

Present:

Mr. Justice A S M Abdul Mobin

and

Mr. Justice Md. Akhtaruzzaman

Criminal Miscellaneous Case No. 48853 of 2023.

Ayatullah Al Kabir @ Tuhin @ Abu Atique Al Bangali
@ Ami Jihadi Balok

... petitioner

Versus

The State

... opposite party

Mr. Md. Ariful Islam, advocate

..... for the petitioner

Ms. Samira Tarannum Rabeya (Miti), Deputy
Attorney General with Ms. Kazi Samsunnahar with
Mr. Mohammad Akter Hossain and Ms. Tahmina
Sultana, Assistant Attorney Generals

.. for the opposite party

Heard and Judgment on: 22.02.2024.

A S M Abdul Mobin, J:

This Rule at the instance of accused petitioner
Ayatullah Al Kabir @ Tuhin @ Abu Atique Al Bangali
@ Ami Jihadi Balok was issued under section 561A of
the Code of Criminal Procedure calling upon the
opposite party to show cause as to why the order dated
19.10.2020 passed by the learned Judge of Shishu
Adalat, Mymensingh in Shantrash Case No. 05 of 2021

corresponding to G.R. Case No. 1540 of 2019 arising out of Mymensingh Sadar Police Station Case No. 97 dated 26.12.2019 under sections 6(2)(ই)(ক)/ 8/ 10/ 11/ 12/13 of the Santrash Birodhi Ain, 2009 (as amended in 2013) now pending in the Court of Santrash Daman Tribunal, Mymensingh so far it relates to the petitioner should not be quashed.

By the impugned order dated 19.10.2020, the learned Judge of the Shishu Adalat rejected the prayer of the accused petitioner for declaring him a child and to try him as a child.

The case was initiated on a first information report (FIR) lodged by informant Amitab Shekhar Chowdhury, Inspector (T.I.), D.A.D., RAB-14, Mymensingh. The accused petitioner was arrested on 26.12.2019. The case was investigated and charge sheet was submitted under the aforesaid sections of law. The case record was sent to the Santrash Daman Tribunal, Mymensingh and it was

renumbered as Santrash Case No. 05 of 2021. In the meantime, the accused petitioner filed an application before the Shishu Adalat, Mymensingh for treating him as a child and to try him under the Shishu Ain, 2013 by the Shishu Adalat. The learned Judge of the Shishu Adalat was pleased to ask for a report from the investigating officer on examination of his academic certificates. The investigating officer examined the certificates but relying on the recorded in the confessional statement and on the opinion of the medical officer stated in his report that the age of the accused petitioner was in between 20 to 35 years. Thereafter, the learned Judge of the Shishu Adalat vide his order dated 19.10.2020 rejected the prayer of the accused petitioner observing that the determination of bony age by Forensic Medicine Department, Mymensingh was just and reliable. As such, there was no reasonable ground for treating him as a child .

Thereafter, he filed this application under section 561A of the Code of Criminal Procedure before this Court and obtained the rule.

Mr. Md. Ariful Islam, the learned advocate appearing for the petitioner submits that in the FIR, the accused petitioner was said to be a boy of 19 years. When his statement under section 164 of the Code of Criminal Procedure was recorded, his age was noted as 20 years. The learned advocate further submits that in his birth certificate and PEC, JSC as well as S.S.C certificate his date of birth was recorded as 09.10.2003. Accordingly, the learned advocate submits that he was a child under the age of eighteen years and he should be tried in a Shishu Adalat under the Shishu Ain, 2013. The learned advocate finally submits that the trial of the accused petitioner in the Court of Sessions would be illegal and as such the order dated 19.10.2020 passed by

the learned Judge of the Shishu Adalat is liable to be quashed.

The learned advocate with reference to the case of *Arun Karmaker Vs. State* reported in 22 BLD(AD) 76 submits that doctor's certificate is a mere opinion of age, and a declaration in a statement under section 164 that he or she was a major is also not a proof of age, rather a school certificate is a positive evidence in case of determination of age. The learned advocate, accordingly submits that the rule may kindly be made absolute.

Ms. Samira Taranum Rabeya (Miti), the learned Deputy Attorney General appearing for the State opposes the rule.

We have considered the submissions of the learned advocates, perused the application and other materials on record. In the FIR the accused petitioner was shown as 19 years old. The learned Magistrate who recorded his confession noted that he was of 20 years. In

S.S.C. certificate, his date of birth was recorded as 09.10.2003. According to his date of birth, he was a child on the date of commission of the offence. The learned Judge of the Shishu Adalath while passing the impugned order on 19.10.2020 considered the bony age given by the Forensic Medicine Department and rejected the prayer holding that bony age of the accused petitioner determined by the Forensic Medicine Department was proper and reliable. From the report given by the Investigating Officer, it appears that at the time of arrest birth certificate and academic certificates were not available and as such, his real age could not be ascertained. But, considering the oral statement and his physical appearance, his age was noted as 19 years in the FIR. In the confession his age was recorded as 20 years.

From the supplementary affidavit, it appears that the accused petitioner was arrested in connection with another case. That case was investigated and charge

sheet was submitted. But the accused petitioner was not sent up in that case wherein his age was noted as 16 years.

It is well settled in law that doctor's certificate is a mere opinion of age, and a declaration in a statement under section 164 that he or she was a major is also not a proof of age. Moreover, a Radiologist's opinion cannot be preferred to positive evidence like a school certificate. This view finds support in the case of *Arun Karmaker Vs. State* reported in 22 BLD(AD) 76.

In the circumstances, the question arises before us whether there is any scope to hold further inquiry for determination of age of the accused petitioner.

Section 21 of the Shishu Ain, 2013 provides that Shishu Adalat may consider the age of an accused and may declare him as a child, although there was a decision otherwise made by the Court. Proviso to sub section 4 of section 21 of the Shishu Ain, 2013

empowers a Shishu Adalat to vary or alter its decision about the age of an accused despite the fact that the court earlier did not find him a child. Proviso to sub-section 4 of section 21 of the Shishu Ain runs as follows:

"তবে শর্ত থাকে যে, কোন ব্যক্তিকে ইতিপূর্বে শিশু আদালত কর্তৃক শিশু নয় মর্মে ঘোষণা করা হইলেও কোন সন্দেহাতীত দালিলিক প্রমাণ দ্বারা তাহাকে শিশু হিসাবে প্রমাণ করা সম্ভব হইলে উক্ত আদালত, যথাযথ যুক্তি উপস্থাপনপূর্বক, সংশ্লিষ্ট শিশুর বয়স সম্পর্কে প্রদত্ত উহার পূর্বের মতামত পরিবর্তন করিতে পারিবে।"

In view of the aforesaid provision of law, there is a scope for holding an enquiry for determination of age of the accused petitioner. The learned Judge of the Shishu Adalat may consider the evidence and materials on record including the birth and academic and may decide the age of the accused petitioner for ends of justice.

In the circumstances, we are of the view a direction upon the learned Judge of Shishu Adalat to consider the

matter again under the proviso to section 4 of section 21 of the Shishu Ain, 2013.

Accordingly, the learned Judge of the Shishu Adalat is directed to decide the age of the accused petitioner on the basis of evidence and materials on record including the birth certificate and academic certificates of the accused petitioner. If the Adalat finds him as a child, then it may proceed with the trial in accordance under the provision of Shishu Ain, 2013. Otherwise, the Shishu Adalat send back the case record to the Court where the case is pending with a view to proceed with the trial of the case in accordance with law.

With the above observation and direction this rule is disposed of.

Communicate the order at once.

Md. Mahmud Hassan Talukder, J.

I agree.

