

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

% Judgment delivered on 02.09.2011

+ **CRL. M. A. 8520//2011 & CRL.A. 878/2009**

**SURENDER KHARE** ... Appellant

- versus -

**STATE** ... Respondent

**Advocates who appeared in this case:**

For the Appellant : Mr Arvind Jain with Mr Kuldeep Singh  
For the Respondent : Mr Pavan Narang

**CORAM:**

**HON'BLE MR. JUSTICE BADAR DURREZ AHMED**

**HON'BLE MS. JUSTICE VEENA BIRBAL**

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

**BADAR DURREZ AHMED**

1. This is an application under Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as 'the said Act'). The prayer of the appellant is that he be declared as a juvenile within the meaning of Section 2(k) of the said Act and, consequently, that he be treated as a 'juvenile in conflict with law' as defined in Section 2(l)

of the said Act. It has also been prayed that consequent upon such declaration, the appellant, who has been in custody since 11.02.2007, be released in view of the provisions of the said Act, whereby a juvenile cannot be detained for a period in excess of three years.

2. The present appeal arises out of the impugned judgment dated 21.03.2009 passed by the learned Additional Sessions Judge, New Delhi in Sessions Case No. 45/2007 arising out of FIR No. 82/2007 registered at Police Station R. K. Puram under Sections 302/363/376/201 IPC. The date of the incident in this case was 06.02.2007. By virtue of the impugned judgment, the appellant has been convicted under Sections 302/363/376/201 IPC and by a separate order on the point of sentence dated 21.03.2009 the appellant was sentenced to imprisonment for life in respect of the offence punishable under Section 302 IPC. A fine of ₹ 5,000/- was also imposed and in default of payment of the said fine, he was required to undergo two years imprisonment. He was also sentenced to rigorous imprisonment for three years in respect of the offence punishable under Section 363 IPC and a fine of ₹ 2,000/- was also imposed on him. In default of payment of which, the appellant was to undergo six

months imprisonment. For the offence punishable under Section 376 IPC, the appellant was also awarded a sentence of life imprisonment with a fine of ₹ 5,000/- in default of which he was to undergo two years imprisonment. As regards the offence punishable under Section 201 IPC, the sentence awarded to the appellant was of seven years imprisonment with a fine of ₹ 2,000/- and in default whereof, he was required to undergo six months imprisonment.

3. In the present appeal, the appellant had moved an application (Crl. M. B. 1372/2009), seeking suspension of sentence. The said application came to be heard by a Division Bench of this Court on 06.05.2010, wherein, it was urged on behalf of the appellant that he was a juvenile at the time of the incident. However, this plea of the appellant was rejected and having regard to the other facts and circumstances of the case also, this Court did not find it to be a fit case for suspension of sentence and consequently dismissed the appellant's application for suspension of sentence. The order passed by this Court on 06.05.2010 is as under :-

**“+ Crl. M. (Bail) No. 1372/2009 in CrI.A.No. 878/2009**

Learned counsel for the appellant has, in support of the present application for suspension of sentence, stressed only

on one aspect viz. the appellant was juvenile at the time of incident. However, he could not controvert the position that PW9 Dr. Alexander F. Khakha, who had examined the appellant along with other doctors Dr. Ajay Kumar and Dr. Vani, opined that the appellant was more than 18 years and below 19 years of age as on 07.04.2007. This testimony of PW9 Dr. Alexander F. Khakha has been accepted by the learned Trial Court, on the basis of which, finding is arrived at that the appellant was major and not juvenile. Further, having regard to the facts of this case, we do not find it to be a fit case for the suspension of sentence.

Application is dismissed.”

Upon reading the said order, it is clear that PW9 Dr Alexander F. Khakha, who had examined the appellant along with other doctors, namely, Dr Ajay Kumar and Dr Vani, had opined that the appellant was 18-19 years and below 19 years of age as on 07.04.2007. It was pointed out by the court that the testimony of PW9 Dr Alexander F. Khakha had been accepted by the trial court on the basis of which a finding had been arrived at that the appellant was an adult and not a juvenile.

4. The learned counsel for the appellant made a four-fold submission with regard to the order dated 06.05.2010. First of all, he submitted that the order dated 06.05.2010 merely records the finding recorded by the Trial Court and cannot be regarded as a finding of this court. Secondly,

even if it is assumed that it reflects an opinion of this Court, he contended that the said order was passed while considering the suspension of sentence application of the appellant and cannot be treated as a final or binding order and can only be treated as the court's *prima facie* opinion. Thirdly, it was contended on behalf of the appellant that since it was only a *prima facie* consideration, this Court had not gone into the question of considering the provisions of Rule 12(3)(b) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as 'the said Rules'). It was submitted that the said Rule 12(3)(b) specifically stipulated that in case the exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for reasons to be recorded by them, may, if considered necessary give benefit to the child or juvenile by considering his/ her age on the lower side within the margin of one year. It was contended that if the benefit of one year on the lower side is given, then, even accepting the evidence of PW9 Dr Alexander F. Khakha, the age of the appellant would be between 17-18 years on the date of the occurrence, that is, 06.02.2007. Fourthly, he submitted that as per the opinion of Dr Alexander F. Khakha and the other doctors, the age of the appellant, as on 07.04.2007, was between 18-19 years. But the date of

occurrence was 06.02.2007 which was 2 months prior to the date on which the said opinion was given i.e., 07.04.2007. Thus, even as per the said report, without giving the benefit under Rule 12(3)(b), the appellant, on the date of the incident, that is, 06.02.2007 would be below the age of 18 years. Thus, it was contended that the appellant was a juvenile at the time of the incident and, therefore, the benefit of the said Act had to be given to the appellant particularly in view of Section 7-A thereof which enables a claim of juvenility at any stage even after final disposal of the case and requires that such claim should be determined in terms of the provisions contained in the Act and the Rules made thereunder even if the juvenile had ceased to be so on or before the date of commencement of the said Act. To substantiate his plea, he referred to Section 7-A of the said Act, which reads as under :-

**“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 recognised 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 thereunder, 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.”

5. There is another complication in this matter. The appellant had also been arrested in another case being FIR No. 90/2007 registered under Section 377/506 IPC at Police Station R. K. Puram, wherein the date of incident was 08.02.2007. The ossification test of the appellant had been done at RML Hospital and the report dated 24.02.2007 indicated the age of the appellant to be between 17-18 years. The matter came up before the Metropolitan Magistrate and on 09.02.2011, when he was to decide as to whether the appellant was a juvenile on the date of commission of the offence i.e., 08.02.2007 in the case under FIR No. 90/2007. The learned Metropolitan Magistrate passed the following order:-

“FIR NO. 90/2007

P.S: R.K. Puram

09.02.2011

Present: Ld. APP for the State.  
Accused produced from JC.  
Dr. Alexander Frenklin, Head of the Medical  
Board constituted in Safdarjung Hospital in FIR  
NO. 82/07.

1. Vide this order I shall decide whether accused Surender Khare was juvenile on the day of commission of offence in this case or not?

2. During the course of trial, accused had moved an application for transferring the present case to Juvenile Board on 07.07.09. It is stated in the application that on the basis of Ossification Test Report of the accused dated 24.02.2007 it was opined by the concerned Doctors that his age was 17 to 18 years. It is also pertinent to mention here that accused was convicted in case FIR No. 82/07 and in the said case Medical Board was constituted, for determination of age of accused. Copy of the said Medical Board Report is on record. As per the said report, age of the accused on 07.04.2007 was 18 to 19 years.

3. It is settled law in view of Arnit Das Versus State of Bihar (2000) 5 SCC 488, a margin of error of two years has to be given on either side, while determining the age of accused.

4. This court keeping in mind the procedure mentioned in Section 7 of Juvenile Justice (Care and Protection of Children) Act, 2007 conducted the enquiry. During the said inquiry, the court inquired from the accused as to whether documents as per Rule 12 (3) (a) of Juvenile Justice (Care and Protection of Children) Act, 2007 can be furnished by him or not. The accused did not furnish the said documents. Further, IO concerned also did not furnish the said documents. It is

pertinent to mention here, that neither accused nor the IO concerned, has furnished, any document, pertaining to, the date of birth of the accused. The net result is, that, this court has to come to the conclusion, pertaining to the age of accused, on the basis of the Ossification Test Report and Medical Board Report, placed on file, as per Rule 12 (3) (b) of Juvenile Justice (Care and Protection of Children) Act, 2007, for determination of age of accused.

5. Date of commission of offence in this case is 08<sup>th</sup> February, 2007. As per Ossification Test Report, the age of the accused was between 17 to 18 years on 24.02.2007. Further, Medical Report on 07.04.2007 suggests that the age of accused was 18 to 19 years on the said day of report. In this regard, court inquired from the Head of the said Medical Board, who apprise the court, that, it is the day 07.04.2007, which is to be seen, while appreciating the margin of 18 to 19 years of age, of the accused.

6. There are two reports, pertaining to the age of accused, in this case. First report, based on Ossification Test, suggesting that accused was 17 to 18 years of age on 24.02.2007. Necessary corollary, to that report can be, that accused was below 18 years of age on 08.02.2007. Thus, there is doubt of twenty days only, with regard to the age of the accused, as seen from the date of commission of offence, in this case. The benefit of said doubt, in view of settled position of law, is given to the accused. More so, where Medical Board Report dated 07.04.2007 also suggesting that on the day of said report, accused was 18 to 19 years of age.

7. Keeping in mind the aforesaid discussion, this court opines, that on the day of commission of offence, in this case, accused was below 18 years of age.

8. Accused is directed to be sent to Juvenile Board for further proceedings, as per law.

9. Copy of this order be given dasti to the accused for official purposes.

-sd-  
(PRASHANT SHARMA)  
M.M.-6, Saket Courts, New Delhi  
9-2-2011”

It will be apparent from the above order dated 09.02.2011 that the Metropolitan Magistrate was faced with two reports pertaining to the age of the appellant. The first report based on the ossification test suggested the age of the appellant to be between 17-18 years as on 24.02.2007. According to the learned Metropolitan Magistrate this implied that the age of the appellant on the date of the incident, that is, 08.02.2007 was below 18 years. He noted that there was a doubt of 20 days only and that the benefit of such doubt should go to the appellant particularly because the Medical Board's Report of 07.04.2007 also suggested that he was between 18-19 years of age. Consequently, the learned Metropolitan Magistrate was of the view that on the date of commission of the offence in the case arising out of FIR No. 90/2007, the appellant was below 18 years of age. He directed the appellant to be sent to the Juvenile Board for further proceedings, as per law.

6. The Juvenile Justice Board-II, Firozshah Kotla Ground, Delhi Gate, Delhi took up the matter on 10.02.2011, when it passed the following order :-

“State Vs. Surender  
FIR No. 90/07  
PS R. K. Puram  
u/s 377/506 1PC

Case received by transfer. It be checked and registered as per rules.

10.02.2011

Present: MsVandana Chauhan, Ld. Substitute APP for the State.  
Juvenile with parents.

One of the Members is not sitting presently.

Juvenile has been produced from central jail. Sh. David, Ld. counsel from DLSA has been asked to assist the party at this moment.

The juvenile has been declared to be so vide order dt. 09.02.11 of the Ld. Adult Court. The juvenile has remained in custody for four years as of today. It is stated that while conducting the enquiry, the Board is to follow the procedure laid down for trial in summons cases. The ld. counsel refers to Section 258 Cr. P. C. applicable to summons cases. The provision empowers the Court to stop proceedings at any stage without pronouncing judgment for reasons to be recorded. Where such stoppage is made after evidence of principle witnesses being recorded, the provisions requires pronouncement of a judgment of acquittal and release of the offender where applicable.

In the present case, the juvenile has been facing the enquiry since long. He has already undergone the maximum period for which any child can be detained in special home for rehabilitation. No fruitful purpose would be served by continuing the present enquiry. By virtue of the power bestowed by Section 258 Cr. P. C., the Board deems it fit that the proceedings in the present enquiry be stopped. As stipulated in the provision, since principle witnesses have been examined, the stoppage of the proceedings shall have the effect of acquittal of the juvenile. He be released if not wanted in any other case.

File be consigned to Record Room.

- sd -  
(Madhu Shukla)  
Member, JJB-II

- sd -  
(Geetanjli Goel)  
Principal Magistrate  
JJB-II, Delhi Gate,  
New Delhi/10.02.2011/H

It is clear that the Juvenile Justice Board had observed that the appellant had already undergone the maximum period for which any child / juvenile could be detained in a special home for rehabilitation and that no fruitful purpose would be served by continuing the enquiry under the said Act. Consequently, invoking the powers under Section 258 Cr. P.C, the Board thought it fit that the proceedings in the inquiry pursuant to FIR No. 90/2007 be stopped. Since the principal witnesses had been examined, the stoppage of the proceedings, as indicated in Section 258 Cr. P.C itself,

would have the effect of acquittal of the juvenile. Consequently, the appellant was directed to be released, if not wanted in any other case.

7. Thus, on the one hand, we have the present appeal which is pending before us and in which the appellant has not been regarded as a juvenile by the trial court. We also have the order dated 06.05.2010 passed by this Court whereby the appellant's application for suspension of sentence was rejected and the Court had observed that the trial court had arrived at the finding that the appellant was not a juvenile. On the other hand, we have the proceedings in respect of the FIR No. 90/2007, which has culminated in the order dated 10.02.2011 of the Juvenile Justice Board, whereby the appellant has been recognized as a juvenile under the said Act and the proceedings have been stopped by invoking the powers under Section 258 Cr. P.C. It is also clear from a reading of Section 258 Cr. P.C that when proceedings are stopped prior to pronouncement of a judgment but after evidence of the principal witnesses has been recorded, the same would have the effect of an acquittal.

8. We, therefore, have an anomalous situation where, in respect of one FIR the appellant has been regarded as a juvenile within the meaning of

the said Act, whereas under another FIR, he has not been considered to be a juvenile. The incidents in connection with the two FIRs are only two days apart: The date of occurrence in respect of FIR No. 82/2007 is 06.02.2007 and the date of occurrence in respect of FIR No. 90/2007 is 08.02.2007.

9. While this Court in its order dated 06.05.2010 did notice that from the testimony of PW9 Dr Alexander F. Khakha, the appellant was not a juvenile on the date of the occurrence in FIR No. 82/2007, we agree with the learned counsel for the appellant that, first of all, this Court only recorded what the Trial Court had found and did not itself arrive at that finding and, secondly, the said observation was, in any event, only a *prima facie* one at the stage of consideration of the suspension of sentence application of the appellant and cannot be regarded as a conclusive determination of the age of the appellant. That being the position, once an application under Section 7-A of the said Act has been moved before us wherein the claim of juvenility has been raised, it is incumbent upon us to determine such a claim in terms of the provisions contained in the said Act and the said Rules. The detailed report with regard to the determination of

the age of the appellant in the present case i.e., FIR No. 82/2007 has been exhibited as Exhibit PW9/A and the same has been proved by PW9 Dr Alexander F. Khakha. As per the report Exhibit PW9/A, the age of the appellant as on 07.04.2007 has been indicated to be 18-19 years. The date of the incident in the present case was 06.02.2007. Therefore, the age of the appellant as on the date of the incident would be two months less than the age given in Exhibit PW9/A which would mean that the appellant would be 17 years and 10 months old on the lower side. Thus, even if the benefit of one year margin on the lower side is not given, the appellant would still have to be regarded as a juvenile on the date of the incident. In case the benefit of one year is given on the lower side then, clearly, the appellant would be less than 18 years old on the date of the occurrence. In either eventuality, the appellant would have to be regarded as a 'juvenile in conflict with law' within the meaning of Section 2(l) of the said Act. Rule 12(3) of the said Rules stipulates that in every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining the documents specified in Clause (a), namely, (i) the matriculation or equivalent certificates, if available; and in

the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a *panchayat*; and in the absence of either (i), (ii) and (iii) of Clause (a), the medical opinion of a duly constituted Medical Board. In the present case, there is no evidence concerning the three types of documents mentioned in Clause (a) of Rule 12(3) of the said Rules. Consequently, it is the medical opinion of a duly constituted Medical Board, which will have to be considered for the purposes of declaration of the age of the appellant. No further medical opinion is necessary inasmuch as Exhibit PW9/A is the opinion of a duly constituted Medical Board comprising of Dr Alexander F. Khakha, Dr Ajay Kumar and Dr Vani. It is on the basis of the said opinion that we have come to the conclusion that the appellant was a juvenile on the date of the incident. This is also in conformity with the declaration of juvenility in the case arising out of FIR No. 90/2007.

10. It is clear from the provisions of Section 7-A (2) of the said Act that if the court finds a person to be a juvenile on the date of commission of the offence in a proceeding under sub-Section (1) of Section 7-A, it shall

forward the juvenile to the Board for passing an appropriate order and the sentence, if any, passed by a Court shall be deemed to have no effect.

11. Section 6(2) of the said Act stipulates that the powers conferred on the Board by or under the said Act, may also be exercised by the High Court and the Court of Session, when the proceedings comes before them in appeal, revision or otherwise. Thus, instead of forwarding the appellant to the Board for passing an appropriate order, by virtue of Section 6(2) read with Section 7-A(2), this Court can pass the appropriate order.

12. The orders that may be passed with regard to a juvenile are indicated in Section 15 of the Said Act. Section 15(1) provides that where a Board (in this case this Court) is satisfied on inquiry that a juvenile has committed an offence, then notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it thinks so fit, either (a) allow the juvenile to go home after advice or admonition; or (b) direct the juvenile to participate in group counselling and similar activities; or (c) order the juvenile to perform community service; or (d) order the parent of the juvenile or the juvenile himself to

pay a fine, if he is over fourteen years of age and earns money; or (e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years; or (f) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years; or (g) make an order directing the juvenile to be sent to a special home for a period of three years. It is clear that the maximum period for which a juvenile can be sent to a special home is three years in view of Section 15(1)(g) of the said Act.

13. Section 16 (1) also stipulates that notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law shall be sentenced to death or imprisonment for any terms which may extend to imprisonment for life, or committed to prison in default of payment of fine or in default of furnishing security. The proviso to Section 16(1) stipulates that where a juvenile who has attained

the age of sixteen years has committed an offence and the Board is satisfied that the offence committed is so serious in nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juveniles in a special home to send him to such special home and that none of the other measures provided under this Act is suitable or sufficient, the Board may order the juvenile in conflict with law to be kept in such 'place of safety' and in such manner as it thinks fit and shall report the case for the order of the State Government. Section 16(2) provides that on the receipt of a report from a Board under subsection (1) of Section 16, the State Government may make such arrangement in respect of the juvenile as it deems proper and may order such juvenile to be kept under protective custody at such place and on such conditions as it thinks fit. The proviso to Section 16(2) of the said Act is very material as it stipulates that the period of detention so ordered shall not exceed, in any case, the maximum period provided under Section 15 of the said Act.

14. A reading of Sections 15 and 16 of the said Act makes it clear that even where the Board is satisfied upon an inquiry that the juvenile has

committed an offence, the juvenile can at the most can be sent to a special home for a period of three years or if the juvenile has committed a very serious offence and has attained the age of 16 years, he can be kept in a place of safety under the protective custody of the State. But, this period of detention cannot exceed the maximum period of three years provided under Section 15 of the said Act.

15. Coming back to the present case, we find that the appellant has been found guilty of having committed the offences he was charged with. The learned counsel for the appellant submitted straightaway that he is not challenging the conviction but is only claiming benefit of the said Act in view of the fact that the appellant was a juvenile on the date of commission of the offence. He submitted that the appellant has already been in custody for over four years and six months. The maximum detention of three years that the appellant could have undergone as a juvenile has already been exceeded and, therefore, he cannot be detained any further.

16. A plea had been raised on behalf of the learned counsel for the State that the period of three years which the appellant is seeking to take

advantage of in the present proceedings, has already been exhausted in the proceedings emanating from FIR No. 90/2007, which have been stopped by the Juvenile Justice Board by virtue of its order dated 10.02.2011. There are two answers to this contention raised on behalf of the State. The first is that the order dated 10.02.2011 passed by the Juvenile Justice Board operates as an acquittal and, therefore, the entire period of detention can be reckoned for the purposes of the present appeal emanating from FIR No. 82/2007. Secondly, even if we do not adopt this course, we find that the appellant would still be entitled to the benefit under the Said Act inasmuch as he would still have crossed the maximum period of detention contemplated under the said Act. This will become clear if we examine the details with regard to his period of custody. The appellant was arrested in both the cases, that is, FIR No. 82/2007 and FIR No. 90/2007 simultaneously on 11.02.2007. Insofar as the present case is concerned, he remained in custody throughout the trial period, that is, up to 29.03.2009. Thus, the period of custody when the appellant was an under-trial works out to two years, one month and eighteen days. In addition, the appellant has been in custody post-conviction with effect from 30.03.2009 till date i.e., 02.09.2011, which works out to two years, five months and two days.

Since the under-trial period up to 29.03.2009 would be common in respect of both the offences, the benefit of set-off can be taken in respect of both the offences as has been settled by the Supreme Court in the case of **State of Maharashtra v. Najakat: AIR 2001 SC 2255**. In addition, the appellant has already undergone the period of two years five months and two days post-conviction. Hence, the appellant, in total, in this case, has been in detention for four years six months and twenty days which is far in excess of the maximum period of three years permissible under the said Act.

17. In view of the foregoing, while the conviction of the appellant is sustained inasmuch as the appellant has not challenged the same, the sentence awarded to him is set aside and since he has already been in detention for over three years and, therefore, cannot be sent to a Special Home or 'place of safety' for further detention, he is directed to be released forthwith. This application is allowed and the appeal stands disposed of accordingly.

**BADAR DURREZ AHMED, J**

**VEENA BIRBAL, J**

**SEPTEMBER 02, 2011  
SR**