

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)

Present

Mr. Justice Md. Iqbal Kabir

And

Mr. Justice Md. Riaz Uddin Khan

Criminal Appeal No. 3944 of 2024

In the matter of:

A petition of appeal under section 41 of the
Children Act, 2013

-And-

In the matter of:

Md. Din Islam @ Babu

... Appellant

Versus

The State

...Respondent

Mr. Md. Maksudur Rahman, Advocate

...For the Appellant

Mr. Farid Uddin Khan, DAG with

Mr. Md. Anichur Rahman Khan, DAG

...For the State

Judgment on: 22.01.2025

Md. Riaz Uddin Khan, J:

This Criminal Appeal is directed against the order dated 18.03.2024 passed by the Shishu Adalat-4, Dhaka in Bail Petition Case No. 44 of 2023 arising out of Kamrangirchar Police Station Case No. 45 dated 26.06.2022 corresponding to G.R Case No. 358 of 2022 (Kam:) under sections 143/324/326/307/302/34 of the Penal Code, now pending in the Court of Shishu Adalat-4, Dhaka rejecting the application for declaration of the appellant as child.

The accused-appellant is indicted in a case along with other accused on the allegation of killing the deceased and injuring two other victims.

Succinct facts for disposal of this appeal is that one Md. Abdul Hakim lodged an First Information Report (FIR) in Kamrangirchar Police Station, Dhaka on 24.06.2022 against 10 FIR named accused including the accused-appellant and 8/10 unknown persons alleging *inter alia* that the deceased was his son. There was a quarrel between the deceased and his friends with the accused and as a result on 24.06.2022 at about 10.45 hours all the accused suddenly attacked the deceased and his friends indiscriminately; the accused-appellant gave a knife blow on the abdomen of the deceased and also on the abdomen of another victim namely Md. Rafi and gave knife blow on the left hand, forehead and right leg of another victim namely Bijoy; thereafter all the accused left the place of occurrence and the local witnesses rescued the deceased and admitted him to Dhaka Medical College Hospital for treatment and on 25.06.2022 at about 09.00 a.m. the doctor declared him dead and his injured friends are under treatment now. Hence is the FIR.

The police arrested the accused-appellant and produced before the learned Chief Metropolitan Magistrate, Dhaka on 26.06.2022 and the learned Magistrate sent him to jail.

The accused-appellant filed an application before the learned Shishu Adalat-4, Dhaka for treating the accused-appellant as a child on 27.03.2023 by submitting a photocopy of the birth certificate of the appellant issued by the Chairman of Sultangonj Union Parishad of Tejgaon (north) Circle and after hearing the learned judge on 18.04.2023 directed the Chairman of Sultangonj Union Parishad to submit a report of genuineness of the said birth certificate and the order could not be implemented, because that union parishad was abolished and delimited under Ward No. 57 of Dhaka South City Corporation (DSCC); the court then directed the ward councilor of the ward to enquire the matter and on 26.06.2023 Ward Councilor of Ward No. 57 of DSCC submitted the inquiry report to the Court; then the learned judge sent the appellant to Sir Salimullah Medical College Hospital (SSMC) for ascertaining the age by his order dated 18.07.2023. Thereafter on 07.09.2023 Dr. Mohammad Omar Farook, Medical Officer, Forensic Medicine Department, SSMC, Dhaka submitted the medical report before the Court and after hearing on 04.01.2024 the learned judge rejected the application for treating the accused-appellant as child on the finding that on appearance of the accused it seems that he was a major of 18 years of age.

The accused-appellant again filed similar application for treating him as child before the said Shishu Adalat-4, Dhaka and the learned judge was pleased to reject the same by the impugned order dated 18.03.2024 on the finding that similar application was earlier rejected on merit.

Being aggrieved by and dissatisfied with the said order of rejection the accused appellant preferred the instant appeal.

Mr. Md. Maksudur Rahman, the learned advocate appearing for the appellant submits that the Shishu Adalat failed to consider the facts and circumstances of the instant case and in the forensic report the doctor opined that "considering the physical examination and co-relating with the radiological finding: I am of the opinion that the age of Md. Din Islam @ Babu s/o late Motiur Rahman is about 18-19 (eighteen to nineteen) years". The doctor examined the accused-appellant on 07.09.2023 and the date of occurrence is 24.06.2022 which means the doctor examined the accused-appellant after about 1 year 3 months from the date of occurrence. As such at the time of occurrence, according to the doctor's report, the age of the accused-appellant was 17 years or above but under 18 years which the learned Judge failed to consider.

He then submits that the accused appellant filed an application before the

Shishu Adalat submitting his birth certificate to prove his age and prayed for passing necessary legal order as the accused was a child on the alleged date of occurrence. The appellant submitted a photocopy of the birth certificate issued by the Sultangonj Union Parishad showing his date of birth as 16.09.2005, and then a certificate issued by the ward councilor of 57 ward of DSCC but the Judge did not apply his judicial mind in disposing of the application of the accused petitioner to treat him as child under the Children Act, 2013 and did not consider the submitted papers properly and as such committed an error of law.

He further submits that the learned Judge did not call for the respective authorities as witness and any further conclusive proof from proper source to verify the authenticity of the said submitted papers as such committed gross mistakes of law for which the order dated 30.11.2022 passed by the Shishu Adalat is liable to be set aside.

The learned advocate finally submits that even if there is any doubt in the documentary evidence there is not a single date on record on the basis of which the Shishu Adalat could

determine that the appellant was major on the date of alleged occurrence as such the impugned order is liable to be set aside.

On the other hand the learned Deputy Attorney General (DAG) appearing for the State raised serious objection against such application at this stage filed with a *malafide* intention to delay the process of trial since the appellant is the principal accused of the murder case. The offence is heinous and brutal in nature and deserves capital punishment as it appears from the FIR that the accused appellant alone made knife blows indiscriminately upon the bodies of 3 victims including the deceased. He submits that no reliance could be placed on the opinion of a medical officer because ultimately it is an expert opinion and cannot be said to be conclusive as regards the age. The learned DAG vehemently submitted that this Court may take notice of the relevant fact that there is no original certificate issued by any authority before the alleged occurrence in the case on hand which prima facie proves that the appellant was a minor or not a major as on the date of occurrence hence the appeal is liable to be dismissed.

We have considered the submissions of the learned Advocates for the respective parties

and carefully examined all materials on record available before us.

Section 14 of the Shishu Ain, 2013 (hereinafter referred to as the Ain, 2013) deals with the duties and functions of Child Affairs Police Officer wherein one of her/his duties is to ensure that the age of the child is being determined correctly or in determining the age, the birth registration certificate of the child or other reliable documents relevant thereto are taken into consideration.

Section 44 deals with arrest of a child and subsequent procedure to be followed by police. Sub-section 3 and 4 reads as under:
(3) After arrest of a child, the police officer who arrested the child shall immediately inform the Child Affairs Police Officer the causes and place of arrest and subject matter of allegation etc. and, after primary determination of his age, shall record it in the file:

Provided that no child shall be handcuffed or tied up with rope or cord around the waist.

(4) For the purpose of determination of age under sub-section(3), the police officer shall record his age by finding out and

verifying the birth-registration certificate or, in absence of such certificate, the relevant documents including the school certificate or the date of birth given at the time of school admission:

Provided that where it appears to the police officer that the concern person is a child but, despite all possible attempts, it is not possible to be confirmed through any documentary evidence, the said person shall in that case be considered as a child under the provision of this Act.”

Section 21 of the Ain, 2013 provides for making an inquiry for presumption and determination of age of the child by the Shishu Adalat when a child is produced before it which is reproduced bellow:

21. (1) If any child, whether being charged with an offence or not, is brought before the Shishu Adalat in connection with any offence, or if any child is brought before the court for the purpose other than of giving evidence, and it appears to the Shishu Adalat that he is not a child, the court may hold necessary inquiry and hearing to assess the age of that child.

(2) Based on the evidence as may be forthcoming during the inquiry and hearing

under sub-section (1), the Shishu Adalat shall record its findings thereon and declare the age of the child.

(3) For the purposes of determining the age-

(a) the Shishu Adalat may call for relevant documents, registers, information or statements from any person or institution;

(b) the court may issue subpoena to any person or to any officer or employee of any institution to produce documents, registers, information or statements as mentioned in clause (a).

(4) The age of any child ascertained and declared by the Shishu Adalat under this section shall, for the purposes of this Act, be deemed to be the actual age of that person, and any order or judgment of the court shall not be ineffective or invalidated by any subsequent proof that the age of such person has been incorrectly ascertained:

Provided that if any person, previously declared 'not a child' by the Shushu Adalat, is subsequently proved to be child by any undoubted documentary evidence, the court may revise its previous order regarding the age of the concerned child with adequate justification.

That being the position of law whether the present case has any cause for our interference against the order of the Shishu Adalat rejecting the applications twice for treating the accused appellant as child.

It appears from the impugned order that the accused appellant earlier filed similar application before the Shishu Adalat-4, Dhaka which was rejected on 04.01.2024 giving findings. Then the instant application is filed before the said Adalat without any new ground or submitting any new document to prove his age.

It further appears from record that in the FIR appellant's age is shown as 19 years who was arrested and produced before the Magistrate on 26.06.2022 showing his age as 19 years who made confession under section 164 of the Code of Criminal Procedure before the Magistrate but the appellant did not annexed this document to show that during his confession what age he stated therein. After investigation police submitted charge sheet but that is also not produced before us to show the age. It further appears that the appellant did not file the original document of the birth certificate issued by Sultangonj Union Parishad or any school certificate for

perusal by the learned Judge of the Adalat. The accused appellant sought interference by this Court only on the basis of the medical report opining his age between 18-19 years of age.

The Shishu Ain, 2013 is a benevolent legislation for the benefit of the children who are actually below the age of 18 years at the time of alleged occurrence. It is no doubt true that if there is a clear and unambiguous document in favour of the petitioner that he was a minor below the age of 18 years on the date of the occurrence, he would be entitled to the special protection under the Shishu Ain. But when an accused commits a grave or heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor/shishu, a casual or cavalier approach while ascertaining as to whether an accused is a shishu or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common people in the institution entrusted with the administration of justice. The benefit of the principle of benevolent legislation attached to the Shishu Ain would thus apply only to such cases

wherein the accused is held to be a child on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave, serious or heinous offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of minority is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue. Any effort which weakens the system and shakes the faith of the common people in the justice dispensation system has to be discouraged. This view has been reflected by the Indian Supreme Court in a catena of decisions such as in the case of Parag Bhati Vs. State of U.P (2016) 12 SCC 744, Ramdeo Chauhan alias Raj Nath Vs. State of Assam, (2001) 5 SCC 714 and in the case of the State of Jammu & Kashmir Vs. Shubam Sanra in Criminal Appeal No. 1928 of 2022.

When a claim of being a child is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. In the instant case the petitioner utterly failed to submit any prima facie

document which warrant enquiry by the Shishu Adalat to ascertain the age of the accused-petitioner disbelieving the police report. In the present case there is no prima facie cogent, clear and convincing documentary evidence on record for applying provision of section 21 of the Ain, 2013 as after thorough investigation police found the accused petitioner as of 19 years of age. On the other hand the opinion of the medical officer is to be considered coupled with other documents and evidence in ascertaining the age. Radiological/Ossification test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion, especially of one person, by radiological examination. Such evidence is not conclusive evidence but only a useful guiding factor to be considered in absence of original documents mentioned in section 44 of the Shishu Ain, 2013. In the present case there was no medical board rather opinion was given by only one medical officer. Whether the medical evidence should be relied upon or not would obviously depend upon the value of evidence. It could have been a complete different case, that means, the opinion of

the medical board could not be overlooked by Court, if the medical board was comprising five (5) members one from department of Forensic Medicine, one from department of Radio Diagnosis, one from department of Anatomy, one from department of Oral Diagnosis and one from department of Physiology. And the Adalat would have been directed each of them to submit report before the court individually/severally. This procedure is being followed by our neighbouring country India in a number of cases.

We like to add that there are better techniques available and are used for determining of age across the world. For example, the United States Immigration Department uses 'wisdom teeth' technique. Under this technique, the doctors examine the third molar which usually erupts between 17 to 25 years of age. The average error in this technique is also significantly lower than the ossification of any other bone. Another most modern scientific technique is 'epigenetic clock' technique. The Epigenetic clock is DNA clock which measures DNA methylation levels to estimate the age of a tissue or an organ. The median/mean error in

this technique can be reduced to less than 4 (four) weeks. (Reference: Shamin T, Age Estimation: a Dental Approach. Published in the Journal of Punjab Academy of Forensic Medicine & Toxicology, Vol-6, issue-1.). Our policy makers/government should think to introduce such techniques in our country as well.

The submission on behalf of the appellant that even if the document submitted is doubtful there is not a single date emerging on record on the basis of which it could be said that the appellant was major on the alleged date of occurrence, is a very unreasonable argument. That is not the correct way of looking at the core issue. The correct position is to closely examine whether there is any convincing evidence as regards the correct date of birth of the accused and after ascertaining the same, reach to an appropriate conclusion.

In this case, it is not clear from the documents before us whether the provisions of section 14 and or 44 of Shishu Ain, 2013 were followed by the police including the child affairs police officer. It is also not clear whether any claim was made by the appellant that he was a child before the police, in

particular before the investigating officer. It seems from record that the claim was first time made before the Shishu Adalat and nothing wrong in doing so as per the provision of Shishu Ain. In dealing the instant case though the Shishu Adalat did not exhaust or follow all the provisions as provided under section 21 of the Shishu Ain, 2013 but came to the right conclusion that the appellant was a major of 18 years of age.

In the facts and circumstances of the case and the position of law as discussed above we are unable to find any substance in this appeal for our interference.

Before we part, we would like to quote observation made by the Indian Supreme Court in the case of the State of Jammu & Kashmir (supra) regarding their legislation namely The Juvenile Justice (care and protection of children) Act, 2015 similar to our Shishu Ain, 2013 wherein their lordships observed:

“79. Before we close this matter, we would like to observe that the rising rate of juvenile delinquency in India is a matter of concern and requires immediate attention. There is a school of thought, existing in our country that firmly believes that howsoever heinous the crime may be, be it single rape,

gang rape, drug peddling or murder but if the accused is a juvenile, he should be dealt with keeping in mind only one thing i.e., the goal of reformation. The school of thought, we are talking about believes that the goal of reformation is ideal. The manner, in which brutal and heinous crimes have been committed over a period of time by the juveniles and still continue to be committed, makes us wonder whether the Act, 2015 has subserved its object. We have started gathering an impression that the leniency with which the juveniles are dealt with in the name of goal of reformation is making them more and more emboldened in indulging in such heinous crimes. It is for the Government to consider whether its enactment of 2015 has proved to be effective or something still needs to be done in the matter before it is too late in the day.”

Now, may we expect in the *juxtaposition* of the present day situation of crimes committed by so-called ‘Kishore Gang’ (juvenile delinquents) especially in Dhaka, Chattogram and other major cities of our country comparing the situation of India as spelt out in the preceding paragraph that our government/policy makers to consider whether

its enactment of Shishu Ain, 2013 has proved to be effective or acts as boomerang or something still needs to be done by amending or enacting new law before it is too late.

In the result, the Appeal is **dismissed**.

Every person accused of a criminal offence, how heinous and brutal it may be, has a right to a speedy and public trial. In that view, the trial court is directed to conclude the trial as early as possible after examining the vital and necessary witnesses taking positive endeavour. It is needless to say that the guilt or the innocence of the accused appellant shall be determined strictly on the basis of the evidence that may be led by the prosecution and the defence at the time of trial. All observations made in this judgment are meant only for the purpose of deciding the issue of age of the appellant.

Communicate the judgment and order at once.

Md. Iqbal Kabir, J:

I agree.