police under those provisions and after going through the materials on record the Children's Court took cognizance of those offences. However, the Children's Court framed charges under Sections 363 and 366A of the IPC against the appellant.

42. Neither of the aforesaid offences prescribes mandatory minimum punishment. In absence of minimum punishment of imprisonment for 7 years or more for the offences alleged to have been committed by the appellant, the Board could not have resorted to the special provisions made under the Act of 2015 to tackle the child in the age group of 16-18 years. Since the appellant had not been alleged to have committed any 'heinous offence', the Board could not have conducted preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence, physical capacity to commit such offence etc., as provided under Section 15 of the Act of 2015. It could not have even transferred the case of the appellant under Section 18(3) of the Act of 2015 to the Children's Court for trial as an adult. Surprisingly, in the instant case, I find that after receipt of the record from the court of ACJM, the Board not only failed to notice that the appellant was not alleged to have committed any 'heinous offence' but it also transferred the case of the appellant to the Children's Court mechanically and on the basis of gravity of the offence.

43. Similarly, the Children's Court also failed to apply its judicial mind to the facts of the case and mechanically proceeded ahead by taking cognizance of the offences and framing charges against the appellant. It did not give re-look and determine whether the appellant (child) was to be tried as an adult or not as provided under Section 19(1)(ii) of the Act of 2015.

44. In view of the discussions made above both the issues framed above are decided in negative. Neither the order impugned passed by the Children's Court is sustainable nor the offences alleged against the appellant would fall within the ambit of 'heinous offences' as defined under the Act of 2015.

45. Consequently, in exercise of supervisory jurisdiction of this Court, I deem it fit and proper to set aside the order dated 07.02.2018 passed by the Board whereby the trial of the case of the appellant was transferred to the Children's Court and all subsequent orders passed by the learned Presiding Judge of the Children's Court in Special (Child) Case No. 22 of 2018 arising out of Parsa Bazar P.S. Case No. 73 of 2016, including the impugned order dated 07.03.2018. They are set aside, accordingly.

46. Registry is directed to send back the lower court records to the Children's Court forthwith through special messenger. The learned Presiding Judge of the Children's Court is directed to remit the record back to the Board through special messenger and send compliance report to this Court forthwith. The Board shall proceed with the case of the appellant in accordance with law.

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