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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 30th October, 2018
Pronounced on: 12thDecember, 2018

\+ CRL. M.C 3855/2016

A.M. ..... Petitioner

Through: Mr. Praveen Nagar, Mr. Pranjay Chopra, Ms. Hema Narula, Mr.Nitin Chahar and Mr. Shubham, Advocates

versus

STATE & ORS. ..... Respondents

Through: Mr. Amit Ahlawat, APP for the State with SI Arun
Mr. Chandra Prakash, Adv. for R-2 & 3
Mr. Anurag Jain and Ms. Ayushi Sharma, Advocates for R-4

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

O R D E R

1. Though the petitioner has given his full description, having regard to the background facts, which would need to be elaborated to an extent little later, it being inappropriate to disclose his identity, he is being referred to in the cause title as "A.M.", and wherever necessary hereinafter as the "petitioner" or "the victim" (or as "PW-1"). For similar reasons, for sake of convenience, the second to fourth respondents would also be referred to as "A1" "A2"and "A3"

respectively. The registry while uploading this order on the website shall also take similar care.

2. A1, A2 and A3 had been brought before the Juvenile Justice Board (JJB) for inquiry on the basis of report (charge-sheet) under Section 173 of the Code of Criminal Procedure, 1973 (Cr. PC) submitted on 22.05.2006, upon conclusion of investigation into first information report (FIR) no.382/2005 (Ex. PW7/B) of police station Mukherjee Nagar. The FIR had been registered on 05.09.2005 on the statement (Ex. PW1/A) of the petitioner, he, at the relevant point of time being a child aged seven and half years. According to the allegations in the FIR, a case of complicity of A1, A2 and A3 who may collectively be referred to as "*the respondents*" or as "*the juveniles in conflict with law*" or "*JCLs*" has been made out for the offence of having indulged in carnal intercourse against the order of nature ("*unnatural offence*") punishable under Section 377 of Indian Penal Code, 1860 (IPC). On the basis of the evidence collected during investigation, prayer was made, in the charge-sheet, for respondents to be proceeded against for offences punishable under Sections 377, 323, 506 read with Section 34 IPC and also under Section 23 (Punishment for cruelty to juvenile or child) of Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as "*the JJ Act of 2000*").

3. The inquiry before the JJB was held on the basis of notice of accusations issued and served on 04.07.2009 for offences punishable under Sections 377, 323, 506 IPC. The inquiry culminated in judgment of JJB, rendered on 31.10.2011, whereby the JCLs were

"*acquitted*" with the observation that the defence had "*created*" a probable doubt on the story of prosecution by bringing defence witnesses.

4. Section 52 of the JJ Act of 2000, which was in vogue during the relevant period, governed the subject of appeals. Though it would provide for "*an appeal to the court of Session*" to be brought by "*any person aggrieved by an order made by a competent authority*", which would include JJB, its sub-Section (2)(a) would inhibit an appeal to be entertained against "*any order of acquittal*" in respect of a juvenile alleged to have committed an offence. Section 53 of the JJ Act of 2000 conferred upon the High Court the power and jurisdiction of "*revision*".

5. The State did not prefer any remedy against the judgment dated 31.10.2011 of the JJB. The petitioner, however, claiming to be the victim of the offences approached the court of Sessions invoking its revisional jurisdiction under Section 397 Cr. PC by filing a petition (Crl. Revision No.57337/2016) seeking to assail the said decision of the JJB. The petition was dismissed by the Additional Sessions Judge to whom the matter was allocated, by his order dated 26.05.2016.

6. It is the legality of the aforesaid orders, which is challenged by the petition at hand invoking the inherent power and jurisdiction of this court under Section 482 Cr. PC read with Section 53 of the JJ Act of 2000.

7. The petition has been resisted by the respondents primarily on the contention that the decision of the JJB cannot be called in question because it is based on findings on fact as per the evidence brought on

record. It is also the submission of the JCLs (the respondents) that the scrutiny of the judgment of JJB by the court of Sessions, in its revisional jurisdiction, should be treated as final and binding, there being no special case made out for this court to step in under its extraordinary jurisdiction, particularly on account of the fact that the events which were subject matter of the inquiry before the JJB relate to the year 2005, both the petitioner and the respondents having since attained majority and moved on in their respective lives, the need for a quietus to be given being one of primacy.

8. *Per contra*, in response to the last above noted argument of the respondents, it has been submitted on behalf of the petitioner that his grievance is that notwithstanding the sufficiency of the incriminating evidence which was adduced, he has been termed as a person whose word could not be relied upon, this being an insult to the injuries suffered, his anxiety being only to establish the truth and find succor in the acceptance of the credibility of his word so that he can come out of the trauma of having been dubbed as a liar, the question as to whether any penal consequences are to flow from conclusions against the respondents being not his concern or priority.

9. It is the submission of the petitioner that it is the bounden duty of this court to "*secure*" the ends of justice and "*to prevent abuse of the process of any court*" and, from this perspective, if the judgment of the JJB or, for that matter, of the court of Sessions, are perverse, this court is obliged under the law to step in and bring about the necessary correction, particularly in view of the revisional power conferred upon it by Section 53 of the JJ Act of 2000, re-enacted by Section 102 of the

Juvenile Justice (Care and Protection of Children) Act, 2015, (for short, "*the JJ Act of 2015*") which has replaced the earlier legislation requiring scrutiny of the "*legality or propriety*" of the impugned orders of the special forum created by the said special legislation.

10. The chronology of events leading to the inquiry before the JJB needs to be noted, *albeit* briefly, for consideration of the various issues that are raised.

11. Indisputably, the petitioner, then aged about seven and half years, was a student of third standard of a private school located close to his residence, the respondents (JCLs) also being students of different classes of the same school. It is admitted case of all sides that A1, A2 and A3 were also juveniles, their age at the relevant point of time being 15 years, 15 years and 16 years respectively, such being their description in the medico legal certificates (MLCs) prepared on the basis of their respective medical examination conducted on 06.09.2005 in a municipal hospital. Further, there is evidence on record to show that the JCLs had attained puberty and assumably the physical capacity to engage in sexual intercourse, the medical opinion based on examination on 07.09.2005 (per reports Ex. PW4/A to C) being submitted in corroboration, the evidence of the examining medical officer (PW-4) to this effect not having been challenged.

12. From the FIR (Ex. PW7/B), which is based on the statement (Ex. PW1/A) of the petitioner and endorsement (Ex. PW7/A) of SI Chander Bhan (PW-7), the investigating officer (IO) and the statements of the petitioner (PW-1), his father (PW-2) and his mother (PW-5), it had emerged that though the accusations were leveled on

05.09.2005, per the narration, the petitioner had been subjected to sodomy on several occasions, this being a pattern for a long time prior thereto, it all having begun, at the time when the petitioner was a student of second standard.

13. According to the FIR, and the petitioner having deposed on the same lines affirming these facts before the JJB (in his deposition as PW-1), the JCLs had taken him to the bathroom of the school and after having closed its door having subjected him to the carnal intercourse against the order of nature. He also stated that he had told this fact to his teacher (he would mention her by name) but the said teacher had instead beaten him up and feeling afraid on this account, he had not disclosed the incident to anyone. But, the three JCLs thereafter continued to subject him to similar acts of sodomy on several occasions in the subsequent period with threats that if he were to reveal this to anyone, they would throw him in the drain, pointing out the drain flowing behind the school.

14. As per the FIR and the depositions of above mentioned witnesses, the mother had found the petitioner in a depressed state and after his father was also brought in the loop, the child being questioned, such facts came out.

15. In this context, reference may also be made to the statement of class teacher (DW-2) of the third standard of the said school where the petitioner was studying at the time of registration of the FIR. She deposed that the petitioner was not interested in pursuing the studies and was rather reluctant in coming to attend the class, he being irregular, the truancy having been brought to the notice of his parents

for which purpose a general request to his classmates had been made by her. This witness also spoke of an application (Ex. DW1/A) which had been moved by PW-2 (father of the petitioner), on 03.09.2005, two days prior to the registration of the FIR. The contents of the said application addressed to the principal of the school have a bearing on the subject at hand. It would reveal that, on 02.09.2005, the petitioner had gone to the bathroom in the school but since there was a large crowd there, he could not come back and, in the meantime, his school bag had been deposited by the other children in the class with the teacher, she being told that the petitioner had left the school, the request being that the child be allowed to sit in the class and that he had been properly counseled. DW-2 (the class teacher) examined by JCLs in the inquiry before the JJB deposed that she had told the parents of the petitioner about the child's irregular conduct and further that he did not deserve to continue in the school.

16. The petitioner was medically examined in the municipal hospital on 06.09.2005 as per MLC (Ex. PW6/A). The initial examination and preparation of MLC was in the hand of Dr. Ramneek Mahajan, he having left the services of the hospital and being not available, the said fact consequently having been proved by Dr. Devashish Panigrahi (PW-6). As per the MLC, the petitioner had been referred to a medico legal expert, his further examination having been carried out by Dr. C.B. Dabas (PW-3) who proved the observations (Ex. PW3/A) recorded on 06.09.2005 on the said very MLC by him. The following clinical notes based on the said medical examination forming part of Ex. PW3/A are crucial :-

“ - There is no evidence of any greasing / oiling.
- *There is no evidence of fresh bleeding / discharge from the anus.*
- *There is no recent external injury in the gluteal region.*
- *The anal margins show old healed abrasions in the anal verge at 6 o’clock and 12 o’clock position.*
- *Sphincter is lax and anal canal is patulous and examination P/R is slightly painful. There is bruising of the anal mucosa extending upto rectum.*
- *There is no active bleeding at present. Anal swab is preserved and sealed with seals of ‘Dr. C.B. D’and handed over to IO.”*

17. During the inquiry, the respondents pleaded innocence and false implication, and contested with the plea that the prosecution witnesses, particularly the petitioner (PW-1), were not reliable. They introduced facts in an endeavour to bring out that it was impossible for such acts to be committed in the bathroom of the school building submitting that a class room was situate right in its front, where a *chowkidar* (watchman) would invariably stand outside, the teachers also taking rounds (around the toilet), a window and ventilator in the toilet opening outside making the inner portions visible to persons standing out.

18. The defence brought out facts to prove the usual practice followed wherein a student seeking to go to the bathroom would be issued a pass, only one student being allowed at a particular point of time, a *chowkidar* being stationed outside the entrance gate, the class teacher (DW-2), however, not being acquainted with the conduct of

the respondents since she was not their class teacher during the relevant period.

19. In their statements under Section 281 Cr. PC, the respondents pleaded that the evidence was false and baseless. They claimed that the complaint had been lodged to "*extract illegal money*", the petitioner having fallen in bad society and not being interested in studies on which account the school authorities were on the verge of removing him from its rolls, A3 adding that he had made an oral complaint, against the petitioner, to the school authorities and further that he had not been attending the school for eight months (from January 2005 onwards) because he was preparing for board examination (of class X).

20. The school records, produced by a clerk from the office (DW1), would show that A3 had attended the school till 15.02.2005 and, thereafter, from 30.08.2005 onwards till the date of reporting of the case to the police through the class teacher (DW-2).

21. The JJB acquitted the respondents, by its judgment dated 31.10.2011, the reasons (the identity having been omitted) having been set out as under :-

> *"5. In support of their case, prosecution has produced before the Board victim A.M. himself, PW-2… has deposed that when he was in 2nd class when all the three juveniles use to commit unnatural act. Further three days before lodging of the complaint, they committed unnatural act with him. However, in his cross-examination, it is admitted by PW-1 A.M. that there was a chowkidar outside every toilet. Further a pass was given to the child for going to*

toilet as also stated by defence witness ... teacher as well. Further juveniles were in a different class. Further victim deposed that there are only two toilets in the school and school is from 1st to 12th standard.

6. In view of the above, where there are children in school from 1st to 12th standard and there are only two toilets and there are chowkidar available every time, it is unlikely that such an act could be committed during school time with victim.

7. Further there is no other independent witness to the said act which was committed with victim repeatedly as per the prosecution case. Father and mother of victim are formal witnesses and they have themselves not seen anything. All their testimony is hearsay. Further doctor opined that there were old abrasions near the anal region. But the reason due to which such abrasions could be caused has not been stated by the doctors.

8. Then defence counsel has created doubt on the story of prosecution by calling from the school an application written by the father of victim A.M.. Then ... teacher also produced before the Board as defence witness. She has also deposed that A. was not regular in school and was not interested in studies and decision was taken to dismiss him from the school, after which his father moved an application Ex. DW1/A. Then defence counsel further creates doubt on the story of prosecution that such a complaint was done to save the child from getting dismissed from the school.

9. In view of the above, prosecution failed to prove their story beyond reasonable doubt. On the other hand, defence has created a probable doubt on the story of prosecution by bringing defence

witnesses, benefit of which goes to juveniles and they are hereby acquitted for the offence punishable u/s. 377 / 323 / 506 IPC."

22. As mentioned earlier, the petitioner had approached the court of Sessions invoking its revisional jurisdiction which was repelled by order dated 26.05.2016.

23. It is the submission of the petitioner that the clinical observations and medical opinion (Ex. PW3/A) have been glossed over by JJB, side-stepping the corroboration the same provided to his word about he having been forced into a series of acts by which he was sodomised and there is no reason why he would falsely implicate persons who were not involved or leaving out those who were the perpetrators of such unnatural acts, and that given his age, the acts to which he was subjected could not be perceived as anything but against his will and by use of force.

24. Placing reliance on *Modi's Medical Jurisprudence and Toxicology* (24th Edition published by LexisNexis) which would describe his position as that of a "*catamite*", a young boy who was used as a "*passive agent*" in the anal intercourse, it was pointed out by the counsel for petitioner that signs found in a passive agent used for the act of sodomy (confirmed sodomite) generally include the following :-

"(i). The shaving of the anal hair, but not necessarily the pubic hair.

(ii). A funnel-shaped depression of the buttocks towards the anus.

However, this may be absent in a strong, healthy person who has been involved as a passive agent, while it may be natural in thin individuals or old women. However, in passive agents, there is a complete relaxation of the sphincter when lateral traction is applied on both the buttocks.

(iii). The dilated and patulous condition of the anus with disappearance of its radial folds and the prolapsed of the rectal mucosa as the sphincter is relaxed. In a dead body, the anal orifice dilates from the relaxation of the sphincter and the protrusion of the rectum occurs from the force of decomposition gases.

(iv). Cicatrices of old lacerations in the rectum near the anus.

(v). The presence of a gonorrheal discharge, chancre or condyloma. The active agent may be infected by the passive agent, who may already be afflicted with gonorrhea or syphilis."

25. Further, the said authoritative text on medical jurisprudence also guides the possibility of following signs being discovered in case where the passive agent is not accustomed to sodomy :-

"(i). Abrasions on the skin near the anus with pain in walking and on defecation, as well as, during examination. These injuries are extensive and well defined in cases where there is a great disproportion in size between the anal orifice of the victim and the virile member of the accused. Hence, lesions will be most marked in children, while they may be almost absent in adults when there is no resistance to the anal coitus. These injuries, if slight, heal very rapidly in two or three days. In most of the cases brought

before Modi, he had seen superficial abrasions, varying from 1/6"to 1" x 1/6"to 1/4", external to the sphincter ani. In some cases, there may be bruising of the parts round about the anus and the abrasions may extend into the anus beyond its sphincter.

(ii). Owing to the strong contraction of the sphincter ani, the penis rarely penetrates beyond an inch, and consequently, the laceration produced on the mucous membrane within the anus with more or less effusion of blood is usually triangular in nature, having its base at the anus and the sides extending vertically inwards into the rectum. Modi had found lacerations internal to the sphincter ani in several cases, but a typical triangular wound only in a few cases. These signs may not be present in cases where the active agent has used lubricants or / and has introduced his penis slowly and carefully without using force into the anus of the passive agent who is a consenting party.

(iii). Blood may be found around the anus, on the perineum or thighs, and also on the clothes.

(iv). Semen may be found in or at the anus, on the perineum, or on the garments of the boy too young to have seminal emissions. Swabs from inside and around the anus must be taken and examined microscopically."

26. It is the grievance of the petitioner that the order of the JJB is conspicuously silent on consideration of the crucial medical part of the evidence, findings adverse to the cause brought to the authorities by him having been recorded, per his submissions, on irrelevant facts. It is his submission that the restrictions against one child in a particular class only being allowed to use the washroom at a particular point of

time, was not a guarantee for the students of other classes not being in the washroom at that point of time. It is argued that the *chowkidar* whose presence has been referred was not even examined during the investigation or trial to ascertain as to whether such person would be invariably present so as to rule out abuse of the place. It is submitted that there was no occasion for independent witness(es) to such acts to be located, the teacher named by the petitioner to whom complaints were lodged, more than once, not being contacted or called for her version, the dis-interest in the studies and irregularity in the school being on account of the offences alleged by him not having been kept in consideration. The sum and substance of his submissions is that the approach to the case by the authorities below has led to serious mis-carriage and travesty of justice, the order of acquittal being perverse, it having overlooked crucial evidence, and that his testimony could not have been treated as incredible.

27. The broad argument in response to the petition raised by the respondents (JCLs) is that since there has been a revisional scrutiny by the court of Sessions, this court should shun a second layer of scrutiny in exercise of the power under Section 482 Cr. PC. But, in the view of this court, the question of far more significance and import is as to whether the court of Sessions could have exercised the revisional jurisdiction qua an order of this nature under the law governing juvenile justice. This would need a look at the relevant provisions and scheme of the special legislation in contrast to the general criminal law.

28. It is trite that the Code of Criminal Procedure, 1973 (Cr. PC) applies to the investigation or inquiry into, or trial of, all offences punishable under the Indian Penal Code, 1860 (IPC) or "*under any other law*" (Section 4), this general rule being subject to any special procedure as may be prescribed under special enactments. The schedule appended to the Code of Criminal Procedure, 1973 specifies the criminal court by which various offences are to be tried. In relation to the cognizable offences involved in the present matter, the court of the Metropolitan Magistrate (for metropolitan areas in Delhi) would be the specified court of trial. It does not need any elaboration that the procedure prescribes the forum for investigation into such cognizable offences and also the action to be taken on the report of investigation thereupon as indeed the court of cognizance or the court where the trial is to be held.

29. Traditionally, the cases involving juvenile offenders ("*juvenile in conflict with law*") have been brought and dealt with by special forums created for such purposes, the Juvenile Justice Act of 1986 having governed the field till it was replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000 which, in turn, has since been replaced by the Juvenile Justice (Care and Protection of Children) Act, 2015. Noticeably, the proceedings in the criminal court before such forums are termed as "*inquiry*" and not described as "*trial*".

30. The law in the JJ Act, prescribes the inquiry against a juvenile in conflict with law (JCL) to be held by a "*Juvenile Justice Board (JJB)*", constituted in terms of Section 4, such forum to consist of a

Metropolitan Magistrate (or a Judicial Magistrate of the First Class), and two social workers of whom at least one shall be a woman, forming a bench and every such bench to have the powers conferred by the Code of Criminal Procedure, 1973, on a Metropolitan Magistrate (or a Judicial Magistrate of the first class), the Magistrate on the board being designated as the Principal Magistrate.

31. Section 14 of the JJ Act, 2000 prescribed the procedure for "*inquiry*" and, to the extent relevant, would read thus :-

> *"14. Inquiry by Board regarding juvenile.—(1) Where a juvenile having been charged with the offence is produced before a Board, the Board shall hold the inquiry in accordance with the provisions of this Act and may make such order in relation to the juvenile as it deems fit:*
>
> *Provided that an inquiry under this section shall be completed within a period of four months from the date of its commencement, unless the period is extended by the Board having regard to the circumstances of the case and in special cases after recording the reasons in writing for such extension."*

32. It is basic that like a criminal trial in an ordinary case, an inquiry by the JJB into the accusations against a juvenile would also end in clear findings as to the guilt or otherwise leading either to an order of acquittal or he being convicted, followed by consequences in terms of the benevolent legislation, there being certain restrictions in the matter of punishment.

33. Section 54(1) of the JJ Act, 2000 provided as under :-

> "*54. Procedure in inquiries, appeals and revision proceedings.—(1) Save as otherwise expressly*

> *provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trials in summons cases."*

34. Thus, for purposes of inquiry (same as trial in ordinary cases) against a juvenile in conflict with law, the JJB would treat the criminal case as one triable as a "*summons case*", irrespective of the prescription in this regard in the Code of Criminal Procedure. The trial of a summon case, as Chapter XX of Cr. PC shows, begins (Section 251) with a notice being served on the person against whom the proceedings are held, to bring to his knowledge the substance of accusations against him and after recording his plea the evidence is taken on board, the case culminating in the judgment (of acquittal or conviction), the records required to be maintained, in terms of Section 274 Cr. PC, to include "*the memorandum of the substance of the evidence*" of each witness examined.

35. Under the general law, a judgment of conviction rendered by a court of the Metropolitan Magistrate can be challenged by appeal, with some exceptions, in the court of Sessions (Section 374 Cr. PC). The judgment of acquittal, however, can be challenged only "*with the leave of the High Court*" in accord with the provision contained in Section 378 Cr. PC, the proviso to Section 372 Cr. PC having some bearing on the said subject.

36. Carving out a clear exception to the general rule, in cases governed by the JJ Act, 2000, the law would inhibit an appeal to be

entertained against an order of acquittal rendered by a Juvenile Justice Board, this by virtue of the provision contained in Section 52(2)(a). It is, however, trite that where the remedy of appeal is not available, the revisional court can still be approached bringing to its notice the breach of the expectation of "*legality or propriety*" being adhered to.

37. In the above context, under the general law, the provisions contained in Section 397 to 401 of the Code of the Criminal Procedure are generally resorted to. For purposes of this discussion, it is necessary to quote the provision of Section 397 Cr. PC, it reading as under :-

> *"397. Calling for records to exercise powers of revision.—(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself; to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling, for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record."*

38. The manner in which the High Court is to exercise the revisional power is indicated in detail in Section 401 Cr. PC. Similarly, the manner in which the Sessions court is to exercise the revisional power is indicated in Section 399 Cr. PC, this drawing substantially from Section 401 Cr. PC. What is crucial to note here is that under the general criminal law procedure, the High court, on one

hand and, the Sessions Judge, on the other, enjoy a co-ordinate jurisdiction of revision, it being the choice and prerogative of the party aggrieved to approach one or the other, the only restriction being that if one is approached, the other will not exercise the revisional jurisdiction in the same case against the same order, the test for revisional scrutiny, however, being similar – that is to say to examine and satisfy itself "*as to the correctness, legality or propriety*" of the impugned order (which should not be an interlocutory order).

39. The JJ Act, 2000 has since been repealed and replaced by the JJ Act, 2015. The broad scheme of the legislation dealing, *inter alia*, with juveniles in conflict with law remains the same in as much as a Juvenile Justice Board (JJB), consisting of a Metropolitan Magistrate and two social workers included as members, constituted under Section 4 remains the prime forum of inquiry, the new law also conceiving of some role of certain other criminal courts including "*children's court*" established under the Commissions for Protection of Child Rights Act, 2005 or a Special Court under the Protection of Children from Sexual Offences Act, 2012, wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the said law. The procedure for inquiry into charge brought against a juvenile in conflict with law remains under the JJ Act of 2015 as the one prescribed for "*trial of summons case*" [Section 103(1)]. The scheme of the law continues to be the same as under the JJ Act, 2000, in that Section 101 of JJ Act, 2015 (similar to Section 52 of the JJ Act, 2000) does not permit an appeal against an order of acquittal rendered by the Juvenile Justice

Board and, consequently, the revisional challenge against such order being the only remedy available. But, it is crucial to note, both the JJ Act, 2000 and the JJ Act, 2015 would contain specific provisions on the subject of "*revision*".

40. Section 53 of the JJ Act, 2000 read as under :-

> *"53. Revision.—The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit :*
> *Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."*

41. Section 102 of the JJ Act, 2015 reads thus :-

> "*102. Revision.— The High Court may, at any time, either on its own motion or on an application received in this behalf, call for the record of any proceeding in which any Committee or Board or Children's Court, or Court has passed an order, for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit:*
>
> *Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."*

42. The procedure to be followed, *inter alia*, by the revisional forum, is indicated by identical provisions contained in Section 54(2)

of the JJ Act, 2000, lifted word by word and engrafted in Section 103 (2) of the JJ Act, 2015, the said clause reading thus : -

> *"103(2). Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973."*

43. It bears repetition to say that the remedy of "*revision*" is provided, under the general criminal procedural law, by Section 397 Cr. PC conferring the corresponding power co-ordinately on the High Court and the court of Sessions. For purposes of "*procedure*" to be followed for exercise of such revisional power, guidance is to be taken by the High Court from Section 401 Cr. PC and by the court of Sessions from Section 399 Cr. PC. In contrast, under the juvenile justice law, the remedy of "*revision*" is specifically provided by the afore-quoted provision – Section 53 of the JJ Act, 2000, which now is in the form of Section 102 of the JJ Act, 2015. Both in Section 53 of the erstwhile law, and Section 102 of the law now in force, reference to revisional power vesting in the court of Sessions is conspicuously omitted. To put it simply, and straight, the special law on juvenile justice conceives of revisional scrutiny only by the "*High Court*" and no other forum. It is trite that if there is a special law governing the subject, the general law will yield to the special legislation. It is the special legislation which prevails.

44. From the above, this court concludes, that in cases involving juveniles in conflict with law, the orders passed by the competent authorities under the special legislation are subject to revisional scrutiny only by the High Court and not by the court of Sessions. To put it slightly differently, by implication, the power of revision in terms of Section 397 read with Section 399 Cr. PC cannot be exercised by the court of Sessions in cases arising out of the Juvenile Justice Act, both of 2000 and 2015.

45. In view of the above conclusion, order dated 26.05.2016 of the Additional Sessions Judge in criminal revision petition (no.57337/2016) was an order passed without jurisdiction and therefore, is *non-est,* liable to be ignored and kept aside. It is clear that the petitioner had approached the said court of Sessions under deficient legal advice and the court of Sessions had examined the records of the case decided by the JJB on the wrong understanding that it could exercise the revisional jurisdiction in such matter which, in fact, was not available.

46. It is pertinent to note here that the petitioner has approached this court by this petition invoking not only the inherent power under Section 482 Cr. PC but also the revisional jurisdiction under Section 53 of the JJ Act, 2000. The petition was presented in October, 2016. By such time, the JJ Act, 2015 had come to be enacted, the revisional jurisdiction of this court in such matters being exercisable in terms of Section 102 of the new legislation. By virtue of the above finding, it is the "*legality or propriety*" of the judgment dated 31.10.2011 of the JJB, which needs to be examined by this court. From this perspective,

the limitations on the exercise of power under Section 482 Cr. PC on which lot of argument was raised by the respondents would, infact, not even arise. At the same time, the inherent power of this court "*to secure the ends of justice*" or "*to prevent the abuse of the process of court*" is always available concurrently while exercising the revisional scrutiny of the lower court records both in relation to substantive as also procedural matters. [*Popular Muthiah vs. State represented by Inspector of Police, (2006) 7 SCC 296*].

47. While considering the expressions "*correctness*", "*legality*" or "*propriety*" in the specific context of revisional scrutiny, *albeit* in the civil jurisdiction, a Constitution Bench of the Supreme Court in its decision reported as *Hindustan Petroleum Corporation Ltd. vs. Dilbahar Singh, (2014) 9 SCC 78* expounded as under :-

> "*29.1. The ordinary meaning of the word "legality" is lawfulness. It refers to strict adherence to law, prescription, or doctrine; the quality of being legal.*
>
> *29.2. The term "propriety" means fitness; appropriateness, aptitude; suitability; appropriateness to the circumstances or condition conformity with requirement; rules or principle, rightness, correctness, justness, accuracy.*
>
> *29.3. The terms "correctness" and "propriety" ordinarily convey the same meaning, that is, something which is legal and proper. In its ordinary meaning and substance, "correctness" is compounded of "legality" and "propriety" and that which is legal and proper is "correct".*
>
> *29.4. The expression "regularity" with reference to an order ordinarily relates to the procedure being*

followed in accord with the principles of natural justice and fair play."

48. Before adverting to the issues raised by the petitioner *vis-a-vis* the decision of the Juvenile Justice Board, some guidelines concerning the exercise of the revisional jurisdiction (mostly in the context of Section 397 Cr. PC) need to be taken note of.

49. In *K. Chinnaswamy Reddy vs. State of Andhra Pradesh, AIR 1962 SC 1788*, the Supreme court had observed thus :-

> *"7. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of Section 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised..."*
>
> (emphasis supplied)

50. *In Amit Kapoor Vs. Ramesh Chander & Anr., (2012) 9 SCC 460*, the Supreme Court observed thus : -

"12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the CrPC."

(emphasis supplied)

51. In *Chander Babu alias Moses vs. State through Inspector of Police and Ors., (2015) 8 SCC 774*, it was held thus : -

> *"11. ... Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the Court."*
>
> (emphasis supplied)

52. While dilating upon the revisional power of the High Court in specific context of Section 53 of the JJ Act in the case of *Jabar Singh Vs. Dinesh and Anr., (2010) 3 SCC 757*, the Supreme Court observed thus : -

> "*29. A plain reading of Section 52 of the Act shows that no statutory appeal is available against any finding of the court that a person was not a juvenile at the time of commission of the offence. Section 53 of the Act which is titled "Revision", however, provides that the High Court may at any time, either of its own motion or on an application received on that behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order, and may pass such order in relation thereto as it thinks fit. While exercising such revisional powers, the High Court cannot convert itself to an appellate court and reverse the findings of fact arrived at by the trial court on the basis of evidence or material on record, except where the High Court is not satisfied as to the legality or propriety of the order passed by the trial court."*
>
> (emphasis supplied)

53. The duty of the criminal courts to render complete and effective justice has been the subject of discourse in various pronouncements. Some observations of the Supreme Court in at least two cases may be quoted here. In *Zahira Habibulla H. Sheikh and Anr. vs. State of Gujarat and Ors., (2004) 4 SCC 158*, the court observed thus :-

> *"56. As pithily stated in Jennison v. Baker [(1972) 1 All ER 997 : (1972) 2 QB 52 : (1972) 2 WLR 429 (CA)] : (All ER p. 1006d)*
>
> *"The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope."*
>
> *Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice."*

54. In *Dayal Singh and Ors. vs. State of Uttaranchal, (2012) 8 SCC 263*, it was held as under : -

> *"34. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a*

> *criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a "fair trial", the Court should leave no stone unturned to do justice and protect the interest of the society as well."*

55. In *Popular Muthiah* (supra), the Supreme Court while observing that the High Court, exercising the power under Section 482 Cr. PC acts *"ex debito justitiate*" in order to do real and substantial justice for which alone it exists, quoted the following observations in earlier ruling of *Dinesh Dutt Joshi v. State of Rajasthan, (2001) 8 SCC 570* :

> *"31. The principle embodied in the section is based upon the maxim: quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest i.e. when the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable. The section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified in the section. As lacunae are sometimes found in procedural law, the section has been embodied to cover such lacunae wherever they*

> *are discovered. The use of extraordinary powers conferred upon the High Court under this section are however required to be reserved, as far as possible, for extraordinary cases."*

56. The judgment dated 31.10.2011 of the Juvenile Justice Board, the relevant parts whereof, has been quoted above, is no judgment in the eyes of law. It does not dwell at all on the circumstances leading to the complaint being lodged with police. It cursorily refers to the opinion of the examining medical doctor without subjecting it to scrutiny in light of the personal account of the petitioner (PW1). In a case of this nature, it was not expected of the medical officer to dwell further on "*the reason*" for abrasions to be caused in the anal region. For this, the criminal court was expected to be guided by medical jurisprudence and if further assistance to understand the connection between the two was required, it could call for the same by invoking the power to summon additional material or evidence. It is not comprehended as to how the JJB expected "*independent witness*" to be produced against the scenario where three senior boys of the school had allegedly intimidated the petitioner, a child of about seven years, into surrendering himself for being sodomised in the close confines of a bathroom of the school. The defence theory called for further scrutiny before the material placed could be treated as rendering the version of the petitioner "*improbable*" or "*unlikely*", particularly in absence of the version of the *chowkidar* or the school teacher named by the petitioner.

57. The argument raised by the defence, with regard to the teacher's statement respecting the child's lack of interest in attending school, disinterest in studies and resultantly his poor performance in school, as a consequence of which he was not considered a fit student needs to be examined from all angles since it may conversely be indicative of trauma of the child as well. It is but obvious that a child placed in such situation as is alleged would hesitate or be unwilling to attend school and might consequently be unable to perform well, social withdrawal being a direct outcome of sexual abuse.

58. The Manual for Medical Examination of Sexual Assault, published in 2010 by Centre for Enquiry into Health and Allied Themes (CEHAT), succinctly elaborates on the above subject while laying down the psychological effects of sexual abuse like fear and shock, physical and emotional pain, intense self-disgust, powerlessness, worthlessness, apathy, denial, numbing, withdrawal and the inability to function normally in their daily lives. The said manual in its conclusion also takes into account, among other psychological consequences, "*disorientation, lack of concentration*" as also the "*desire to get away from the location where the incident occurred to erase the memory of the incident*".

59. A child victim of sexual abuse cannot be expected to conduct himself in a normal or healthy manner in school which, in his mind, is no longer a place of safety. It would be unfair without deeper probe to hold such conduct or low performance against a child who has faced sexual trauma within the four corners of a school where he is expected to have a secure environment. Thus, the argument of the defence

regarding the child's poor performance in school, implying thereby that his word cannot be believed to be true and his case lacks substance, required to be scrutinized on the touchstone of the psychology of the child who may have suffered sexual abuse of such nature. Unfortunately, the JJB did not examine the material on record from such perspective.

60. It is trite that the criminal court can decline to pronounce the person prosecuted to be guilty if its judicial conscience as to the guilt is not satisfied. But, for benefit of doubts to be given, it must be ensured that the doubts are "*reasonably"* drawn from the material on record. The reasoning set out in the impugned order of the JJB indicates cursory scrutiny of the evidence on its surface, the view taken on such basis being perverse in as much as the core evidence has been glossed over, bringing in the element of arbitrariness.

61. Before rendering the final decision on the petition at hand, it is necessary to record disapproval of the manner in which the statements of the respondents under Section 281 Cr. PC were recorded. For this, the initial part of the said statements recorded on 26.05.2011 needs to be quoted [some portions being withheld so as to protect the identity of the person(s) involved] as under :

> *"The entire incriminating evidence which has come on record has been put to the juvenile. It has been put to him that on 05.09.2005 for past one year at during the school hours at ___School, Delhi within the jurisdiction of PS Mukherjee Nagar you alongwith your associates committed illegal / unnatural act with the child _____ against the course of nature and to commit this act you caused simple inuury to the child*

_____ and also threatened him not to disclose this act otherwise he will be killed by you. This and rest of the investigation evidence which has come on record has been put to the Juvenile and he is asked as under :

Q.1 Have you committed the above mentioned offence?

Ans. No…"

62. From a Metropolitan Magistrate holding a position of some standing and seniority in judicial service, appointed as Principal Magistrate of Juvenile Justice Board, such record of proceedings is not expected, the loose expressions which have been used and the manner in which the incriminating evidence was put to elicit explanation, it taking the shape more of a notice of accusations (as if the proceedings being held were at the stage of Section 251 Cr. PC), this being reflected by the very first question quoted above, and vague reference to "*rest of the investigation evidence*", being wholly uncalled for. It appears that the Magistrate forgot that the incriminating evidence on which attention of the JCLs was to be drawn was to be the one adduced during inquiry held by it and not the evidence that may have been gathered during "*investigation*".

63. The order dated 26.05.2016 of the court of Additional Sessions Judge is treated as *non-est* for want of jurisdiction. On the foregoing facts and in the circumstances, the judgment dated 31.10.2011 of the Juvenile Justice Board is set aside. The case arising out of FIR

no.382/2005 of police station Mukherjee Nagar is remitted to the said forum for further inquiry in accordance with law.

64. Given the deficiencies noted above, the Juvenile Justice Board will have the discretion, and the authority, in law, to call for such further evidence as is required. Needless to add, given the deficiencies in the statements under Section 281 Cr. PC, the said proceedings will have to be recorded afresh and this followed by another opportunity for adducing further evidence in defence, if any. At the same time, given the spirit of the law, and bearing in mind the fact that the case is of old vintage, the JJB shall render its fresh decision expeditiously, preferably within three months of the date of next appearance of the JCLs (second to fourth respondents) being hereby fixed.

65. The Juvenile Justice Board shall take up the case for further proceedings in compliance with the above directions on 14.01.2019, on which date the JCLs are directed to present themselves before it, accompanied by the counsel of their choice.

66. Before parting, the court feels obliged to express further opinion on one more concern.

67. The legislation on the subject of juvenile justice creates a special forum for inquiry against juveniles in conflict with law requiring that the Magistrate appointed as its member must have "*special knowledge or training in child psychology or child welfare*". These have been the pre-requisites of Section 4(3) of the JJ Act, 2000 and Section 4(3) of the JJ Act, 2015. The manner in which the Juvenile Justice Board in this case dealt with the responsibility of

appreciating the evidence smacks of total disconnect with the specialized field of child psychology. It is desirable that the mandate of the law that only such Magistrates are appointed as members of the Juvenile Justice Board as possess "*special knowledge or training in child psychology or child welfare*" is strictly and scrupulously followed. For this, there is perhaps a need to put in position a formal system of scrutiny of the credentials of the persons whose candidature is considered for such appointment and also for formal training to be imparted to them for building their capacity and sensitization.

68. A copy of this judgment shall be placed before Hon'ble the Chief Justice of this court for kind consideration for such administrative action as may be deemed appropriate.

69. A copy of this judgment shall also be sent to Director, Delhi Judicial Academy for such needful action as may be required at their end.

(R.K. GAUBA)
JUDGE

DECEMBER 12, 2018
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