

In the name of God the most gracious the most merciful

**SUPREME COURT
DARFUR GREATER STATES CIRCUIT
Criminal Circuit**

Before:

Kassim Hamid Hussain

Presiding Judge

Abd Al Latif Mohamed Al Amin

Member

Hashim Al Toum

Member

No. 52/2018

TRIAL OF MOHAMMED IZO DODO ARJA

JUDGMENT

At the non-summary trial No. 26/2017, Al Genaina General Court convicted the said accused under Article (45/b) of Child Act for 2010 with a fine of 3 thousand pounds and in event of nonpayment he will be eligible for 6 months in prison because he violated Article (135) of Criminal Act for 1991, along with payment of fetus blood money in favor of the victim as well as sentencing him to fifteen years in prison by reason of violating Article (45/b) with a fine of two thousand pounds and in event of non-payment he will be eligible for 6 months in prison consecutively applicable with the other penalties.

The Appeal Court of West Darfur State upheld the conviction under Article (45/b) of Child Act together with the penalty under which is imposed and cancelled the conviction under Article (135) of Criminal Act including the penalty and blood money in accordance with the memorandum No. 61/2017 dated 30/08/2017.

The convict was dissatisfied with this judgment and the present petition was therefore submitted by his attorney Adam Nehar requesting us to examine the appeal court judgment in order to verify the validity and integrity of proceedings.

The petition focuses on the fact that the victim has two age estimations; one as indicted in the national number that her birth was in 2006 and the other in an age estimation certificate issued by NeyalaMedical Commission.

Both the trial court and the appeal court failed to concentrate on age estimation because there was a scratch in the age.

Further, the victim's adulthood was proved by pregnancy as agreed by jurists and affirmed in the Circular No. 106/1984 which refers to the judgments magazine 1982 - Page (116) relating to the execution of such circular and requested intervention.

We accept the petition in accordance with power vested in us under the provision of Article (188) of Criminal Procedures Act for 1991 with the objective of ensuring validity and integrity of proceedings that led to convict Mohamed Ezzo Dodo under the Article the

object of conviction and the extent of compliance of the same with law based on whatsoever raised by the attorney who seeks justice.

In pursuant to the perusal of all papers, the facts conclude that the convict had an offensive relationship with the victim. She used to go to him in his house in Azarni till she became pregnant in adultery manner. This was discovered by attempting to dispose of embryo and the state of bleeding she sustained thereby commencing these proceeding.

In view of the reasons contained in the petition, the victim`s age estimation as contained in the prosecution exhibit No (2) which was issued by the Medical Commission proved to be sixteen years in words and figures.

I found no scratch in such exhibit affecting the authenticity of the exhibit as mentioned by the attorney because the age is written in figures and words which are conformable.

The national number has never been filed by either party in this trial as an exhibit before the court. I found the national number among the papers of the journal of inquiry without being flagged as an exhibit. We do not know at which stage of proceedings such exhibit has been stuffed with the journal of inquiry. Undoubtedly, it has never been raised at the trial stage. It is therefore incorrect to verify and raise it.

Before us for the first time with the assumption of validity of the age which has been provided, the victim`s age has not exceeded eleven years and months of age. This of course an age to which the attorney is not seeking to uphold because it worsens the appellant`s status contrary to the attorney`s objective towards strengthen his status.

It is correct that the prosecution exhibit no (2) was presented to the convict who did not challenge it in any respect or requested for listening to its writer and ordering an expert in accordance with the provision of Article (162/2) of Criminal Procedures Act for 1991.

We therefore adopt the validity of the age estimation contained therein in accordance with the provision of Article (31/32) of Evidence Act for 1994 from which is the victim`s age who attained 16 years of her age and became pregnant realizing both adulthood elements defined in the interpretation Article (3) of Criminal Act. She is therefore an adult by age with the conclusive sign of adulthood by pregnancy.

It is correct the adulthood in respect of the victim is realized from the Criminal Act point of view but the Child Act for 2010 is different from the Criminal Act and protected the victim as a child according to the provision of Article (4) which defined child whoever has not exceeded eighteen years of age.

This legislative contradiction stems from the difference between Child and Criminal Acts stems from the difference among jurists in determining the legal age from adulthood and the conventions signed by Government of Sudan.

It is understood that the legislator's opinion on removing the difference when following a specific opinion or a school of thought where he can see the interest of the people as these are the axioms of the Islamic Jurisprudence Books in which jurists adopted the assignment of judiciary by time, place, cases and opinion.

It is provided in Sharia Pleadings Book by Maawad Mustafa Sarhan - 1st Edition 1953 - Page 128 that ((if the ruler orders the judges to follow an opinion of a jurist from Imams in respect of special matters if his opinion on people is more merciful and in the interest of the era, the same will be correct))

Dr. Ahmed Kanan has addressed the concept of legal age in his book the Medical Jurisprudent Encyclopedia issued by Dar Al Nafash 1st Edition 2000 Page 127 ((to be the righteousness and correctness and which is the transition of a child from the condition of childhood to manhood by completing the physical and mental growth so as to bear the consequences and from whom guardianship is lifted when attains adulthood and becomes eligible for performing duties but remains incompetent to bear consequences and so he should not be treated as an adult))

He also pointed out on page 164 that most jurists are in the view that the legal age is eighteen years. He attributed the difference between legal age and adulthood to the fact that legal age is little late from physiological or organic adulthood.

He therefore concluded that the criminal judgments and penalties are in agreement with legal ages rather than adulthood.

Dr. Yousef Ishaq Ahmed has justified this by parenting in his book Contradiction of Child Act for 2010 with Criminal Act for 1991 in determining legal age - Edition 2013 when addressing legal age on page (2).

These opinions are in conformity with the definition of legal age which means ((wisdom and knowledge being a starts starts after the end of the young limit which is called perception and adulthood)). Please refer to the Kuwait Jurisprudence Encyclopedia Part (8) Pages 187/188. Also refer to the book of Dr. Yousef referred to on page (2) that legal age comes after adulthood and may be little late.

Therefore, there is no inherence between perception and adulthood. So, the insane adult man is unperceptive and perception is the focus of criminal responsibility.

It is provided in the General Jurisprudent Approach by Mostafa Ahmed Al Zarqa - Edition of Dar Al Qalam -Damascus 1998 - 1st Edition - page 859, that ((we are in the opinion of considering and verifying Sharia provisions that adulthood is a milestone required for lawful adulthood and that legal age is a milestone for completing capacity for acting which depends on practical and financial experience in perceiving good and evil underlying adulthood and bearing of criminal responsibility)) he concluded that ((It must be considered between age of discrimination from which capacity for performance of duties starts and the legal age at which two stages integrate not only one, adulthood then legal age)).

Jurists were in disagreement over determining such legal age. Abu Hanifa estimated it to be 18 years for male and 17 years for the female. Al Shafiee and the two companions estimated it to be 15 years of age for male and female whereas Imam Malik believed to be 18 years for male and female according to the details contained in Kuwait Jurisprudent Encyclopedia – 2nd Edition – Dar Al Salam - Kuwait - Part (7) - Page (160).

Legal age as per Personal Status Law for 1991 is 18 years of age in accordance with Article (215). Article (22/2) of Civil Transaction Act for 1984 concerning capacity for civil rights provides that the legal age is full 18 lunar years.

The childhood as contained in UN Standard Minimum Rules for the Administration of Juvenile Justice for 1982 (Beijing Rules) is ((a child or young person who, under the respective legal system, may be dealt with for an offence in a manner which is different from an adult)) according to Article (2/2/a). Para (c) defined juvenile offender as follows ((A juvenile offender is a child or young person who is alleged to have committed or who has been found to have committed an offence.)) But referred in Article (4) that ((In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.))

The Sudanese legislator adopted the rule of progression in age as a basis of criminal responsibility as the case for civil legal age, and stopped in determining this at three stages in accordance with Child Act for 2010, as follows:

1st stage: between 7 - 12 years regarding the child who has not exceeded this age as lacking discrimination and criminally irresponsible and no criminal actions shall be taken as against him according to Article (68/1) of Child Act, based on definition of child liable to risk of delinquency which means the child who completed 7 years of his age and not yet attained 12 years of age according to Article of interpretation No (4) of Child Act for 2010.

2nd stage: Children in the stage of age between 12 - 18 years are regarded by Child Act as lacking criminal responsibility by reason of their incomplete discrimination. The legislator approved corrective measures to be taken as against them according to Article (69/1) of Child Act based on the definition of juvenile child contained in Article of Interpretation No (4) of Child Act.

3rd Stage: A child who attains 18 years of his age shall fully be held criminally responsible by reason of going beyond childhood stage. This age is in line with Rule (4/1) of Beijing Rules which has not determined age of criminal responsibility and left it to national legislations in a manner that age shall not be fixed at too low an age level.

The difference in philosophy of penalty between Child Act and Criminal Act resulted in two opinions within Supreme Court Circuits. The First opinion proceeds from Criminal Act and the definition of adult that whoever attains adulthood and completes 15 years of his age shall be fully held criminally responsible according to the Government of Sudan precedent

versus M. A.A.M. and others No. 356/2007 - Judgments Magazine 2007 - Page 135 and afterwards. Such opinion was upheld in the precedent 16/2011 - Review 205/2011 which was in the view that the victim who became pregnant as a result of performing sexual intercourse is not a child in accordance with Criminal Act which is derived. This opinion contradicts with the opinion of lower courts in respect of this trial.

The second opinion believes that the provision of Article (4) of Child Act determines childhood age. This does not contradict with Sharia. The most prominent precedent upholding such opinion is the trial No. 173/2014/Red Sea Circuit. Dr. Abbas Suleiman Al Wanhas lengthily discussed in pages 91-150 of his book the child's criminal responsibility, the trial proceedings from jurisprudence, legislative and judiciary point of view together with the two opinions and their support.

Dr. Yousef Ishaq in his above mentioned reference upheld the first opinion (Page 17) whereas Dr. Baha Al Deen Abbas Mohamed supported the second opinion in his foregoing reference in pages (161-184) proceeding from the definition of legal ages in the interest of the child and the conventions ratified by Government of Sudan.

Both opinions and judicial applications have their rule in legislation and a support from Sudan Transitional Constitution for 2005. Child Act was issued so as to be in consistence with conventions ratified by Government of Sudan. Article (27/3) of the Constitution provides that ((all rights and freedoms incorporated in the international agreements and conventions for human rights which are ratified by Republic of Sudan are an integral part of this document))

Further, the Chief Justice issued a Circular No. 2/2016 dated 28/02/2016 concerning the proceedings which the Child Court shall follow in the course of trial based on the provision of Article (65) of Child Act calling upon courts for the necessity that the transitional constitution, the relevant ratified international agreements and protocols, policies, decisions and directives which laid down by the national Council for Child Welfare, are to be taken as a guidance.

I am therefore in the opinion that the available mechanisms for weighing either opinions is the transitional constitution for 2005 and Child Act itself which refers in Article (3) thereof that its provisions shall prevail over any other law which contradicts therewith to the extent which removes such contradiction in interpretation for the child's interest and in the assumption that it is a subsequent Act the provisions of which prevail over Criminal Act which preceded it. Further it's a specific Act excluded from any common law that is the Criminal Act as contained in Article (6) Paras (3) & (4) of Law of interpretation of Common Laws and Provisions for 1974.

So, I can see no support to the attorney's opinion that is based on the Circular 106/1984 dated 23/11/1984 after the Criminal Act has included in the definition of the adult which nullified by Child Act for 2010. We therefore uphold the second opinion based on this philosophy.

The female child in the proceedings of this trial despite she has become pregnant from the convict, we can see her as a child and victim and not an offender because her perception is incomplete and the abuses towards her are therefore subject to trial under Child Act and not Criminal Act. So, we agree with the lower courts in respect of their approach towards application of Child Act.

We also agree with such courts over the conviction as it was proved by the convict's admission in writing in page (6) of the journal of inquiry without a requirement for supporting these statements. The convict's retraction of his statement that he inserted part of his penis into victim's vagina is useless because it has come in a discretionary crime and not a hadd crime as defined in the interpretation Article (3) of Criminal Act according to the amendment to Evidence Act by Law (31) for 1994 Article (22/2) which is read in accordance with the amendment as follows ((Retraction of an admission in hadd crimes is a suspicion which makes the admission inconclusive evidence)).

So, the victim's allegations that there is a love relationship between her and the convict which led her to go to his house and perform sexual intercourse with him being a child who has not yet perceived life after such consent, are not reliable as her perception is incomplete despite she attained adulthood.

Article (83/a) of Child Act necessitated observation of victimized children's weak confession and characterization of proceedings accordingly.

Article (5/k) of general principles of Child Act provides that it is necessary to ensure protection of child from all forms of violence and harm or inhuman treatment or abuse in all forms thereof including sexual, negligence and exploitation.

I am therefore in the opinion of upholding the conviction under Article (45/b) of Child Act and to be read in conjunction with Article (86/f) of the same Act.

the penalty as contained in Article (86/f), when conviction is decided under Article (45/b), adopted two limits, a maximum limit which is death penalty and a minimum limit that is 20 years in prison with a fine as a legislative singling out the content of which cannot be overlapped or going down lower than what provided by the legislator when the judge singles out a penalty proceeding from his power provided for in Article (39) of Criminal Act for 1991.

The rule is that the judge must impose death penalty from the philosophy of the Child Act.

The Chief Justice issued the Circular 46/2011 dated 10/10/2011 concerning judicial singling out over such penalty and the prominent of its contents it instructed court to observe the following:

Firstly: Courts are to single out the penalty on convicts of crimes contained in Article (86) of Child Act by observing the aim of the legislator to strengthen the penalties on such crimes subject to the extent of gravity of the offence which has been committed and proportionality

between the penalty which they decide and the maximum limit that legally prescribed in accordance with the foregoing Article.

Secondly: When the penalty is singled out towards the convict under Article (45/a) & (b) if it is found in its judgments reason for failure to impose death penalty whenever fate deemed to be life imprisonment.

The trial court sentenced the convict to 15 years in prison with a fine and upheld by the appeal court in contravention of the offence prescribed under Article (45/b) read in conjunction with Article (86/f) by reason of going beyond the maximum and minimum limits prescribed for commitment of such offence as the minimum limit is 20 years in prison with a fine. The legislator` objective of imposing such fine is to compensate the victimized child against abuses she sustained and harms resulting from the offence.

So, and in accordance with the provision of Article (83/3) the trial court must decide upon such compensation. This Article is read as follows ((the judicial bodies shall ensure for all children being victims of the offences provided for in Articles 45/46, the availability of appropriate proceedings for obtaining, without discrimination, an indemnity for harms which are caused to them by persons who are legally responsible for these offences. For further details please see the criminal circular 46/2011 which refers to allocation of part of the fine for such objective by way of indemnity without prejudice to the right to blood money or indemnity for certain wound (Arsh). Please refer to page 294 of the Child Criminal Protection previously referred to.

This penalty is imposed in contravention of law and the victim has not been indemnified. So, I am in the opinion that this necessitated us as a court of law to intervene. This opinion is supported by what is contained in the trial of Idris Fadul vide No. 56/2017 dated 21/08/2017/National Supreme Court unpublished, which is similar to this trial in terms of singling out the penalty contrary to the provisions of Child Act. I am in the opinion that the trend of our intervention, if both my colleagues the members of the circuit agree, to be on the basis of the provision of Article (185) Paras (b) & (h) of Criminal Act which prevents us from strengthening the penalty. The conclusion of our opinion is as follows:

1. Upholding the conviction under Article (45/b) which to be adjusted and read in conjunction with Article (86/f) of Child Act for 2010.
2. Returning the papers to the trial court so as to act in accordance with the directives of this memorandum.

Abd Al Latif Mohamed Al Amin
Supreme Court Judge
23/04/2018

Second Opinion:

I agree with my colleague`s first opinion Judge Abd A Latif in terms of causation and result and addition to his memorandum.

Kassim Hamid Hussain
Supreme Court Judge
13/05/2018

Third Opinion:
I agree and no addition.

Hashim Ibrahim Al Toum
Supreme Court Judge
16/05/2018

Final Order:

1. Upholding the conviction under Article (45/b) which to be adjusted and read in conjunction with Article (86/f) of Child Act for 2010.
2. Returning the papers to the trial court so as to act in accordance with the directives of this memorandum.

Kassim Hamid Hussain
Supreme Court Judge
17/05/2018