THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 14th May, 2024

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl. A. No.20 of 2023

Appellant : Ashish Manger

versus

Respondent : State of Sikkim

Application under Section 374(2)
of the Code of Criminal Procedure, 1973

Appearance

Mr. Kazi Sangay Thupden, Advocate (Legal Aid Counsel - Pro Bono) for the Appellant.

Mr. Yadev Sharma, Additional Public Prosecutor for the State-Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Appellant preferred an appeal against the impugned Judgment, dated 20-07-2023 and Order on Sentence, dated 25-07-2023, of the Court of the Learned Special Judge (POCSO Act, 2012), Gangtok, Sikkim (hereinafter, the "Special Judge"), in ST (POCSO) Case No.11 of 2021 (*State of Sikkim vs. Ashish Manger*), by which the Appellant was convicted under Sections 9(l), 9(m), 9(n), all punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act"). He was sentenced to undergo rigorous imprisonment for five years each, under each of the sections convicted, which were ordered to run concurrently, with fine imposed under each of the sections and default clauses of imprisonment.

2. During the course of hearing, Learned Counsel for the Appellant raised the contention that the Learned Special Judge failed to notice during the trial that the Appellant was a minor at

the time of offence. Pursuant thereto, an application under Section 9 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter, "JJ Act"), dated 06-11-2023, came to be filed by the Appellant, being I.A. No.01 of 2023 in the said appeal. It was urged by Learned Counsel for the Appellant that the date of birth of the Appellant is 31-03-1998 and the offence was committed in the year 2015 as appears in the Section 164 of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C.") statement of the victim and from the charges framed against the Appellant by the Learned Trial Court on 13-08-2021, rendering him a minor at the time of offence. Consequently, the matter was taken up on 07-11-2023 and on the same date, this Court *inter alia* ordered as follows;

> ***"6.*** Due consideration has been accorded to the submissions put forth. It is clear that Section 9 of the J.J. Act, more especially, the Proviso to the Section lays down that claim of juvenility may be raised before 'any' Court and it shall be recognised at any stage, even after the disposal of the case and such a claim shall be determined in accordance with the provisions of the 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.
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> ***7.*** At this juncture, it is relevant to look at Section 9(2) of the J.J. Act, which provides as follows;
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> > **"9. Procedure to be followed by a Magistrate who has not been empowered under this Act**—(1)……
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> > (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:
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> > ……..**"**
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> ***8.*** In light of the facts and circumstances elucidated hereinabove, the legal provisions referred to and in terms of the directions of the Supreme Court in ***Karan alias Fatiya*** vs. ***State of Madhya Pradesh*** [2022 SCC OnLine SC 1887], it is hereby ordered as follows;

> (i) The copies of the Birth Certificate and Transfer Certificate be forwarded to the Learned Trial Court concerned by 08-11-2023 in physical form as well as in digitised form.
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> (ii) The Appellant shall be produced before the Learned Trial Court concerned on 16-11-2023.
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> (iii) The Learned Trial Court shall take steps to consider whether the Appellant was a juvenile on the date when the offence is said to have been committed.
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> (iv) Towards this end, the Learned Trial Court, if so required, may call for and consider all relevant documents as well as have the facility of medical check-up of the Appellant as provided by law.
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> (v) The Report pertaining to such enquiry shall be submitted before the Registry of this Court within four weeks from today.**"**

(i) In compliance thereof, the Learned Special Judge submitted a communication bearing Ref. No.312/PD&SJ, GTK, dated 28-11-2023, with the records of proceedings dated 09-11-2023 and 16-11-2023 conducted in terms of the said Order, having reached a finding *inter alia* that; "*Giving the benefit of doubt to convict Ashish Manger, the date of incident (for the purpose of computing his age) is taken as the last date of 2017 i.e., 31.12.2017. On computing the same with his date of birth i.e., 31.03.1998, it is seen that he was 19 years 9 months old as on 31.12.2017.*"

3. Aggrieved by the conclusion arrived at by the Learned Special Judge, the Appellant filed an objection assailing it, and multi-pronged arguments were canvassed by the Learned Counsel for the Appellant before this Court, *viz*;

(i) That, the report overlooks the fact that the year of offence was 2015, despite the victim having stated so, in her Section 164 Cr.P.C. statement duly corroborated in her cross-examination, while deposing before the Court. That, the Charge framed by the Learned Special Judge on 13-08-2021 against the

Appellant was based on the fact that the offence took place in the year 2015. Relying on Section 60 of the Indian Evidence Act, 1872 (hereinafter the "Evidence Act") it was contended that the law provides that oral evidence must be direct and that in the instant matter the victim who bore the brunt of the offence is the best witness concerning the year of the offence. On this aspect strength was garnered from the decision of the Supreme Court in ***Neeraj Dutta*** vs. ***State (Government of NCT of Delhi)***[1].

(ii) That, in order to gauge the age of the Appellant the Learned Special Judge has relied on the Section 161 Cr.P.C. statement of witnesses, which is clearly erroneous, in view of the fact that such statement can only be used for the purpose of contradiction and corroboration and it is not substantive evidence. Succour on this count, was placed on the observation of the Hon'ble Supreme Court in ***Parvat Singh and Others*** vs. ***State of Madhya Pradesh***[2].

(iii) That, the Learned Special Judge sans basis opined that the date of offence as mentioned by the victim before the Learned Magistrate was an incorrect date and that the offence took place in the year 2017. Resisting such observation, Learned Counsel submitted that the year 2017 was mentioned only in the Charge-Sheet and the deposition of the Investigating Officer (IO) PW-10, which is not substantive evidence and lacks corroboration and ought to have been disregarded by the Learned Special Judge. Attention of this Court was invited to the decision of the Supreme Court in ***Rajesh Yadav and Another*** vs. ***State of Uttar Pradesh***[3] wherein it was held that;

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1 (2023) 4 SCC 731
2 (2020) 4 SCC 33
3 (2022) 12 SCC 200

> **"27.** Section 173(2) CrPC calls upon the investigating officer to file his final report before the court. It being a report, is nothing but a piece of evidence. It forms a mere opinion of the investigating officer on the materials collected by him. He takes note of the offence and thereafter, conducts an investigation to identify the offender, the truth of which can only be decided by the court. The aforesaid conclusion would lead to the position that the evidence of the investigating officer is not indispensable. The evidence is required for corroboration and contradiction of the other material witnesses as he is the one who links and presents them before the court. ……..**"**

(iv) In the next prong of his arguments, Learned Counsel contended that the Learned Special Judge also relied on the statement of PW-6 to compute the age of the Appellant at the time of offence, reasoning therein that, as per PW-6 the offence took place seven years ago, which when computed backwards would be in the year 2017. To the contrary, the evidence of PW-6 having been recorded in February, 2023, the offence would, even if so computed, be in the year 2016 and not 2017. Hence, the computation thus arrived at by the Learned Special Judge was incorrect. That, the evidence of PW-6 stating that PW-4 gave her information that the victim wanted to be taken away from the place she was living, is not corroborated by PW-4 herself. PW-6 stated that PW-4 had informed her of the above mentioned circumstance but PW-4 stated that she did not know why the victim wanted to go to her sister's place. Thus, the golden link in the chain of evidence has not been established. In any event, the evidence of PW-6 being hearsay is not admissible. On this count, reliance was placed on ***Sakatar Singh and Others*** vs. ***State of Haryana***[4].

(v) That, further PW-6 had deposed that the victim was aged 10/11 years when the offence took place. The victim's date

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[4] (2004) 11 SCC 291

of birth being 21-11-2005 having been established and bearing in mind the deposition of PW-6 regarding the victim's age, the offence would have been committed in the year 2015/2016 and not 2017. The date of birth of the Appellant indubitably is 31-03-1998 as also concluded by the Learned Special Judge, therefore in 2015/2016 he would be about 17/18 years. That, it is now settled law that where two views are possible, the one favouring the accused should be considered by the Court. That, this principle of law has been reiterated by the Supreme Court in ***Pawan Kumar*** vs. ***State of Uttar Pradesh and Others***[5]. The Learned Special Judge was also in error in considering 31-12-2017 as the date to conclude that the Appellant was 19 years at the time of offence as reflected in his report. Since the Appellant was born in the month of March, the computation of his age ought to have truncated in the month of March and could not have been extended to the month of December as done by the Learned Special Judge.

(vi) In the final leg of his arguments, it was contended that there has been no compliance of Section 6 and Section 9 of the JJ Act. That, the Appellant was arrested on 04-01-2021 and is in judicial custody till date after his conviction. That, the Supreme Court in ***Karan alias Fatiya*** vs. ***State of Madhya Pradesh***[6], while dealing with a similar matter set aside the sentence of the child in conflict with law who had attained the age of majority, while upholding the conviction. That, the Appellant herein was sentenced to five years rigorous imprisonment of which he has already completed more than three years. Considering that he was a minor at the time of the offence the conviction be upheld but the

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5 2023 SCC OnLine SC 1492
6 (2023) 5 SCC 504

remaining sentence be set aside, in terms of the decision of the Supreme Court in ***Karan alias Fatiya*** (*supra*).

4. Learned Additional Public Prosecutor fairly conceded to the submissions put forth by Learned Counsel for the Appellant concerning the age of the Appellant and reiterated that except the two instances, i.e., one mentioned in the Charge-Sheet and the other in the evidence of the IO, PW-10, no other witness has stated that the offence was of the year 2017. The victim in fact has specified that the offence took place in the year 2015 and her evidence would be the best evidence in this context. There is no corroborative evidence with that of PW-10, to establish that the offence took place in 2017 and hence, the Prosecution has no objection to the submissions and prayers advanced by Learned Counsel for the Appellant.

5. I have given due consideration to the submissions advanced and perused the documents, the impugned Judgment and Order on Sentence, the report dated 28-11-2023 along with the proceedings dated 09-11-2023 and 16-11-2023 annexed to the report by the Learned Special Judge and the citations relied on by Learned Counsel for the Appellant.

6. In light of the facts and circumstances before me, in my considered opinion, the submission that the age of the Appellant was erroneously computed by the Learned Special Judge in his proceedings dated 09-11-2013 and 16-11-2013 vide report dated 28-11-2013 cannot be faulted for the following reasons;

(i) It is the unequivocal statement of the victim in her Section 164 Cr.P.C. statement that the offence took place in 2015 and she has fortified this submission by corroborating it in her cross-examination before the Court, wherein she reiterated that

the offence took place in the year 2015. Charge was framed by the Learned Trial Court against the Appellant for the offence committed in the year 2015. The reliance of the Learned Special Judge on the Section 161 Cr.P.C. statement of the witnesses as stated in his proceeding dated 16-11-2023 is clearly an erroneous understanding of the law and against its tenets. In ***Parvat Singh*** (*supra*), the Supreme Court has reiterated that as per the settled proposition of law a statement recorded under Section 161 Cr.P.C. is inadmissible in evidence and cannot be relied upon or used to convict the accused and can be used only to prove the contradictions and/or omissions.

(ii) As held in ***Rajesh Yadav*** (*supra*), the charge-sheet is an opinion of the IO, here PW-10, and is not indispensable. He is not an eyewitness to the incident and his conclusions are based on the materials collated by him during the investigation. The truth of it all can only be decided by the Court, hence the evidence of PW-10 concluding that the offence was of 2017 in the teeth of the deposition of the victim, ought to have been dispensed with.

(iii) That having been said, the Supreme Court in ***Neeraj Dutta*** (*supra*), relied on by Learned Counsel for the Appellant has held that Section 60 of the Evidence Act requires that oral evidence must be direct or positive. That, direct evidence is when it goes straight to establish the main fact in issue. The word "direct" is used in juxtaposition to derivative or hearsay evidence, where a witness gives evidence that he received information from some other person. That, even with regard to oral evidence, there are sub-categories, primary evidence and secondary evidence. That, primary evidence is an oral account of the original evidence i.e. of a person who saw what happened and gives an account of it,

recorded by the Court, or the original document itself, or the original thing when produced in Court. As correctly pointed out by Learned Counsel for the Appellant, the evidence of the victim qualifies as direct and primary evidence and is thereby admissible in evidence, whereas the evidence of PW-6 being hearsay evidence which although not defined in the Evidence Act is inadmissible to prove a fact. Besides, it has to be considered that the evidence of PW-6 as reflected earlier does not corroborate with that of PW-4 who she claims is her informant. In ***Sakatar Singh*** (*supra*) the Supreme Court was of the considered view that it is dangerous to base a conviction on hearsay evidence.

(iv) The entries in the Live Birth Register of the District Hospital at Sl. No.1632 dated 06-04-1998, reveal that, the date of birth of the Appellant was registered as 31-03-1998. His birth certificate bearing registration no.1632/98, dated 06-04-1998, also bears the same date of birth and was proved by Dr. Bishal Pradhan, Registrar of Births and Deaths Cell, District Hospital, Singtam. Pradeep Sharma, Principal of Sonamati Memorial Government School, Khamdong produced the original school admission register, wherein at Sl. No.39, dated 26-02-2010, the date of birth of the Appellant has been reflected as 31-03-1998. Hence, in consideration of the entire documentary evidence it is indisputable that the date of birth of the Appellant is 31-08-1998. The offence having occurred in 2015, it goes without saying that he was a minor then. As the specific date of the offence has not been mentioned, although the year has been reflected, the Court is to take a liberal view and lean in favour of the accused. On this aspect it is worthwhile adverting to the decision of the Supreme Court in ***Pawan Kumar*** (*supra*), wherein it was *inter alia* held that;

> **"39.** In a case of juvenility where two views are possible, this Court has held that a liberal approach should be undertaken. This position was laid down by this Court in the case of *Arnit Das* v. *State of Bihar*, (2000) 5 SCC 488 where it was held that:
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> > *"19…….*
> >
> > *(ii) a hypertechnical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases; and"*
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> **40.** This proposition of taking a liberal view and about extending the benefit of juvenility where two views are available has been reiterated by this Court in numerous subsequent decisions such as *Mukarrab* v. *State of Uttar Pradesh*, (2017) 2 SCC 210, *Ashwani Kumar Saxena* v. *State of Madhya Pradesh*, (2012) 9 SCC 750 [para 13] as well as *Rishipal Singh Solanki* v. *State of Uttar Pradesh*, (2022) 8 SCC 602 which concluded as follows in para 33.8:
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> > *33.8. If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.*
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> **41.** Even if the medical report which shows the age of the appellant as 19 years is taken to be correct even then in a case where an exact assessment of age was not possible, considering the conflicting reports and documents in our considered opinion, the provision given in sub-rule 3(b) of Rule 12 would come into play and the Court ought to have given the appellant a benefit of one year in the present case.
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> **42.** Consequently, we accept the report of the Additional Sessions Judge, Barabanki dated 28.09.2022 and declare that the appellant was a juvenile on the date of the commission of crime i.e., on 01.12.1995.**"**

(v) Now, on the edifice of the foregoing discussions, it remains to be seen as to what relief is available to the Appellant in the said circumstance. In ***Karan*** (*supra*) the Supreme Court was examining the correctness of the Judgment and Order, dated 15-11-2018, whereby a Division Bench of a High Court affirmed the

death sentence awarded by the Learned Trial Court and dismissed the appeal preferred by the Appellant against his conviction and sentence. During the pendency of the appeal before the Hon'ble Supreme Court, the Appellant claimed juvenility and the consequent benefits available under the provisions of the JJ Act. On the matter being examined by the Supreme Court, as emanates in the Judgment (*supra*), it was concluded that the Appellant was a child that too below 16 years of age under the JJ Act. The Supreme Court discussed Section 9 of the JJ Act and observed *inter alia* that, the Appellant having been held to be a child on the date of commission of the offence, the sentence imposed has to be made ineffective. The Supreme Court then went on to hold that the relief to be extended to the Appellant may be examined through a different perspective also, i.e., whether he has already undergone the maximum sentence which can be awarded against a child in conflict with law for committing heinous offence and who is below 16 years of age. Section 18 of the Act was examined and it was observed as follows;

> **"16.** On a perusal of the aforesaid Section 18 of the 2015 Act, it is to be noticed that the JJB having found a child to be in conflict with law who may have committed a petty or serious offence and where heinous offence is committed, the child should be below 16 years, can pass various orders under clauses (*a*) to (*g*) of sub-section (1) and also sub-section (2). **However, the net result is that whatever punishment is to be provided, the same cannot exceed a period of three years and the JJB has to take full care of ensuring the best facilities that could be provided to the child for providing reformative services including education, skill development, counselling and psychiatric support.**
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> **17. In the present case, the appellant is held to be less than 16 years, and therefore, the maximum punishment that could be awarded is up to 3 years. The appellant has already undergone more than 5 years. His incarceration beyond 3 years would be illegal, and therefore, he would be liable to be released forthwith on this count also."**
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> **(emphasis supplied)**

(vi) The Supreme Court in ***Karan*** (*supra*) while considering whether the conviction in such a circumstance should be set aside by relying on Section 9 of the JJ Act, observed *inter alia* as follows;

> **"33.** ……. According to sub-section (3) of Section 9 of the 2015 Act, the Court which finds that the person who committed the offence was a child on the date of commission of such offence would forward the child to the JJB for passing appropriate orders and sentence, if any, passed by the court shall be deemed to have no effect. This does not specifically or even impliedly provide that the conviction recorded by any court with respect to a person who has subsequently after the disposal of the case been found to be juvenile or a child, would also lose its effect; rather it is only the sentence if any passed by the court would be deemed to have no effect.
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> ……..
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> **35.** The intention of the legislature was to give benefit to a person who is declared to be a child on the date of the offence only with respect to its sentence part. If the conviction was also to be made ineffective then either the jurisdiction of regular Sessions Court would have been completely excluded not only under Section 9 of the 2015 Act but also under Section 25 of the 2015 Act, provision would have been made that on a finding being recorded that the person being tried is a child, a pending trial should also be relegated to the JJB and also that such trial would be held to be null and void. Instead, under Section 25 of the 2015 Act, it is clearly provided that any proceeding pending before any Board or court on the date of commencement of the 2015 Act shall be continued in that Board or court as if this Act had not been enacted.
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> ……..
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> **39.** For all the reasons recorded above, it is ordered as follows: The conviction of the appellant is upheld; however, the sentence is set aside. Further as the appellant at present would be more than 20 years old, there would be no requirement of sending him to the JJB or any other child care facility or institution. The appellant is in judicial custody. He shall be released forthwith. The impugned judgment [*Karan* v. *State of M.P.*, 2018 SCC OnLine MP 1849] shall stand modified to the aforesaid extent.**"**

7. In light of the aforementioned pronouncement of the Supreme Court and considering the circumstances in the present case, the Appellant now being above 25 years of age, I am of the considered view that the same benefit as propounded in ***Karan*** (*supra*) is required to be extended to the Appellant. As he was a

child in conflict with law when the offence took place, and since he has been incarcerated from 04-01-2021, i.e., beyond three years now, his further incarceration would tantamount to an illegality. He is therefore liable to be released from judicial custody. In consideration of his present age, there is no requirement to send him either to the Juvenile Justice Board or any other care facility or institution.

8. The conviction is upheld and the sentence stands modified to the above extent.

9. Appellant be set at liberty forthwith.

10. The concerned authorities shall however examine their records to verify whether he is involved in any other matter before such release.

11. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

12. Appeal disposed of accordingly.

13. Copy of this Judgment be transmitted to the Learned Trial Court for information along with its records immediately.

14. Copy of this Judgment be forwarded to the Jail Authority at the Central Prison, Rongyek, by e-mail for information and necessary steps. A soft copy of the Judgment also be made available to the Appellant by the Jail Superintendent.

(Meenakshi Madan Rai)
Judge
14-05-2024

Approved for reporting : **Yes**

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