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

+ W.P.(CRL) 1292/2010

BHAGWAN DASS @ MITTU Petitioner
Through Mr. Chirag Jamwal & Mr. Ajay
Upadhyay, Advocates

versus

STATE OF NCT OF DELHI Respondent
Through Mr. Amit Singh Rathore, proxy
counsel for Mr. Saleem Ahmed, ASC
for State.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER
28.11.2011

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1. By the present petition, the Petitioner seeks setting aside of the order on sentence dated 26th March, 2001 passed by the learned Trial Judge directing him to undergo Rigorous Imprisonment for a period of 10 years and a fine of Rs 5000/-, in default of payment of fine to further undergo Rigorous Imprisonment for a period of 2 years for offences punishable under section 376(2)(g) IPC. The Petitioner was further directed to undergo rigorous Imprisonment for a period of 7 years and a fine of Rs 4000/-, in default of payment of fine to further undergo Rigorous Imprisonment for a period of 18 months for offences punishable under section 366/34 IPC . The

Petitioner had preferred Crl. Appeal No.202/2001 against the said order. This Court vide its judgment dated 20th November, 2009 modified the sentence from 10 years to 5 years for offence under Section 376/34 IPC and Rigorous Imprisonment for 4 years for offences under Section 366/34 IPC and fine of Rs.5000/-.

2. Learned counsel for the Petitioner contends that the petitioner is entitled to the benefit of juvenility under Section 7A of the Juvenile Justice (Care and Protection) Act(for short 'JJ Act'). It is stated that the Petitioner herein was unaware about the position of law regarding juvenility. Thus, this plea could not be raised either during trial or appeal. The date of commission of offence is 20th April, 1983 on which date the age of the Petitioner Bhagwan Dass @ Mittu was below 17 years. The date of birth recorded in the Election Card of the Petitioner is 16th April, 1966 and this fact is also recorded in other documents, that is, Driving Licence and Ration Card. Thus, the Petitioner on the date of commission of the offence that is 20th April, 1983 was a juvenile and is entitled to the benefit under Section 7A of the JJ Act.

3. This Court vide order dated 14th July, 2011 had observed that the Petitioner claims to be a juvenile after his appeal by this court and Special

Leave Petition had been dismissed. In order to ascertain the claim of juvenility, it would be appropriate that an enquiry for the purpose of age determination is conducted by the learned Trial Court. 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 reported that during the inquiry, statement of 8 witnesses was recorded, CW1 Mr. Bineshwar Ram, Inspector, Food and Supply, Circle-33, Dwarka, New Delhi, CW2 Mr. Prakash Chand Thakur, AERO (Assistant Electoral Registration Officer), Assembly Constituency No.39, Rajender Nagar, Delhi, CW3 Mr. Babu Lal, LDC, Transport Authority, South-West Zone and CW4 Mr. Alok Mishra, Manager, TIN 10047, 49, Rajender Bhawan, Rajender Place, New Delhi-110008.

5. CW1 has desposed that as per their record, Ration Card No. APL-20250632 had been issued in the name of Bhagwan Dass, born in the year 1966. CW3 and CW4 have also deposed that in their records, that is, the Driving Licence and the Pan Card respectively the date of birth of the Petitioner is recorded as 16th April, 1966. The ossification test of the Petitioner was also got conducted at DDU Hospital. CW 6 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 30 years and below 40 years as on 1st September, 2011. Hence, after recording the relevant evidence, the learned Trial Court has submitted that the date of birth of the Petitioner is sometime in between 1971-1981.

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 contemporaneous documents that is the election card, PAN card and the driving licence record his date of birth to be 16th April, 1966 which show his age to be around 16 years but the same are not supported by any documents. The Medical Board has opined that the age of the Petitioner was not below 30 years and more than 40 years as on 1st September, 2011. Even if the age of Petitioner is taken to be 40 years in 2011 the age of petitioner would be around 12 years when the alleged offence was committed in 1983. 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 has 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 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

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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

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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 28, 2011
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