



2022:KER:63899

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

THURSDAY, THE 17TH DAY OF NOVEMBER 2022/26TH KARTHIKA, 1944

BAIL APPL. NO. 7321 OF 2022

(CRIME NO.414 OF 2022 OF PEERUMEDU POLICE STATION, IDUKKI)

PETITIONER/ACCUSED:

SOFIKUL ISLAM
AGED 16 YEARS
CHENIBARI P.O, BHERIBHERI BILL,
BHALUK KHOWA PARA, KALAIGAON,
DARRANG, ASSAM, PIN - 784525

BY ADVS.
SRI.VISHNU BABU
ADV.ASWINI SHANKAR
SRI.P.YADHU KUMAR
SMT.SWETHA K.S.

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031

SMT.M.K.PUSHPALATHA, PUBLIC PROSECUTOR

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
07.11.2022, THE COURT ON 17.11.2022 PASSED THE FOLLOWING:



"C.R."

BECHU KURIAN THOMAS, J.

B.A. No.7321 of 2021

Dated this the 17th day of November, 2022

ORDER

In this bail application under section 439 of the Code of Criminal Procedure, 1973, petitioner laments that he is only 16 years of age and hence he ought to be treated only as a child in conflict with law and could not have even been arrested. Petitioner claims that he should be released on bail forthwith. The contentions bring to the fore questions on the method to be adopted when the age is in dispute.

2. Petitioner, who stands indicted for the offences under sections 366A, 376 and 376(1) of the Indian Penal Code, 1860, apart from sections 3(a) and 4 of the Protection of Children from Sexual Offences Act 2012, alleges that he is only 16 years in age. The main contention urged is that under the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short 'the JJ Act of 2015'), petitioner is liable to be treated as a child and therefore, he could not have been arrested.

3. Sri.Vishnu Babu and Adv. Aswini Sankar, learned counsel for the petitioner, vehemently contended that as per the Aadhaar card, petitioner's



date of birth is 02-01-2006 and therefore, he is required to be treated only as a child in conflict with the law. It was also submitted that the date of birth certificate issued by the Department of Health Services, State of Assam, also shows his date of birth as that on the Aadhar card. Ignoring those crucial documents, the investigating officer is alleged to have arrested the petitioner on 03.06.2022, and he has been in custody since then, contended the learned counsel.

4. Smt.M.K.Pushpalatha, the learned Public Prosecutor, on the other hand, contended that petitioner is the neighbour of the victim who had committed aggravated penetrative sexual assault on the minor victim aged 13. According to the learned Public Prosecutor, the dispute on age is without any basis as the investigating officer had obtained the transfer certificate issued by the school specifying his date of birth as 13.02.2003. This indicates that the petitioner is presently 19 years of age and, hence, he cannot be treated as a child in conflict with law. According to the Public Prosecutor, it was only after noticing the age of the accused as 19 years that he was arrested by the investigating officer. The learned Public Prosecutor also submitted that the date of birth on the Aadhaar card cannot be relied upon, as under the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, the date of birth is not made conclusive while under the Juvenile Justice (Care and Protection of Children) Act, 2015, the main document to prove the age is



the certificate from the school specifying the date of birth. The respondent has also filed a statement producing the certificate from the school specifying the date of birth of the petitioner, which was handed over to the investigating officer by the accused himself. Annexure R1(a) is a transfer certificate issued by the school authorities specifying the date of birth of the petitioner.

5. Coming to the facts of the case, it is relevant to notice that petitioner is the accused in Crime No.414 of 2022 of Peerumedu Police Station and is alleged to have committed rape on a victim aged 13 years, after kidnapping her from her mother's custody.

6. Certain additional circumstances, which are not disputed, are also required to be mentioned. Petitioner is a married man hailing from Assam. He claims to be working at Peerumedu in one of the estates, and the victim was residing with her mother, who is also a worker in the same estate. Consequent to their acquaintance, the accused is alleged to have kidnapped the girl and subjected her to aggravated penetrative sexual assault on 01-06-2022 and thereby committed the offences alleged. Petitioner was arrested on 03-06-2022.

7. It is trite law that the question of the age of a child can be raised at any time. In the decision in **Hari Ram v. State of Rajasthan and Another** [(2009) 13 SCC 211], it was held that a claim of juvenility could be raised before any Court at any stage, and such claim is required to be



determined based on the provisions contained in the Juvenile Justice Act.

8. Further, as per S.7A of the JJ Act of 2015, once such a claim is put forward, the Court is bound to make an inquiry by taking such evidence (not by an affidavit) as may be necessary so as to determine the age of such a person. Reference to the decisions in **Ashwani Kumar Saxena v. State of Madhya Pradesh** [(2012) 9 SCC 750] would be relevant.

9. If the age of a person, allegedly a child in conflict with law, is under dispute, the statute, through section 94 of the JJ Act of 2015, mandates that the said child shall be produced before the Juvenile Justice Board. If, on appearance, the Board finds the age of the child doubtful, then the same shall be determined under three modes. The first mode is by reference to a certificate issued by the school or the matriculation or equivalent certificate, specifying the date of birth of the child. If such a certificate is not available, then the date of birth can be determined by reference to the birth certificate issued by a local authority like a Panchayat, Municipality or Corporation. If both the aforesaid documents are not available, then the age of the child has to be determined on the basis of an ossification test or other latest medical age determination test to be conducted.

10. For the purpose of better comprehension, section 94 of the JJ Act of 2015 is extracted below:



“S.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.”

11. It is evident from a reading of the above-extracted provision that if a certificate from the school is available which specifies the date of birth, that alone can be looked into for the purpose of identifying the date of birth of the alleged child.



12. In the decision in **Jarnail Singh v. State of Haryana** [(2013) 7 SCC 263], the Supreme Court held, by reference to the erstwhile Juvenile Justice Act, that the extract of the school register issued by the school of first admission without anything further can be accepted as proof of age.

13. In this context, it is apposite to refer to the decision in **Raghavan K. v. State of Kerala** (2021 (6) KHC 553), **Alex v. State of Kerala** (2021 (4) KLT 480) and in **Rajan v. State of Kerala** (2021 (4) KLT 274), a Division Bench of this Court had held that the certificate of extract of the admission register from the school first attended is a valid proof of the age of an alleged child. However, all those cases arose out of incidents that occurred prior to 2015 and before coming into force of the JJ Act of 2015, and have no application in the instant case.

14. It is relevant to note that under section 94 of the JJ Act of 2015, a marked departure is made from the erstwhile statute and not only the certificate from the school but a date of birth certificate from the matriculation or equivalent certificate from the concerned examination Board is also acceptable as proof of age. The JJ Act of 2015 does not mandate that a certificate from the school first attended is required. With effect from 01-01-2016, proof of age is to be determined in the event of a dispute by relying upon the date of birth certificate from the school or the matriculation or the equivalent certificate from the examination Board as the first step. Only in the absence of the above documents, the age can be



determined by reference to the birth certificate of the local authority. The decisions in **Alex** and **Rajan** (supra), therefore, have no application as they both related to incidents prior to the coming into force of the JJ Act of 2015

15. In this context, the decision in **Mahesh v. State of Kerala** (2021 (4) KLT 776) is relevant. The Division Bench of this Court had, after referring to section 7A of the JJ Act of 2015, observed as follows:

“At this juncture, for completeness of the position of law, we wish to point out that, the Juvenile Justice (Care and Protection of Children) Act, 2000 has been repealed as per Section 111 of Juvenile Justice (Care and Protection of Children) Act, 2015 with effect from 01/01/2016. The corresponding provision of Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 is Section 9 of Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015). The said provision contemplates that when an enquiry as to the age of a person is to be conducted, the concerned Court before which such person is produced, shall take evidence as may be necessary (but not on an affidavit) to determine the age of such person and shall record the finding on the matter. Section 94 of the JJ Act, 2015 contemplates the documents which can be relied on for determining the age of a person and the order of preference of such documents. As per the said provision, date of birth certificate from the school or matriculation certificate equivalent certificate from the concerned examination Board, in its absence, a birth certificate given by the Corporation or a Municipal Authority or a Panchayat, are the documents which can be relied on for determining the age. In the absence of any of the said documents, ossification test or any other latest age determination test can be conducted. One of the important deviations from the earlier provisions is that, it does not insist for the certificate from the school first attended, as it provides for certificate from the school or matriculation certificate by the concerned



examination board. As the application of the said provision is effective from 01/01/2016 onwards, in all matters where the date of occurrence of the crime is on or after the said date, the procedure to be followed is that contemplated under the Juvenile Justice (Care and Protection of Children) Act, 2015. In such cases, the acceptable documents and the order of preference of such documents, shall be as contemplated in the said Act.”

16. On a consideration of the above principles, I am of the view that if there is a certificate from the school or the matriculation or equivalent certificate from the examination Board concerned that specifies the date of birth, the said document alone is acceptable as proof of age of the accused under section 94(2)(i) of the JJ Act, 2015, who claims to be a child in conflict with the law. However, if such a document is not available, then the document specified in section 94(2)(ii) can be accepted as proof of age. If the above-referred documents are not available, resort can be made to the test contemplated under section 94(2)(iii) of the JJ Act of 2015. The Aadhaar card is not recognized by the JJ Act 2015 as a document of proof of date of birth of an accused under the said Act.

17. Though the learned counsel for the petitioner laid great emphasis on the birth certificate issued by the Government Health Department of Assam, the said document cannot be taken into reckoning for the purpose of determination of the age of a child in view of the statutory mandate of section 94 of the JJ Act of 2015 at least for the present, in view of the existence of Annexure R1(a) - the transfer



certificate specifying the date of birth of the petitioner obtained from the school.

18. Having given my anxious consideration to the legal submissions made impressively by the learned counsel for the petitioner, I am of the view that the age of the petitioner is prima facie found to be above 18, and therefore, the investigating officer was justified in treating the petitioner as an adult.

19. Coming to the facts of the case, the petitioner, who is already a married man, is alleged to have committed rape on a 13 year old minor. The investigating officer also apprehends the accused absconding from Kerala. He is also alleged to be the neighbour of the victim. Even though petitioner was arrested on 03.06.2022 and has been in detention since then, I am of the view that considering the gravity of the offence, the circumstances and the possibility of the accused intimidating the witnesses, including the victim, this is not a fit case where the petitioner could be released on bail, at this juncture.

Accordingly, I dismiss this bail application.

**BECHU KURIAN THOMAS
JUDGE**

vps

Corrigendum Dated 21.11.2022

"B.A. No.7321 of 2021" shown in the title of the order shall stand



2022:KER:63899

B.A. No.7321/22

-:11:-

corrected and read as "B.A. No.7321 of 2022".

**BECHU KURIAN THOMAS
JUDGE**

vps