

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Present:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

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THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

Tuesday, the 16th day of July 2019/25th Ashadha, 1941

Crl.M.Appl.1/2019 IN CRL.A No.629/2019

SC No.129/2015 of SESSIONS COURT, PALAKKAD

APPLICANT/1ST APPELLANT

1. ABHILASH, AGED 26 YEARS
S/O. BALAN, KOLLAMPOTTA, MADATHILKAM, KOLLANGODE,
PALAKKAD.

RESPONDENT/RESPONDENT

1. STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERLA, ERNAKULAM - 682 031.

Application/Petition praying that in the circumstances stated in the affidavit filed therewith the High Court be pleased to

This application/petition coming on for orders upon perusing the application and the affidavit filed in support thereof, and upon hearing the arguments of M/S P.VIJAYA BHANU (SR.), POOJA PANKAJ, AJEESH K.SASI, M.REVIKRISHNAN, P.M.RAFIQ, THOMAS J.ANAKKALLUNKAL, V.C.SARATH, VIPIN NARAYAN, SRUTHY N. BHAT, Advocates for the petitioner and the PUBLIC PROSECUTOR for the respondent, and of M/S GOVERNMENT PLEADER, Advocate for the respondents, the court passed the following:

“C.R.”

O R D E R

Shaffique, J.

This is an application filed by the first appellant/accused seeking suspension of sentence. The petitioner is the first accused in Sessions Case No.129/2015 of the Court of Sessions, Palakkad. By judgment dated 11/4/2019, petitioner along with another accused had been convicted and sentenced to undergo imprisonment for life and to pay a fine of ₹4,00,000/- each with default sentence of rigorous imprisonment for four years each for the offence punishable u/s 302 r/w S.34 of I.P.C. They are also sentenced to undergo rigorous imprisonment for 10 years each for the offence u/s 397 r/w S.34 of I.P.C. While seeking for suspension of sentence, the petitioner had produced a birth certificate as Annexure A thereby indicating that he was born on 29/11/1992 and as on the date of commission of offence, i.e., on 2/6/2010, the petitioner was a juvenile as he has not completed the age of 18 years. It is therefore contended that the entire trial process including the conviction and sentence imposed on the

petitioner is vitiated and the judgment is *non est* in law and he is entitled to have the conviction and sentence imposed against him dislodged. Though several other grounds had also been indicated in the application, no other grounds were urged by the counsel for the appellant. Annexure A apparently is a birth certificate issued by the Secretary, Registrar of Birth and Death, Pallassana Grama Panchayat. The date of birth of one Abilash whose mother's name is Kumari and father's name is Balasubramanian having their address at Kollanpotta, Pallassana is stated to be on 29/11/1992. The date of registration was 2/12/1992.

2. The Public Prosecutor has filed an objection inter alia producing a report from the Inspector of Police, Town Police Station. The certified extract of the birth certificate is also produced as Annexure II(a). It is however contended that as per the admission register received from the Headmistress of ALP School, Pallassana, the date of birth of the petitioner is recorded as 30/5/1992. The extract of admission register from V.I.M.H.S.S, Pallassana is also produced which indicates that the date of birth of Abhilash B., is 30/5/1992. The election ID and aadhaar card of

the petitioner also indicate the date of birth as 30/5/1992. The learned Public Prosecutor therefore argued that in the light of the judgment of the Apex Court in **Jarnail Singh v. State of Haryana** [(2013) 7 SCC 263], the age of juvenile has to be determined primarily on the basis of the school records and only if such documents are not available, other broader proof including the birth certificate need be considered. In **Jarnail Singh** (supra), the Apex Court observed that for determining the age of a minor, only a reference to Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007 is required. Paragraphs 22 and 23 are relevant which reads as under;

"22. 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 7-A, 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 of 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."

23. *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 of a child who is a victim of crime. For, in our view, there is hardly any difference insofar 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, PW 6. 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 child concerned 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 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 child concerned, on the basis of medical opinion".

3. It could therefore be seen that though the birth certificate given by a competent authority is also one among the documents that could be relied upon to ascertain the age of a juvenile, the certificate issued by the Panchayat need be considered only if the other documents are not available. Apex Court observed that the high rated option available will conclusively determine the age of minor. If the said certificate is available, no other evidence can be relied upon. In the absence of the high rated certificate, which is matriculation or equivalent, Rule 12(3) envisages consideration of date of birth entered in the school first attended by the child. If that is available, it has to be treated as final and conclusive and no other material is to be relied upon. Only when such evidence is not available, birth certificate issued by Panchayat need be considered for determining the age of the juvenile. In fact, the Rules have subsequently been incorporated into the statute in a modified

form under Section 94, when the 2015 Act came into force. S.94

reads as under:-

“94. Presumption and determination of age.

1. Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

2. In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining —

i. the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

ii. the birth certificate given by a corporation or a municipal authority or a panchayat;

iii. and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the

order of the Committee or the Board shall be completed within fifteen days from the date of such order.

3. *The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."*

4. It is contended by the learned counsel for appellant that the State Government has framed Kerala Juvenile Justice (Care and Protection of Children) Rules, 2014, which lays down a different criteria. Rule 19 was introduced for determining the age of a child in need of care and protection or a juvenile in conflict with law and birth certificate given by a Corporation or Municipal Authority or a Panchayat has been treated as the primary document for determining the age of a juvenile. Apparently, the 2014 Rules was contrary to the 2007, Central Rules. That apart, the Central Statute itself had in the 2015 Act incorporated S.94 to the statute book. Rule 19 of Kerala Rules is therefore repugnant to the Central Act and Rules and cannot be relied upon.

5. In a recent judgment of the Apex Court in **Gaurav Kumar alias Monu v. State of Haryana** [(2019) 4 SCC 549], the Apex Court had occasion to observe that with reference to an incident which happened on 23/5/2000, Rule 12 of the Juvenile

Justice (Care and Protection of Children) Rules, 2007 will not apply and the question of juvenility has to be determined on the basis of Juvenile Justice (Care and Protection of Children) Rules, 2001. In fact, Rule 22(5) of the 2001 Rules, which prevailed during the relevant time reads as under;

"22(5). In every case concerning a juvenile or a child, the Board shall either obtain, -
(i) a birth certificate given by a corporation or a municipal authority;
(ii) a date of birth certificate from the school first attended; or
(iii) matriculation or equivalent certificates, if available; and
(iv) in the absence of (i) to (iii) above, the medical opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board,
regarding his age; and, when 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."

6. A perusal of the provision would indicate that either of the three certificates was enough to determine the age of a juvenile or a child. But the statutory scheme had undergone a change and while enacting the 2007 Rules, the legislature had made a conscious departure from the earlier provision and had enacted Rule 15(3) thereby giving prime importance to a

certificate from the school in which the juvenile first attended. In this case also, it is relevant to note that though the age of the victim was stated to be 19 in the year 2010, no objection was raised regarding the age of the accused during trial. However, the extract of school admission register produced by the prosecutor when he was admitted to Standard- 1 indicates his date of birth as 30/5/1992 and on the basis of the law laid down by the Apex Court in ***Jarnail Singh*** (supra), the said certificate has to be considered for determining the age of the petitioner and consequently he cannot be treated as a juvenile.

In the light of the aforesaid facts, we do not think that this is a fit case in which the accused is entitled to be released on bail by suspending the sentence. Application is hence dismissed.

16-07-2019

Sd/- A.M. SHAFFIQUE, JUDGE
Sd/- N.ANIL KUMAR, JUDGE

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PS to Judge

Rp