

CRLREV No. 517 of 2016

Manas Kumar Khuntia	...	Petitioner
	-Vrs.-	
State of Orissa	...	Opposite party

11. 18.8.2016 This revision petition has been filed to set aside the order dated 24.6.2016 passed by the learned Sessions Judge, Jajpur in Criminal Appeal No.47 of 2016 in confirming the order passed by the learned C.J.M. -cum- Principal Magistrate, Juvenile Justice Board, Jajpur in J.G.R. Case No.21 of 2016 and for a direction that the petitioner should be released on bail.

On perusal of the L.C.R., it appears that the date of birth of the petitioner as per the School Admission Register is 06.03.1999 and the occurrence in question stated to have taken place on 05.06.2016 and therefore, as on the date of occurrence, the petitioner was aged about 17 years 3 months.

The FIR was registered as Korai P.S. Case No.92 dated 12.06.2016 under sections 363/366 of the Indian Penal Code. Subsequently, the case turned to also one under section 376 of the Indian Penal Code read with section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereafter "POCSO Act") and the investigation is under progress.

Section 376 of the Indian Penal Code prescribes punishment for rape with rigorous imprisonment which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

Section 4 of the POCSO Act prescribes punishment for "penetrative sexual assault" which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

The Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter "2015 Act") was brought into force on 15.01.2016 vide S.O.110(E) dated 12.01.2016. Section 2(33) of the 2015 Act defines "heinous offence" as follows:-

"heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more.

In view of the definition of "heinous offence" in 2015 Act and looking at the punishment prescribed under section 376 of the Indian Penal Code and section 4 of the

POCSO Act, it is apparent that both these offences which are stated to have been committed in this case after 2015 Act was brought into force, come within the definition of "heinous offence".

Section 15 of the 2015 Act reads as follows:-

"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 (2 of 1974):

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."

Section 14 of 2015 Act deals with inquiry by Board regarding child in conflict with law. Sub-section 5 (f) of section 14 reads as follows:-

"(5) (f) inquiry of heinous offences:-

(i) for child below the age of sixteen years as on the date of commission of an offence shall be disposed of by the Board under clause (e);

(ii) for child above the age of sixteen years as on the date of commission of an offence shall be dealt with in the manner prescribed under section 15."

In view of section 15 read with section 14 (5) (f) of the 2015 Act, it is clear that once the child is above the age of sixteen years as on the date of commission of "heinous offence", he shall be dealt with in the manner prescribed under section 15 of the 2015 Act. 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. For making such an assessment, the Board may take into the assistance of experienced psychologists or psycho-social workers or other experts.

In view of the purpose of amendment for which the Juvenile Justice (Care and Protection of Children) Act, 2015 was enacted after repealing the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) by virtue of section 111 of 2015 Act, it is the requirement of law that in case of a child who has completed or above the age of

sixteen years as on the date of commission of "heinous

offence", the Juvenile Justice Board constituted under section 4 of 2015 Act has to make a preliminary assessment in terms of section 15 of 2015 Act. Though in the proviso to subsection (1) of section 15 of 2015 Act, the word "may" has been used, but in the context of the provision, when the power is coupled with an obligation and duty, the word "may" which denotes discretion should be construed to mean a "command" and it becomes mandatory otherwise it would defeat the very purpose of the amended Act.

The L.C.R. does not indicate that any such assessment has been made and therefore, before adjudicating the bail application, it is felt necessary that a preliminary assessment report in terms of section 15 of the 2015 Act should be called for from the learned C.J.M.-cum-Principal Magistrate, Juvenile Justice Board, Jajpur in J.G.R. Case No.21 of 2016.

The L.C.R. which has been received in this Court be sent back to the concerned Juvenile Justice Board to make preliminary assessment in terms of section 15 of 2015 Act keeping in view the observation made in this order and

report be submitted by the Board within two weeks from the

date of receipt of the L.C.R. which should indicate as to whether the petitioner had the required mental and physical capacity to commit the "heinous offence" as alleged against him and the ability to understand the consequences of such offence and the circumstances in which he allegedly committed the offence.

List this matter immediately after receipt of the preliminary assessment report from the concerned Board.

L.C.R. be returned back by the Board immediately to this Court after the preliminary assessment.

Let a copy of the order be sent to the learned Registrar General of this Court for onward communication to all the Juvenile Justice Board of the State for their information and necessary action at their end with reference to the observation made.

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S.K. Sahoo, J.

