

Crl. A. No.02 of 2020

SANDEEP RAI

...APPELLANT

VERSUS

STATE OF SIKKIM

...RESPONDENT

Date: 15.10.2020

CORAM:

**HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CHIEF JUSTICE
HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**

...

(ARUP KUMAR GOSWAMI, CJ)

Heard Ms. Sedenla Bhutia, learned Legal Aid Counsel for the appellant. Also heard Ms. Pema Bhutia, learned Assistant Public Prosecutor for the respondent.

2. The prosecution case is that based upon a written statement (Exhibit-7) given by victim's guardian as well as sister of the appellant, who was examined during trial as PW-2, Gyalshing P.S Case No.10/2017 dated 03.04.2017 under Section 376D IPC read with Section 6 of Protection of Children from Sexual Offences Act,2012 (for short, POCSO Act) had been registered against the appellant and another, who was later on tried by Juvenile Justice Board (for short, JJB),constituted under Section 4 of Juvenile Justice (Care and Protection) Act, 2015 (for short, the Act of 2015), he being a child in conflict with law as defined under Section 2 (13) of the Act of 2015.

3. Charge sheet was filed against the appellant on 13.09.2018 wherein the age of the appellant was shown as 18 years. At the time of filing of the charge sheet, the appellant was stated to be absconding.

4. The learned Sessions Judge, POCSO Act, convicted the appellant under Section 5 (l), (m), (n) of POCSO Act, punishable under Section 6 of POCSO Act.

5. While hearing the appeal, it has been brought to our notice by the learned Counsel for the appellant that PW-2, in her cross-examination, had stated that as informed by her brother (PW-8), who is also the father of the victim, the accused was around 17 years of age at the time of the occurrence. It is also brought to our notice that PW-8, who is also the brother of the appellant, in his cross-examination on 13.05.2019, had stated that the accused was about 19 years of age at that point of time.

6. Learned Counsel for the appellant submits that the aforesaid evidence of PW-2 and PW-8 goes to show that the accused being below 18 years of age at the time of commission of the offence was a child within the meaning of Section 2(12) of the Act of 2015 and thus, a juvenile in terms of Section 2 (35) of the Act of 2015. Accordingly, she submits that the appellant ought to have been brought before JJB to face trial and in that view of the matter, the impugned judgment cannot be sustained in law. She submits that it appears to her that these aspects were not argued before the learned trial Court.

7. Ms. Pema Bhutia has submitted that while recording statement of the appellant under Section 313 Cr.P.C., his age was recorded as 20 years and if that be so, the appellant was not a child at the time of commission of the offence.

8. In the context of the aforesaid submission of the learned Counsel for the parties, it will be appropriate to take note of Section 9 of Act of 2015, which reads as follows: -

“9. Procedure to be followed by a Magistrate who has not been empowered under this Act.- (1) When a Magistrate, not

empowered to exercise the powers of the Board under this Act is of the opinion that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay, record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction.

(2) In case a person alleged to have committed an offence claims before a court other than a Board, that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence, the said court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly as may be:

Provided that such a claim may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such a claim shall be determined in accordance with the provisions contained in this Act and the rules made thereunder even if the person has ceased to be a child on or before the date of commencement of this Act.

(3) If the court finds that a person has committed an offence and was a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.

(4) In case a person under this section is required to be kept in protective custody, while the person's claim of being a child is

being inquired into, such person may be placed, in the intervening period in a place of safety.”

9. Perusal of Section 9 of the Act of 2015, amongst others, goes to show that a claim of juvenility may be raised before any Court and when such a claim is raised, the claim is required to be determined in accordance with the provisions of the Act of 2015 and the rules made there under.

10. Section 94 of the Act of 2015 provides for presumption and determination of age of a person brought before a Child Welfare Committee (for short, CWC), constituted under Section 24 of the Act of 2015 or JJB. Section 94 of the Act of 2015 reads as follows:-

“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;

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(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."

11. Having regard to the nature of the evidence of PW-2 and PW-8 with regard to the age of the appellant, we are of the considered opinion that an enquiry is called for to determine the age of the appellant. Accordingly, we direct JJB, Gyalshing to determine the age of the appellant in terms of Section 94 of the Act of 2015 and to submit a report before this Court on or before 25.11.2020.

12. All persons and authorities whose assistance may be required by the JJB for carrying out the exercise as directed by us shall provide full assistance and co-operation to the JJB.

13. Registry will forthwith communicate this order by electronic mode to the learned District and Sessions Judge, Gyalshing, who will ensure delivery of this order to the JJB without any delay to enable the JJB to do the needful in terms of this order.

14. Registry will list the case on 27.11.2020 as a part- heard case.

Judge

Chief Justice

pm/