

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

RESERVED ON: 20.10.2011
PRONOUNCED ON: 16.11.2011

+ CRL.A. 968/2008, CrI. MA Nos. 14457/2009 & 14686/2010

NEERAJ @ BABLOO Appellant
Through: Mr. S.B. Dandapani, Advocate

versus

STATE N.C.T. OF DELHI Respondent
Through: Mr. M.N. Dudeja, APP for the State

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE PRATIBHA RANI

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| 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 |

MS. JUSTICE PRATIBHA RANI

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1. The Appellant Neeraj @ Babloo has impugned the judgment dated 24th July, 2008 and order of sentence dated 28th July, 2008 whereby he was convicted for having committed the offence punishable under Section 302 IPC for murder of Smt. Bindu (wife of complainant Shri Shishir Tiwari) and their five year old son. He was sentenced to undergo imprisonment for life and pay a fine of ₹ 10,000/- and, in default to undergo simple imprisonment for a period of three months.

2. The co-accused Ashok was convicted under Section 411 IPC and sentenced to undergo rigorous imprisonment for three years which he had already undergone at the

time of judgment and was ordered to be released forthwith. He has not preferred any appeal challenging this order.

3. During the course of hearing, after the application seeking suspension of sentence imposed upon the Appellant was dismissed on 17th February, 2009, another Crl. Misc. Application No. 14457/2009 under Section 482 Cr. P.C. was filed by the Appellant praying for disposal of appeal under Juvenile Justice Act claiming that the Appellant was born on 9th August, 1988 and that on the date of occurrence of the alleged incident/offence i.e. on 22nd April, 2004, he was below 18 years of age and that he being a juvenile, the case was required to be disposed of under the Juvenile Justice Act.

4. An enquiry was ordered to be conducted on the issue of the Appellant being juvenile, as despite this plea not being taken during the trial, it was permissible for the Appellant to raise this plea in an appeal. Initially, the SHO of the concerned police station was directed to find out from the Registrar of Birth and Death or Village Panchayat as to what was his date of birth and also ascertain from the school authorities about the date of birth entered in the school record when the Appellant was got admitted in the school.

5. On receiving the report that the birth of the Appellant was not registered anywhere and there was a possibility of date of birth recorded in school records being inaccurate, the Registrar (Appeals) was directed to record the evidence pertaining to the year when the Appellant was born, with further directions to record the statement of his parents as well. The Superintendent, Tihar Jail was also directed to produce the Appellant before the Medical Board constituted at LNJP Hospital for conducting Ossification and Dental Test in order to determine his age.

6. The Verification Report recording the age of the Appellant was submitted by Inspector Manoj Pant, SHO, Preet Vihar to the effect that the Appellant was born in Village Biroli, P.S. Begpura, Itawa, U.P. but as per the statement made by Gram Pradhan Smt. Malti Devi, there was no record regarding his age in Gram Panchayat Biroli. However, as per the school certificate obtained from Head Master of Shri

Krishna Bihari Bal Vidya Mandir, Mishri Tola, Itawa, U.P., the date of birth of the Appellant was recorded as 9th August, 1988.

7. During the enquiry conducted by Registrar (Appeals), the statement of Shri Santosh Kumar Dubey (father of the Appellant), AW-1 was recorded. He claimed the date of birth of his son to be 9th August, 1988 which he mentioned at the time of the admission of the Appellant, in school. He stated that the date of birth of the Appellant was not registered with the Municipality or Registrar (Birth and Death). AW-2 Shri Shashi Shekher, Head Master, Shri Krishna Bihari Bal Vidya Mandir, Mishri Tola, Itawa, U.P. made a statement on the basis of the original scholar register. Copies of the relevant pages were also placed on record Ex. AW-2/1 (6 pages). He stated that the scholar register was maintained by the school for its day to day official functions and in the school record, the date of birth of the Appellant had been recorded as 9th August, 1988.

8. AW-3 Shri Dhamm Priya, Lecturer, Govt. Inter College, Itawa, U.P. also produced the summoned record Ex. AW-3/1 and stated that as per the admission form, the date of birth of the Appellant Neeraj Dubey was recorded as 9th August, 1986. He further stated that the date of birth was recorded on the basis of affidavit (photocopy of which is Ex. AW-3/2) submitted by father of the Appellant to this effect.

9. After seeing the transfer certificate issued by the College on 8th December, 2005, he clarified that inadvertently on the transfer certificate, the date of birth of the Appellant Neeraj Dubey has been shown as 9th August, 1988 which is incorrect.

10. As per the Ossification Test conducted on 11th February, 2010, the age of the Appellant has been estimated to be between 25 years to 40 years.

11. On behalf of the Appellant, it has been submitted that the age (of the Appellant) has to be considered on the basis of school record which is sufficient to prove that on the date of occurrence of the crime/incident/offence i.e. 22nd April, 2004, he was a juvenile. It has been submitted that Ossification Test Report is very vague giving the estimated age to be 25 years to 40 years, which can't be looked into

by the Court as it gives a range of 15 years in estimating the age and it is even difficult to make out what could be the margin of error in such type of cases.

12. On behalf of the State, learned APP has submitted that from the statement of AW-2 and AW-3 as well as the affidavit filed by PW-1, father of the Appellant, contradictions are apparent regarding his date of birth which has been changed from 9th August, 1988 to 9th August, 1986 by giving an affidavit at the time of his admission in Govt. Inter College, Itawa, U.P. There seems to be an attempt to tamper with the record while obtaining the Transfer Certificate in the year 2005 i.e. after the occurrence of the crime/incident/offence to ensure that the Appellant is declared a juvenile taking the date of birth as 9th August, 1988, so as to enable the Appellant to get the benefit and protection available to a juvenile.

13. We have carefully considered the submissions made on behalf of the Appellant and by the learned APP on the issue of the age of the Appellant on the date of commission of offence. Here, the Appellant is mainly relying on the date of birth as recorded in the school register at the time of his admission in the school i.e. Shri Krishna Bihari Bal Vidya Mandir, Mishri Tola, Itawa, U.P. which was also mentioned on the transfer certificate of the Govt. Inter College, Itawa, U.P. In the case *Babloo Pasi Vs. State of Jharkhand & Anr. (2008) 13 SCC 133*, while dealing with admissibility of such certificates and relying on the judgment *Birad Mal Singhvi v. Anand Purohit 1988 Supp SCC 604*, in para 28 it was observed as under :-

'It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely : (i) entry that is relied on must be one in a public or other official book, register of record; (ii) it must be an entry stating a fact in issue or a relevant fact, and; (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.'

14. Here, in the case before us, there are two dates of birth mentioned in the

school register: (i) 9th August, 1988 as mentioned at the time of admission of the Appellant in Shri Krishna Bihari Bal Vidya Mandir, Mishri Tola, Itawa, U.P.; and (ii) 9th August, 1986 as mentioned in the record of Govt. Inter College, Itawa, U.P.

15. So far as the date of birth as mentioned in Inter College is concerned, the affidavit (Ex. AW-3/2) submitted by the father of the Appellant, shows the date of birth of the Appellant to be 9th August, 1986, which is contrary to the date of birth as recorded in the primary school.

16. So far as the Ossification Test Report (conducted in February, 2010) is concerned, , the bony age of the Appellant was assessed to be a minimum of 25 years. From the Ossification Test Report, it can be inferred that in April, 2004 i.e. at the time of occurrence of incident/crime, he might be 19 years of age. Even if a margin of error of 1 or 2 years is given to the Appellant, his age could be about 18 years at the time of occurrence of the incident/crime/offence. Thus, the Ossification Test Report also establishes his age to be about 18 years at the time of occurrence of the incident/crime/offence.

17. In the judgment reported as ***Babloo Pasi vs. State of Jharkhand and Anr., (Supra)***, the facts were identical to the extent that neither any birth certificate nor a Matriculation or equivalent certificate from the school was produced before the Juvenile Justice Board in support of the claim of the accused being a juvenile. The Juvenile Justice Board obtained a medical opinion of a duly constituted medical Board. As per the Ossification Test of the accused, his age was opined to be between 17-18 years and giving a margin of one year, as stipulated in Rule 22(5)(iv), his age could be estimated to be 16 years or 19 years. While observing that a medical Board's opinion based on the radiological examination is a useful guiding fact for determining the age of a person but is not incontrovertible, it was held thus:-

“....A hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two view may be possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. It is neither feasible nor desirable to lay down an abstract formula to

determine the age of a person. Determination of age of a delinquent, particularly in borderline cases, is rather a complex exercise. The Juvenile Justice (Care and Protection of Children) Act, 2000 (the Act) as such does not lay down any fixed norms, which could be applied for determining the age of a person. Moreover, being a welfare legislation, the courts should be zealous to see that a juvenile derives full benefits of the provisions of the Act but at the same time it is also imperative for the courts to ensure that the protection and privileges under the Act are not misused by unscrupulous persons to escape punishments for having committed serious offences.”

18. The Juvenile Justice (Care and Protection of Children) Act, 2000 prescribes the special procedure to deal with the offenders in conflict with law who have not completed the age of 18 years. Rule 12 of the Juvenile Justice (Care and Protection) Rules, 2007 prescribes the procedure to be followed in determination of age in cases concerning a child or a juvenile in conflict with law.

19. In the instant case while date and month is same, two different years of birth are emerging from the school record and the college record. The primary school record shows the year of birth of the Appellant as 1988 while the admission register of Govt. Inter College, Itawa, U.P. shows the year of birth as 1986. Although, these dates of birth have been recorded only on the basis of the affidavit given by the father of the Appellant but at the same time, this is the only material available before us to determine his age. Here, we have also got the Ossification Test Report giving the age of the Appellant as 25 to 40 years and the question arises as to whether the minimum age as given in the Ossification Test Report, should be accepted by the court to calculate his age on the date of commission of offence.

20. So far as the reliability of the medical report to ascertain the age of the Appellant is concerned, this issue has also arisen in a number of cases. Reliance can be placed on the case reported as ***Jyoti Prakash Rai @ Jyoti Prakash vs. State of Bihar (2008) 15 SCC 223***, wherein the Apex Court considered this aspect and made the following observations:-

“13. A medical report determining the age of a person has never been

considered by the courts of law as also by the medical scientists to be conclusive in nature. After a certain age it is difficult to determine the exact age of the person concerned on the basis of ossification test or other tests. This court in Vishnu vs. State of Maharashtra opined: (SCC p. 290, para 20)

“20. It is urged before us by Mr. Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the Medical Officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact.”

21. After considering the two dates of birth entered in the school record, we find that if the date of birth of the accused is taken as 9th August, 1986, then his age at the time of commission of offence works out as 17 years 255 days and if his date of birth is taken as 9th August, 1988, (the date of occurrence being 22nd April, 2004); the Appellant's age at the time of commission of offence works out as 15 years 255 days. In any case, the Appellant was below 18 years of age at the time of the commission of offence. After considering margin of error of one year, even medical evidence points to his age being about 18 years.

22. The nominal roll of the Appellant reveals that he has already spent more than 7½ years in jail custody which is more than what could have been awarded to him, had he been tried by the Juvenile Justice Board. Since the Appellant has already spent more than 7½ years in jail, in excess to the maximum period for which he could have been sent by the Juvenile Justice Board to special home, sending him to the Juvenile Justice Board at this stage in accordance with the provisions to Section 7(a) sub-section (2) of the Act of 2000 would cause gross injustice to him. Therefore, we deem it appropriate not to remit the matter to the Juvenile Justice Board as it would not only be prejudicial to the interest of the Appellant who was a juvenile at the time of the commission of offence but would also not sub-serve any public interest.

21. Hence, the conviction recorded by the Trial Court is quashed. The Appellant shall be released forthwith, if not required in any other case.

The Appeal is disposed of in the above terms.

PRATIBHA RANI, J

S. RAVINDRA BHAT, J

NOVEMBER 16, 2011

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