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

+ WP(Crl.) 247/2011

VIJENDER @ BIDDI Petitioner
Through: Mr. Ajay Raghav, Advocate.
versus

THE STATE OF NCT OF DELHI Respondent
Through: Mr. Dayan Krishnan, ASC for the
State with SI Sunil Kumar, PS Uttam
Nagar.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER
14.11.2011

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1. By the present petition, the Petitioner seeks to get an inquiry conducted by the Juvenile Justice Board or Medical Board or appropriate authority on the aspect of juvenility of the Petitioner. He further seeks to set aside the order on sentence passed by the learned Trial Judge.

2. Learned counsel for the Petitioner contends that by the present petition, he does not lay a challenge to the conviction of the Petitioner but only claims the benefit of juvenility for the Petitioner. His prayer is limited to the conducting of an inquiry in regard to the juvenility of the Petitioner and thereafter extending the benefit thereof to the Petitioner under Section 7A of the Juvenile Justice (Care and Protection) Act(for short 'JJ Act'). It

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is stated that in the present case FIR was registered on 15th October, 2000 on which date the age of the Petitioner Vijender @ Bididi was below 17 years. The date of birth recorded in the birth certificate of the Petitioner is 3rd December, 1983 and this fact is also recorded in the school leaving certificate issued by the Government Sarvodya Bal Vidyalaya. Thus, the Petitioner on the date of commission of the offence that is 15th October, 2000 was a juvenile and is entitled to the benefit under Section 7A of the JJ Act.

3. This Court vide order dated 21st July, 2011 had observed that the Petitioner in support of his claim had filed the date of birth certificate issued from the school as per which the date of birth of the Petitioner is 3rd December, 1983. The verification report in this regard revealed that the date of birth of the Petitioner was recorded on the basis of affidavit of the Petitioner's father. Thus, the learned Trial Court was directed to conduct an inquiry into the age of the Petitioner and submit a report in this regard.

4. A report in this regard has been received. The learned Additional Sessions Judge has stated that in support of his claim the Petitioner has examined AW1 Shri Phool Singh, the father of the Petitioner, AW2 Smt. Jawitri, the mother of the Petitioner, AW3 Shri B.N. Trivedi, TGT,

Government Sarvodaya Vidyalaya, Matiala, New Delhi and AW4 Shri Hari Kishan, Teacher, Nagar Nigam Prathmik Bal Vidyalaya, Nawada, New Delhi. The father and mother of the Petitioner have deposed that the date of birth of the Petitioner is 3rd December, 1983, he is the eldest child and has studied upto 6th standard in Government Sarvodaya Bal Vidyalaya, Matiala, Delhi. Further the school leaving certificate of Petitioner also recorded his date of birth as 3rd December, 1983.

5. The ossification test of the Petitioner was also got conducted at DDU Hospital. AW 7 Dr. Sunil Kakkar, HOD (Radiology), DDU Hospital has deposed that after the physical, dental and radiological examination of the Petitioner, the Medical Board opined that the age of the Petitioner was above 22nd years and below 25 years as on 26th August, 2011. Hence, after adducing all relevant evidence on record, the learned Trial Court has submitted that the date of birth of the Petitioner is 3rd December, 1983 and the age of the Petitioner on the date of commission of offence that is on 13th October, 2000 was 16 years 10 months and 10 days.

6. Thus, in view of the report of the learned Additional Sessions Judge and the opinion of the Medical Board, it is clear that the Petitioner was a juvenile at the time of commission of crime. The school leaving certificate

and deposition of the witnesses has proved his date of birth to be 3rd December, 1983. Also the Medical Board has opined that the age of the Petitioner was not below 22nd years and more than 25 years as on 26th August, 2011, which shows that the Petitioner was around 16 years of age when the alleged offence was committed. Hence, the Petitioner being a juvenile at the time of commission of crime is entitled to get the benefit under Juvenile Justice Act.

7. Hon'ble Supreme Court in *Hari Ram Vs. State of Rajasthan* (2009) 13 SCC 211 has held that a juvenile, who had not completed 18 years on the date of commission of the offence is entitled to benefit of the Juvenile Justice (Care & Protection of Children) Act, 2000.

8. The issue thus arises as to how the benefit of juvenility can be extended to the Petitioner in a case where the offences charged have been proved beyond reasonable doubt by the Prosecution. The Hon'ble Supreme Court in *Bhoop Ram vs. State of U.P.*, AIR 1986 SC 1329 held:

"7. On a consideration of the matter, we are of the opinion that the appellant could not have completed 16 years of age on 3-10-1975 when the occurrence took place and as such he ought to have been treated as a "child" within the meaning of Section 2(4) of the U.P. Children Act 1951 and dealt with under Section 29 of the Act. We are persuaded to take this

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view because of three factors. The first is that the appellant has produced a school certificate which carries the date 24-6-1960 against the column 'date of birth'. There is no material before us to hold that the school certificate does not relate to the appellant or that the entries therein are not correct in their particulars. The Sessions Judge has failed to notice this aspect of the matter and appears to have been carried away by the opinion of the Chief Medical Officer that the appellant appeared to be about 30 years of age as on 30-4-1987. Even in the absence of any material to throw doubts about the entries in the school certificate, the Sessions Judge has brushed it aside merely on the surmise that it is not unusual for parents to understate the age of their children by one or two years at the time of their admission in schools for benefits to the children in their future years. The second factor is that the Sessions Judge has failed to bear in mind that even the Trial Judge had thought it fit to award the lesser sentence of imprisonment for life to the appellant instead of capital punishment when he delivered judgment on 12-9-1977 on the ground the appellant was a boy of 17 years of age. The observation of the Trial would lend credence to the appellant's case that he was less than 10 years of age on 3-10-1975 when the offences were committed. The third factor is that though the doctor has certified that the appellant appeared to be 30 years of age as on 30-4-1987, his opinion is based only on an estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out. As regards the opinion of the Sessions Judge, it is mainly based upon the report of the Chief Medical Officer and not on any independent material. On account of all these factors, we are of the view that the appellant would not have completed 16 years of age on the date of the offences were committed. It therefore follows that the appellant should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment when he was convicted by the Sessions Judge under various counts.

8. Since the appellant is now aged more than 28 years of

age, there is no question of the appellant now being sent to an approved school under the U.P. Children Act for being detained there. In a somewhat similar situation, this Court held in *Jayendra v. State of U.P.* 1982 Cri.LJ 1000 that where an accused had been wrongly sentenced to imprisonment instead of being treated as a "child" under Section 2(4) of the U.P. Children Act and sent to an approved school and the accused had crossed the maximum age of detention in an approved school viz. 18 years, the course to be followed is to sustain the conviction but however quash the sentence imposed on the accused and direct his release forthwith. Accordingly, in this case also, we sustain the conviction of the appellant under all the charges framed against him but however quash the sentence awarded to him and direct his release forthwith. The appeal is therefore partly allowed in so far as the sentence imposed upon the appellant are quashed.

9. In view of the fact that the Petitioner was a juvenile at the time of the commission of offence and the said benefit has to be extended to him, while maintaining the conviction of the Petitioner, the order on sentence is set aside. The petition is disposed of accordingly. The Petitioner is in custody. The Superintendent, Tihar Jail is directed to release the Petitioner forthwith, if not required in another case.



MUKTA GUPTA, J.

NOVEMBER 14, 2011

‘vkm’