

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

+ Crl.Rev.P. 610/2007

% Date of reserve : 06.04.2009
Date of decision: 27.04.2009

SH. PUNEET VASUDEVA ...PETITIONER
Through: Mr.Varun Goswami, Advocate

Versus

STATE & ANR. ...RESPONDENTS
*Through: Mr.Naveen Sharma, APP for State.
Mr.Anant Kumar Asthana, Advocate
for respondent No.2*

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

MOOL CHAND GARG, J.

1. The present revision petition has been filed under Section 397/401 and under section 482 Cr. P. C. read with Section 53 of the Juvenile Justice (Care and Protection of Children) Act 2000 hereinafter referred to as (the Juvenile Act) assailing the order dated 19.4.2007 passed by the Ld. ASJ (Fast Track Court) in the proceedings arising out of the FIR no. 797/2005 registered under sections 392/202/411/34 IPC read with Sections 25/54/59 of the Arms Act of Police Station Prashant Vihar.

2. The basic issue raised by the petitioner in this case is that the second respondent Radhey Shyam who claimed himself to be juvenile by moving an application before the learned Additional Sessions Judge

on 18.3.2007 should not have been so adjudged by the learned Additional Sessions Judge relying upon a school certificate and the second respondent should not have been sent to the Juvenile Justice Board by holding that he is less than 18 years of age on the date of the commission of offence without recording the evidence.

3. To support his submission, the petitioner has relied upon the proceeding prescribed under Section 54 and Section 7 (A) of Juvenile Justice Act which reads as under:-

Section 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.

(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 (2 of 1974).

Section 7 A. Procedure to be followed when claim of juvenility is raised before any court:-

(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be: Provided that a claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made there under, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect.”.

4. On the basis of these provisions, it is submitted that whenever a question of an accused being juvenile or not is raised before any Court,

which is disputed by the State or the complainant, it can only be decided by recording the evidence.

5. However, in the present case, the learned Additional Sessions Judge has accepted the case of Radhey Shyam, without recording evidence despite the fact that as per ossification test conducted by AIIMS he was found to be of more than 20 years of age as on the date of examination i.e. 10.4.2007, while the offence in this case was committed on 5.9.2005 i.e. about 19 months prior to the examination of accused Radhey Shyam

6. A perusal of the order passed by the learned Additional Sessions Judge goes to show that the findings returned by the learned Additional Sessions Judge are not based upon recording of any evidence but are simply based upon an enquiry report submitted by the police. The police given its report on the basis of the date of birth of the accused Radhey Shyam recorded in a Kutumbwar register of the village, shown as 14.9.88 without any other evidence in this regard. The observations made by the learned ASJ are reproduced herein for the sake of the reference :-

I have carefully perused the record.

From the aforesaid facts and circumstances, the position qua the age of accused Radhey Shyam which now comes out is that as per his school leaving certificate his date of birth is found to be 28.11.21988 and thereby making him less than 18 years of age as on the date of commission of the offence i.e. 05.09.2005. On the other hand as per the Kutumbwar Register the date of birth of accused Radhey Shyam was found to be 14.09.1988 and which also makes him less than 18 years of age as on the date of commission of offence i.e. 05.09.2005.

The third piece of evidence available on record is by way of ossification test of accused Radhey Shyam vide which his age is found to be hovering around 18 years as on the date of commission of offence. No doubt no school record prior to the one produced by the accused is available but the verification as produced by SHO PS Prashant Vihar shows that the

Principal of the said school stated that accused Radhey Shyam took admission in their school on 08.07.2000 and studied till 01.07.2003. No doubt there is some variation in the date of birth as recorded in the Kutumbwar Register but it is equally true that no basis for mentioning of the said date of birth in the said register has even been produced by the prosecution.

In view of my aforesaid discussion, I thus keeping in view the well settled position of law as laid down by Hon'ble Supreme Court of India and Hon'ble Delhi High Court in a number of cases that the benefit in this regard should be given to the accused, also do not find any reason to prima facie disbelieve the date of birth of Radhey Shyam as recorded in his school leaving certificate. I thus hereby hold that accused Radhey Shyam as on the date of commission of offence i.e. 05.09.2005 was less than 18 years of age.

The case qua Radhey Shyam thus needs to be sent to Juvenile Justice Board. IO is directed to file the supplementary charge sheet before Juvenile Justice Board and accused Radhey Shyam be produced before Juvenile Justice Board on 20.04.2007 and he be immediately transferred to OHB-II.

7. However, it is a matter of record that no oral evidence was recorded for determining the age of accused in this case as contemplated under Section 54 read with Section 7 (A) of the Juvenile Justice Act (Supra). Reference can also made to the following judgments which have been cited by the petitioner to oppose the order directing the accused to Juvenile Justice Board, the judgments cited are as under:-

1. (2006) 5 SCC 584 "Ravinder Singh Gorkhi Vs. State of UP"
2. 119 (2005) DLT 353 "Lal Mohd. Vs. State"
3. 1994 CRLJ 2750 (Rajasthan High Court) "Balbir Singh Vs. State of Rajasthan"
4. AIR 1965 SC 282 (Constitution Bench) "Brij Mohan Singh Vs. Priya Brat Naryan Sinha & Ors."
5. AIR 2003 SC 3318 "K Pnadurangan Vs.S. S. Velusamy"

8. In the case of Ravinder Singh Gorkhi Vs. State of Uttar Pradesh reported in (2005) SCC 584 where the age of an accused was sought to be proved by the certificate issued by the Head Master of the school, it has been held:-

We have noticed hereinbefore that the learned Sessions

Judge, Bulandshahar in his report dated 17.2.1999 did not rely upon any evidence other than the school-leaving certificate. He not only disbelieved the statement of the mother of the appellant but also did not place any reliance upon the other documentary evidences adduced on behalf of the appellant, namely, the horoscope and the "Parivar Register". No exception having been taken to by the parties we accept the said part of the report. We are, thus, required only to consider as to whether the school-leaving certificate is reliable.

The purported school-leaving certificate was sought to be proved by Chandra Pal Singh, Headmaster of the Primary Pathshala, Hajratpur. In his cross-examination, he categorically stated that the date of birth of the appellant might have been disclosed by the appellant at the time of admission. He did not have any personal knowledge with regard thereto. No enquiry was made as regards the age of the appellant while he was admitted in the institution. He accepted that it was quite possible that the age disclosed by the guardian may be more or less.

The school-leaving certificate was said to have been issued in the year 1998. A bare perusal of the said certificate would show that the appellant was said to have been admitted on 1.8.1967 and his name was struck off from the roll of the institution on 6.5.1972. The said school-leaving certificate was not issued in the ordinary course of business of the school. **There is nothing on record to show that the said date of birth was recorded in a register maintained by the school** in terms of the requirements of law as contained in Section 35 of the Evidence Act. No statement has further been made by the said Headmaster that either of the parents of the appellant who accompanied him to the school at the time of his admission therein made any statement or submitted any proof in regard thereto. The entries made in the school-leaving certificate, evidently had been prepared for the purpose of the case. All the necessary columns were filled up including the character of the appellant. It was not the case of the said Headmaster that before he had made entries in the register, age was verified. **If any register in regular course of business was maintained in the school, there was no reason as to why the same had not been produced.**

In the counter-affidavit filed on behalf of the State, it has categorically been stated that the appellant had been a history-sheeter; as many as 34 cases for commission of heinous crimes had been filed against him, which included cases under Sections 302, 392, 395 and 364 of the Penal Code; a large number of cases under the U.P. Goonda Act; and Sections 25 and 27 of the Arms Act. One case was filed against him under Section 302 as early as in 1973 and the last case which had been filed against him was in 1996 under Sections 395/364-A of the Penal Code. It is, therefore, unlikely that the appellant was not aware of his legal right.

The school-leaving certificate was not an original one. It was merely a second copy. Although it was said to have been issued in July 1972, the date of issuance of the said certificate has not been mentioned. The copy was said to have been signed by the Headmaster on 30.4.1998. It was accepted before the learned Additional Sessions Judge, Bulandshahr on 27.1.1999. The Headmaster has also not

admitted that the copy given by him was a true copy of the original certificate. He did not produce the admission register.

There cannot, however, be any doubt whatsoever that the certificate was issued for the purpose of the case. The father of the appellant was also an accused. He was described "Surender Pal Singh". The appellant has also been described as "Ravinder Pal Singh, s/p Surender Pal Singh". Before us, the father's name has been described as "Surender Singh", the appellant's name has been shown as "Ravinder Singh Gorkhi", whereas the name of the student in the school-leaving certificate has been shown as "Ravinder Pal Singh".

Determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties. **Different standards having regard to the provision of Section 35 of the Evidence Act cannot be applied in a civil case or a criminal case.**

9. It is also appropriate to take note of para 39 of the judgment which states:-

We are therefore, of the opinion that until the age of a person is determined in a manner laid down under a statute, different standard of proof should not be adopted. It is no doubt true that the court must strike a balance. In case of a dispute, the court may appreciate the evidence having regard to the facts and circumstances of the case. It would be a duty of the court of law to accord the benefit to a juvenile, provided he is one to give the same benefit to a person who in fact is not a juvenile may cause injustice to the victim. IN this case, the appellant had never been serious in projecting his plea that the on the date of commission of the offence was a minor. He made such statement for the first time while he was examined under Section 313 of the Code of Criminal Procedure.

10. In the case of Balbir Singh Vs. State of Rajasthan reported in 1994 Criminal law Journal 2750 where also a question arose as to how the age of accused is required to be determined under the provisions of Juvenile Justice Act, the learned Judge made the following observations:-

A reference to some of the provisions of the Act makes it apparent that extraordinary procedure has been prescribed for an inquiry and punishment for an offence committed by a Juvenile. A trial of a delinquent juvenile under the Code is prohibited. Even a joint trial with a person, who is not a juvenile, is expressly prohibited. A delinquent juvenile has to be dealt with under the provisions of the Act, which are curative and reformatory, than punitive. Section 22 expressly

provides that no delinquent juvenile shall be sentenced to death or imprisonment or committed to prison in default of furnishing security. A delinquent child, who is found guilty on any inquiry, even cannot be sent to jail. He cannot be kept in jail or police station before being produced before a Juvenile Court. The benefits of the provisions of the Act are available to a juvenile only, i.e., a boy who has not attained the age of 16 years or a girl who has not attained the age of 18 years on the day of occurrence. They have been given a special status as a class. Therefore, the age of the accused on the day of occurrence assumes importance. Section 39 of the Act, extracted earlier, provides the procedure of an inquiry to be made under any of the provisions of the Act. It provides that the procedure laid down under the Code for trial in summons cases shall be followed as far as may be. The procedure for trial of summons cases is provided in Chapter XX in the Code. Section 254 of the Code makes it obligatory on the Magistrate to record evidence of the prosecution and defence, if an accused is not convicted under Section 252 or 253. Section 32 of the Act also makes it obligatory to make an inquiry of the age of an accused and for that purpose to take such evidence as may be necessary. The court is required to record a finding on the basis of evidence and material before it is to whether the accused was a juvenile or not. Sections 32 and 39 of the Act, if read together, undoubtedly make it clear that the determination of age of an accused should be after holding an inquiry like a summons case, and the parties are given an opportunity to lead oral evidence and also a right of cross-examination to the witnesses of the opposite party. In short, the age is determined on the basis of evidence to be adduced and other material in support thereof being produced. No hard and fast rule can be laid down as to whether medical evidence should be given preference over a school certificate or vice-versa for deciding the age. It would depend upon the nature and quality of the evidence. But, one thing is clear that an inquiry has to be held for determination of age which includes recording of oral evidence with a right to cross-examination to the other party. No other view is possible than the view which I have taken. The age of an accused on the day of occurrence is an important factor, which decides his fate as to whether he was entitled to get the benefit of the provisions of the Act, which save him from an ordeal of a criminal trial under the Code and also the punishment of imprisonment etc.

11. The second respondent has opposed the petition and has cited following judgments on his behalf, which are detailed below:-

1. Jaya Mala V. Jammu and Kashmir, (1982) 2 SCC 538
2. Bhoop Ram V. State of UP (1989) 3 SCC 1
3. Arnit Das Vs. State of Bihar, (2000) 5 SCC 488
4. Ramdeo Chauhan V. State of Assam, (2001) 5 SCC 714
5. Rajinder Chandra V. State of Chhattisgarh, (2002) 2 SCC 287
6. Pratap Singh V. State of Jharkhand & Anr., (2005) 3 SCC 551
7. Ravinder Singh Gorkhi V. State of UP (2006) 5 SCC 584
8. Vismal Chadha V. Vikas Choudhary, (2008) CriLJ 3190

9. Babloo Pasi V. Jharkhand, 2008 (13) SCALE 137
10. Sameer Malhotra V. State of NCT of Delhi & Anr., Crl. M.C. 3316/2007 of Delhi High Court

12. I have gone through the aforesaid judgments. I find that except for urging that if a discretion is to be exercised when two views are possible about the age of the accused and one of them permits accepting the accused as a juvenile, then that must be followed, nothing else has been said. However, this again has to be done on the basis of an enquiry conducted by the Court after providing an opportunity of examination to the other side as has been held in the case of Balbir Singh (supra).

13. In the present case, the procedure prescribed under Section 7(A) of the Juvenile Justice Act has not been held while holding enquiry about the age of the applicant/accused as to how claim of to be juvenile can be sustained. Accordingly, the impugned order is not sustainable.

14. Accordingly, the revision petition filed by the petitioner is allowed and the impugned order is set aside. It is ordered that the second respondent be produced before the learned Additional Sessions Judge who shall now hold an enquiry under Section 7(A) of the Juvenile Justice Act in the prescribed manner after giving opportunity to the State as well as the complainant while cross-examination of the witnesses who may be produced before the learned Additional Sessions Judge for determining the question whether the accused Radhey Shyam was a juvenile at the time of the commission of the offence or not and further direction will be given. The necessary enquiry however shall be done within three months from today.

Parties to appear before the learned Additional Sessions Judge on 12.05.2009. The trial court record be sent back forthwith along with a copy of the judgment.

MOOL CHAND GARG, J.

April 27, 2009
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