

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

+ CRL.APPEAL No.1192/2011

% Judgment reserved on: 09th February, 2012
Judgment delivered on: 15th March, 2012

AFSAR & ANR Appellants
Through: Mr. G.P. Thareja, Adv.
versus

STATE OF DELHI Respondent
Through: Ms. Rajdipa Behura, APP.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide the instant appeal, the appellants have assailed the judgment dated 26.08.2011 and order on sentence dated 29.08.2011 in case titled as State Vs. Afsar and others in Sessions case No. 29/09 in case FIR 301/2004 under Sections 307/324/34 IPC, wherein the appellants were sentenced to undergo RI for 03 years and fine of Rs.5,000/- each under Section 307 IPC and further to undergo SI for 06 months for the offence punishable under Section 324/34 IPC and fine of Rs.1000/- Both the sentences were to run concurrently. Benefit of Section 428 Cr.P.C. has been given to the appellants.

2. By the aforesaid impugned judgment, two co-accused namely Salim s/o Shakeel and Sanjay Kashyap @ Sonu were acquitted by the Trial Court on the same set of evidence, whereas, the appellants have been convicted.

3. Brief facts arising out of this case are that on 04.08.04 at about 10:15 PM, on receipt of an information with regard to occurrence of a quarrel and causing injury by using of chhura/knife at 150 Gali No. 1, 2nd Pushta Sonia Vihar, ASI Dharam Pal Singh along with Const. Khem Chand reached at the spot. On reaching there they saw Rajender S/o Sh.Havans Lal, R/o 150 B Block, Gali No. 1, 2nd Pushta Sonia Vihar, Delhi, stained with blood. All the injured namely Rajender, Krishan and Shakuntla were taken to GTB Hospital by PCR Van, where they all were medically examined vide MLC No 2493/04, 2637/04 and 2694/04 respectively. Nature of injuries was opined as 'caused by sharp weapon.' On the MLC of Rajender, he was declared unfit for statement and on the MLC of Shakuntla, the nature of injuries were opined as a simple caused by 'blunt weapon' and on the MLC of Krishan, nature of injuries was opined as simple caused by 'sharp object.'
4. The statement of injured Kishan S/o Rajender Kumar was recorded wherein he stated as under:-

"His father had been doing the business of property dealer, who had arranged a plot for sale to Asgar and 2% commission payable by Asgar on sale consideration was settled. On 03/8/04 his father went to the shop of Asgar and asked for his commission. Sirajuddin, father of Asgar refused to pay the commission due to that some altercation had taken place between his father and Sirajuddin. Asgar who was present at the shop stated that he would pay his commission at his house.

*Again on 04/8/04 at about 8.30p.m. Asgar and his brother Afsar along with two another persons had come to his house and called his father out side the house. Asgar extended threat while saying that **'AA MAIN TUGHE ABBI COMMISSION DE DETA HOON'** In the mean time, other unknown boys caught hold of his father and Asgar and Afsar started stabbing his*

father with churee/knives. His mother also came out from his house. Asgar and Afsar extended threat of killing her. When he tried to save his mother, one boy of (Savla colour) among them landed a dunda blow on the head of his mother and when he tried to caught hold the knife which was in the hand of Asgar, the also received sharp injuries on three fingers of his hand. Asgar along with his associates attempted to kill his father”.

5. On merit, Id. Counsel for the appellants has submitted that in the present case, the injuries received by the PW1 Krishan Kumar, PW2 Smt. Shakuntala and PW3 Rajender Kumar in the altercation on the issue of ‘*commission in sale of the property*’. The injuries caused on PW3 Rajender Kumar were a clean deep wound over right hand measuring 4cm x 1cm; a deep clean wound near mouth left side measuring 4cm x 1cm; a deep clean wound on left hip joint on interior abdominal wall; and a wound measuring 2cm x 5cm above left clavicle. He further deposed that after initial treatment the patient was referred to surgery.
6. On the report of X-Ray plate of injured Rajender, found a chip fracture of iliac crest.
7. The injuries received by PW1 Krishan Kumar, though are of simple in nature, however caused by a sharp object.
8. I note, the appellant No.1 used the knife during altercation whereby caused injuries on the vital parts of the body that too by using a sharp weapon. Learned Trial Judge has already taken a lenient view and awarded only three years rigorous imprisonment and fine of Rs.5,000/- under Section 307 Indian Penal Code and SI for 06 months for the offence punishable under Section 324/34 Indian Penal Code and fine of Rs.1,000/-; whereas the

punishment under Section 307 Indian Penal Code may extend up to life imprisonment.

9. Pursuant to the order dated 10.01.2012, the Probation Officer filed the report of appellant no. 2 Afsar, on the submission of Id. Counsel for appellant who sought the benefit to be extended as provided under Section 360 of the Code, which was taken on the record, which reads as under:-

“Report of Preliminary enquiries vide Rule 16 (1) Regarding Afsar s/o Sirfuddin:-

1. **Personal history:** *The accused is a married man of 26 years. He belongs to poor class family of Muslim society. His family originally hails from district Purne of UP.*
2. **Behaviour and habits:** *He is observed well behaved with submissive nature. He is no bad habit.*
3. **Temperament:** *He is observed of cool temperament. No criminal tendency is found on the nature of accused.*
4. **Physical and mental history:** *Physically he is well built. His mental condition is also sound.*
5. **Leisure time activities:** *He spent leisure time with his family members.*
6. **External influences:** *Chances of being influenced by other seems to be very few.*
7. **School record and report of teacher:** *He is illiterate.*
8. **Employment history:** *The accused started to work as a labour. He also works with his elder brother.*
9. **Present occupation & wages:** *He is doing the job of tyre puncture since last 15 years.*
10. **Report of employer:** *He is self employed with no regular work. He is earning of Rs.6000/- pm.*
11. **Associates:** *He is not in the association of bad elements.*

12.Contact with social & religious organization, if any:
Nothing was reported.

13.FAMILY HISTORY :

- | | | |
|----------------------|--------------------|--|
| (a) Father | Sirrajuddin | expired in 2007 |
| (b) Mother | Sakila | 49 years Housewife and handicapped |
| (c) Step father | No | |
| (d) Brother | Asgar | 24 years Mamed and living in joint family |
| (e) Step mother | No | |
| (f) Sister | Riswana | 19 years Student of 11 th class |
| | Rukhsar | 16 years Student of 10 th class |
| | Sabana | 12 years Student of 7 th class |
| (g) Wife | Nagina | 24 years House Wife. |
| (h) Children | | |
| | 04minors two | |
| | daughters and two | |
| | sons | |
| (i) Other interested | No | |
| | relations, if any, | |

14.Economic conditions of the family: *Economic Condition of the family is assessed as poor class family of the society. He is only earning member of his family. They are hardly meeting their day to day requirements.*

Report of neighbours: Positive and favourable.

15.Legal history: *He also faced another case vide FIR No.354/2008 under Section 283 Indian Penal Code police station K.Khas and fined Rs.200/-.*

10. The appellant has already undergone 24 days of incarceration,

11. It is submitted by the learned counsel for the appellant that three injured witnesses namely PW1 Krishan Kumar, PW2 Smt. Shakuntala and PW3 Rajender Kumar had suffered simple injuries as shown in their respective MLCs. Testimonies of the witnesses were full of contradictions, wherein the above mentioned witnesses deposed differently and could not establish conclusively. Therefore, the benefit of doubt ought to have been extended to the appellants.

12. Learned counsel argued that on 31.08.2004 NBWs were issued against accused Salim s/o Shakeel, and thereafter on 14.09.2004 he was arrested at the instance of PW-1 Krishan Kumar. Report of the MLCs of all the injured persons were obtained. On the MLC of injured Rajender, the nature of injuries were opined as 'grievous caused by sharp object' and nature of injuries on the MLC of Shakuntla was opined as 'simple caused by blunt object'.

13. Learned counsel for the appellants has referred the deposition of PW-8 Dr. S. Kohli, who deposed on behalf of Dr. Chanchal, who was working as CMO at the relevant time. He was deputed by M.S. GTB Hospital, to be deposed on behalf of Dr. Chanchal as she left the services of hospital and her present whereabouts were not known. PW8 deposed that on 04.08.2004 at about 11:30 P.M. patient Rajender was brought to the hospital with an alleged history of assault. He was medically examined by Dr. Chanchal who was working as CMO at that time. On local examination following injuries were noticed :-

“a) Superficial wound on left arm measuring 10cm long and 2cm wide

- b) A deep wound over right hand measuring 4cm x 1cm*
- c) A deep clean wound near mouth left side measuring 4cmx1cm*
- d) A deep clean wound on left hip joint on interior abdominal wall.*
- e) A wound measuring 2cmx5cm above left clavicle. He further deposed that after initial treatment the patient was referred to surgery. Nuero surgery, orthopedic department for further management. He further stated that a the time of examination of patient he was fit examination. MLC prepared by Dr. Chanchal is Ex. PW8/A bearing her signatures.”*

14. Further submitted that PW-10 Dr. Raj Pal, deposed that on 04.08.2004 he examined the X-ray plate of injured Rajender, vide plate No. 3629 of pelvis with both hips AF and found a chip fracture of iliac crest. He proved his report as Ex.PW-10/A bearing his signatures at point A.

15. Learned counsel has further referred to cross-examination of PW2, wherein she stated that her husband has been doing the business of property dealing since last 20 years, however, PW1 Krishan stated that his father was doing the business of property dealing since last 06 years and PW3 Rajinder himself deposed that he has been doing the business of property dealing since last 10/12 years, therefore all the public witnesses failed to prove the *modus operandi*/ motive, which they tried to implicate the accused persons in the present case.

16. During cross-examination, PW-2 Smt.Shakuntala deposed that she had told the name of the assailants to the doctor who had medically examined her. But on perusal of MLC no name of assailants had been recorded by the doctor, it proves that the testimony of PW2 does not inspire

confidence and is liable to be rejected.

17. PW-7 is a doctor, has identified the signatures of Dr. Subhash B. Bijita who examined the injured. On perusal of the injuries mentioned on the MLC bearing No. A-2640, the nature of injuries opined as 'simple caused by blunt object' and also MLC no. C-2493/04 of injured Rajender, injury was opined as 'grievous in nature' whereas as per clinical records and X-ray which clearly shows that injuries which were allegedly caused were of 'simple in nature'. In such circumstances, ingredients of Section 307 IPC are not attracted, as argued by Ld. counsel for the appellants.

18. Learned counsel has further referred to the deposition of PW16, wherein, during his cross-examination he admitted that the injured was not examined in his presence. He also admitted that on the radiologist report it was written that **No Bony Injury seen** and thereafter the cutting were made and opined that **Bony injury seen**. He further deposed that on perusal of X-ray report a chip fracture of iliac-crest and same is counter signed by the doctor in the report Ex.PW 10/A.

19. On the issue, whether the ingredients of Section 307 Indian Penal Code, 1860 are disclosed in the present case, the Learned Trial Judge carefully perused the nature of injuries opined by the doctor on the MLC of all the three injured which is Ex.PW7/A, 7/B and Ex. PW8/A wherein it is established that the injuries mentioned in the MLC of injured Krishan Kumar reflects that he received injuries when he tried to get hold of the knife from the hands of accused person, which was simple in nature caused by a sharp object. The injuries opined on the MLC of PW2 Shakuntla, as nature of injury simple caused by blunt object but on the vital part of the

body i.e. head. On perusal of the MLC ExPW8/A of injured PW3 / Rajender, injury No. 3 i.e. deep clean wound near left side mouth and injury No.5 is above the left clavical clearly shows that both the injuries were inflicted on the upper limb i.e. vital part of the body by using sharp weapon. In such circumstances and considering the nature and the number of injuries i.e. six, it could not be said that the ingredients of Section 307 were not attracted, therefore, learned Judge was not in agreement with the contention of ld. counsel of accused on that issue.

20. It is submitted that there are difference of opinions on MLC and there are contradictions on the deposition of the injured persons, therefore, two co-accused persons have already been acquitted, whereas the same allegations are there as regards to the appellant.

21. In support of above arguments, he has submitted that the learned trial Judge has straight away come to the conclusion and did not give any heed that whether the ingredients of Section 307 IPC are met out in the present case, keeping to the fact about nature of injuries.

22. It is further submitted that there is no opinion regarding causing death and therefore, ingredients of Section 299 IPC are not meted out. If the injuries are opined to be fatal, than the case falls under Section 326, however, in the present case it is already point out that the injuries were not fatal, therefore, the benefit of doubt should be given to the appellant and accordingly the case falls under Section 324 Indian Penal Code, 1860.

23. If this court is of the view that the present case falls under Section 324 Indian Penal Code, 1860 then as, he can be released on the period already

undergone by him. Since, the appellant has already undergone 24 days, he may be let of accordingly.

24. Learned counsel for the appellant has further argued that under Section 360(1) Cr.P.C., it is provided that if the accused is below 21 years of age at the time of commission of offence and where the sentence of life and death has not been awarded, then he is entitled to the benefit under Section 360 of Cr.P.C. For convenience same is reproduced as under:-

“(1) When any person not under twenty-one years of age is convicted of an offence punishable fine, or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not Punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it, appears to the court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the court may, instead of sentencing, him at once to any Punishment, direct that he be released on his entering into a bond, with or without sureties to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour :

Provided that where first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect. and submit the proceedings to a Magistrate of the first class forwarding the accused to or taking, bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub-section (2)”.

25. Therefore, Id. Counsel has prayed that when any person under 21

years of age or any women is convicted for an offence punishable with death or imprisonment of life, and no previous conviction is proved against the offender. In that case keeping age, character or antecedents of the offender, and the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct. The report filled by the Probation Officer, does not indicate any criminal antecedents against both the appellants.

26. On the other hand, learned APP has submitted that for the evidence punishable under Section 307 of Indian Penal Code, injuries do not matter, whereas the intention or knowledge and under the circumstances in which the act is done, is most essential. In the present case, apart from PW-1 Sh.Krishan Kumar / complainant, his mother and father also received injuries.

27. Learned APP has further argued that PW-7 Dr. S. Kohli deposed that on 05.08.2004 at about 12:05 a.m. Krishan Kumar aged about 18 years was brought by ASI Vasudev to the Casualty Ward of GTB Hospital for his medical examination with the alleged history of assault. The Doctor who had examined him has now left the services of the hospital. He identified the handwriting and signatures of Dr.Subhash B Bijita which is Ex. PW 7/A. The said MLC was prepared under supervision as he was posted as CMO casualty on that day. On local examination of injured Krishan an incised wound over the distal (Top), part of index finger, middle finger and ring fingers were noticed and patient was referred to surgery emergency for further management.

28. The said doctor further deposed that on local examination of injured

Shakuntla, a lacerated wound measuring 2 x ½ x ½ cm over the left posterior partial region of the head was noticed, and was referred to surgery emergency for further management.

29. During his cross-examination, he reiterated his testimony as submitted by him during examination-in-chief except the fact that both the MLCs were prepared in his supervision but not in his presence. It is further stated that the injuries noticed on Krishan Kumar can be caused, by falling on hard surface/floor, on the person of Shakuntla is possible.

30. Learned APP has further referred Dr. S.Kohli, CMO of hospital and deposed that he has been deputed by M/s. GTB Hospital to depose on behalf of Dr. Chanchal, as who left the services of hospital, and her present whereabouts are not known. He deposed that on 04.08.2004 at about 11:30 p.m., patient Rajender was brought to the hospital with the alleged history of assault. On local examination, following injuries were noticed:

- a. Superficial wound on left arm measuring 10cm long and 2cm wide.*
- b. A deep wound over right hand measuring 4cm x 1cm.*
- c. A deep clean wound near mouth left side measuring 4cm x 1cm.*
- d. A deep clean wound on left hip joint on interior abdominal wall.*
- e. A wound measuring 2cm x 5cm above left clavicle. He further deposed that after initial treatment the patient was referred to surgery, Nuero surgery, orthopedic department for further management. He further stated that at the time of examination of patient he was fit examination. MLC prepared by Dr.Chanchal is Ex. PW 8/A bearing her signatures.*

31. Ld. APP has further submitted that PW-10 Dr. Raj Pal deposed that on 04.08.2004 he examined the X-ray plate form of injured Rajender vide X-ray plate No. 3629 of X-ray pelvis with both hips AP and found a chip fracture

of iliac crest. He proved his report as Ex. PW 10/A.

32. Learned APP has referred PW-16, Dr. Manish Chadha who identified the handwriting and signature of Dr. Sanjeev, Senior Resident on the MLC No.C-2493, pertaining to injured Rajender and deposed that Dr. Sanjeev has now left the services of hospital, and his present whereabouts are not known in the office. As per opinion given by him, the natures of injuries are grievous.

33. During his cross-examination, he admitted that on the radiologist report, it was written “No Bony injury seen” and thereafter the cutting were made and opined that “Bony injury seen”. Therefore, **‘No Bony Injury’** was written by mistake and same was corrected and opined with, **‘Bony Injury Seen’**.

34. Learned APP has further submitted that Learned Trial Judge has dealt the ingredients of section 307 IPC carefully. After pursuing the nature of injuries opined by the doctor on the MLCs, of all the three injured, which are Ex. PW 7/A, 7/B and Ex. PW 8/A, wherein it is established that injuries mentioned in the MLC of injured Krishan Kumar reflects that he received injuries, when he tried to get hold of the knife from the hands of accused person, which is simple in nature caused by sharp object and the injuries opined on the MLC of PW-2 Shakuntla, nature of injury simple caused by blunt object but on the vital part of the body i.e. head and on perusal of the MLC Ex. PW 8/A of injured Rajender / PW-3, injury no. 3, i.e. deep clean wound near mouth left side and injury no. 5 is above the left clavical clearly goes to show that both the injuries were inflicted on the upper limb, i.e. vital part of the body by using sharp weapon. In such circumstances, the Learned

Trial Judge was of the considered opinion that after considering the nature of injury and the number of injuries i.e. six in a number, opined that ingredients of section 307 IPC to be attracted.

35. On considering the submission advanced by Id.Counsels for parties, in the present case, both the appellants used knife not once, but on numerous time. This fact is proved on the injuries caused to PW-3 Rajinder, who received six injuries. Only one injury is opined as superficial wound, rest all opined as deep wounds. X-Ray Report also proved bony injury was sustained. Some injuries are on vital part of body and grievous in nature. It is also proved that all injuries were caused by sharp weapon.

36. However facts remain that none of injuries were opined as fatal. The intention of the appellants were to cause injuries only, therefore some of the injuries received by injured while holding the knife. From the nature of injuries it established that the knife used in the incident not with that force which would have been fatal. Therefore, in my considered opinion, the appellant would not have been convicted under Section 307 of Indian Penal Code, 1860.

37. Keeping the nature of weapon, its forcity and the nature of injuries, the case falls under Section 326 of Indian Penal Code, 1860. Therefore, in my opinion, the Id. Trial judge should not have convicted the appellants under Section 307 Indian Penal Code, 1860, however the appellants are liable to be punished for the offence punishable under Section 326 of Indian Penal Code, 1860, apart from other provisions.

38. In the above facts and circumstances, I modify the judgement and

order on conviction dated 26.08.2011 and convict the appellants under Section 326 of Indian Penal Code, 1860. Consequently, he shall undergo sentence for a period of one year with fine of Rs.3,000 and in default he shall further undergo simple imprisonment for 2 months. The sentence awarded to the appellants under Section 324/34 Indian Penal Code, 1860 shall remain intact.

39. Vide the order dated 26.09.2000 of this court, the respondent/State was directed to verify the authenticity of the documents, as the appellant No.2 has claimed to be juvenile at the time of occurrence of the offence. In pursuance thereto, the respondent/State filed the verification report, found to be correct, as under:-

“Accused Afsar S/o Sirajuddin R/o B-7, Service Road, IInd Pusta, Sonia Vihar, Delhi and Asgar S/o Sirajuddin R/o B-7 Service Road, IInd Pusta, Sonia Vihar, Delhi, has been convicted on 29.08.11 by the Court of Sh.B.S. Chumbak, ASJ/KKD Court Delhi, for a term of RI for three years and to pay a fine of ₹5000/- each in FIR No.301/04 u/S 307/323/324/34 IPC PS Khajuri Khas, Delhi. The Hon’ble High Court of Delhi directed to verify age proof of both the accused through school certificate, driving license, ration card etc. In this regard verification was conducted, accuse Afsar provided his driving license, and ration card, on behalf of these documents the date of birth of accused Afsar is 06/11/1984. Accused Asgar provided his driving license the date of birth of accused Asgar is 08/11/1988 and according school leaving certificate the date of birth of accused Asgar is 09/05/1987.”

40. Vide order dated 10.01.2012 of this court, the concerned Probation Officer, was directed to file the report on the appellants. Pursuant thereto, same has been filed and taken on record.

41. Learned counsel has referred the report of Probation officer, Karkardooma courts, Shahdara, Delhi 32, wherein it has been recorded that no case is pending against him or ever convicted except the present one since the year 2004.

42. Learned counsel has further submitted that appellant no. 2 Asgar lost his father way back in 2007, his mother is 50 years old and is suffering from 55% disability.

43. He further submitted that according to the prosecution case the incident had occurred on 04.08.2004 and on the date the appellant No.2 was a juvenile as per the date of birth, recorded in his School Leaving Certificate, as his date of birth is recorded as 09.05.1987, therefore, his age was 17 years 02 months and 27 days on the date of occurrence.

44. Further, the date of birth recorded in the Driving License is 08.11.1988 and as per the ration card, which is annexed at page 69 of the paper-book, the year of birth is recorded as 1988. Therefore, in all the situations, the appellant no. 2 was under the age of 18 years, on the date of occurrence.

45. Learned counsel has reiterated Sections 2(k) and 2(l) of Juvenile Justice (Care of Protection of Children) Act, 2000, which is reproduced herein under :-

“2 (k). "juvenile" or "child" means a person who has not completed eighteenth year of age;

(l). "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence;”

46. Ld. counsel has further referred to Section 15(1) (a) (f) and (g) of the above act, which is reproduced as under:-

(1) Where a Board 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, -

(a) allow the juvenile to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile;

(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;

(g) make an order directing the juvenile to be sent to a special home, -

47. Therefore, it is submitted that learned Sessions Judge before holding the trial, ought to have held an enquiry as contemplated by Juvenile Justice Act before proceeding with the trial of the case. Because of the fact that during the course of investigation, the investigating officer had collected the age proof of the appellants; however, he intentionally recorded the wrong age as 18 years on the day of incident, whereas the actual age of the appellant no. 2 was 17 years. The driving license issued to appellant no.2 in the year 2007 also reflects his age as less than 18 years, on the date of occurrence. The age reflected in the Ration card of the appellant no.2 also was 17 years as on the date of the incident. Therefore, the age of the appellant from all the available sources reveals that he was a minor on the day of occurrence and hence could not have been tried by the trial court.

48. Ms. Rajdipa Behura, learned APP has fairly conceded that the School Certificate of the appellant No.2 was taken on the record. However, the age was recorded of 18 years, whereas he was less than 18 years of age on the date of the occurrence. Therefore, she does not dispute on the juvenility of the appellant No.2.

49. Keeping the facts and circumstances into view, although the appellant no. 2 did not raise the issue of juvenility before the trial court, however raised before this court, which he can raise at any stage even after the disposal of the case even up to the level of Apex Court, therefore, after taking the documentary proof of his age, and the submission of Id. APP for State, I am of the considered opinion that appellant no. 2 Asgar, was juvenile on the date of occurrence.

50. Accordingly, while maintaining the conviction, as modified by this court, he shall be set free forthwith, as this issue has not been raised before learned Trial Court. After the full trial, learned Trial Judge has found him guilty, and confirmed by this court though with some modifications, therefore, as law has been settled by the Apex Court in **Vaneet Kumar Gupta @ Dharminder vs. State of Punjab (2009) 17 SCC 587** wherein it is held as under:-

“1. Learned counsel appearing on behalf of the appellant has challenged the conviction of the appellant mainly on the ground that on the date of occurrence, the appellant was a juvenile and therefore, he should have been tried under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (“the Juvenile Justice Act” for short). Although it is conceded by learned counsel for the appellant that this point was not specifically raised

either before the Trial Court or the High Court but he submits that in the light of the provision contained in Section 7A of the Juvenile Justice Act, the question about juvenility of the appellant can be gone into even at this stage. Learned counsel has also pointed out that in fact the High Court was aware of the fact that the appellant had not completed eighteen years of age as on the date of alleged commission of offence and was, thus, a “juvenile” inasmuch as the fact of his being confined in Borstal Jail, Ludhiana, meant for housing a juvenile in conflict with law was mentioned in the application filed for grant of bail. It was, therefore, obligatory for the High Court to hold an inquiry itself for determination of the question of age of the appellant or cause an inquiry to be conducted and seek a report regarding the same.

2. Having bestowed our anxious consideration to the facts before us, we are of the opinion that the appeal commends acceptance.

3. Section 7A, inserted in the Juvenile Justice Act with effect from 22nd August, 2006 reads as follows:

7A.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 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 orders and the sentence, if any, passed by a court shall be deemed to have no effect.

4. It is manifest from a fair reading of proviso to sub- section (1) that a claim of juvenility can be raised at any stage and even after the final disposal of the case. In that view of the matter, the appellant is entitled to raise before us claim of juvenility at the relevant time. It appears to us that in view of a recent decision of a three Judge Bench of this Court in Pawan Vs. State of Uttaranchal JT (2009) 3 SC 87, the issue is no longer res-integra. In the said decision, taking note of the observations in the case of Gurpreet Singh Vs. State of Punjab (2005) 12 SCC 615, wherein entertaining the issue whether the accused was a juvenile under the Juvenile Justice Act, 1986, raised for the first time before it, this Court, had laid down the procedure to be followed in such a situation, one of us, R.M. Lodha, J., speaking for the Court has observed thus:

Where the materials placed before this Court by the accused, prima facie, suggest that the accused was 'juvenile' as defined in the Act, 2000 on the date of incident, it may be necessary to call for the report or an enquiry be ordered to be made. However, in a case where plea of juvenility is found unscrupulous or the materials lack credibility or do not inspire confidence and even, prima facie, satisfaction of the court is not made out, we do not think any further exercise in this regard is necessary. If the plea of juvenility was not

raised before the trial court or the High Court and is raised for the first time before this Court, the judicial conscience of the court must be satisfied by placing adequate and satisfactory material that the accused had not attained age of eighteen years on the date of commission of offence; sans such material any further enquiry into juvenility would be unnecessary.

5. Thus, the short question for consideration is as to whether adequate material is available on record to hold that the appellant had not attained age of eighteen years on the date of commission of offence and could, thus, be treated as a “juvenile” within the meaning of Section 2(k) of the Juvenile Justice Act?

6. When the matter came up for hearing on 15th December, 2008, counsel for the State was asked to seek instructions as to whether any inquiry had been conducted with regard to the age of the appellant as on the date of the commission of the offence, particularly in the light of the school register and Transfer Certificate issued by Rama Montessori Junior Basic Vidyalaya Samiti, Nawabganj, Gonda (U.P.). Pursuant to and in furtherance of the said order, an affidavit has been filed by the Deputy Superintendent of Police, Garhshankar, District Hoshiarpur. In the said affidavit, it is stated that upon making inquiries from the Principal of the aforementioned School, Certificate dated 15th December, 1987 has been found to be genuine. It is further stated that as per the inquiries made, the appellant had studied in the said School from Class I to V during the period 1994-1999 and as per the school records, his date of birth is 15th December, 1987. Thus, in view of the said report, filed on affidavit, which is not questioned by learned counsel for the State, the age of the appellant as on the date of occurrence was about 15 years.

7. The inquiry report, which inspires confidence, unquestionably establishes that as on the date of occurrence, the appellant was below the age of eighteen years; was thus, a 'juvenile' in terms of the Juvenile Justice Act and cannot be denied the benefit of the provisions of the said Act. Therefore, having been found to have committed the aforementioned offence, for the purpose of sentencing, he has to be dealt with in accordance with the provisions contained in Section 15 thereof. As per clause (g) of sub-section (1) of Section 15 of the Juvenile Justice Act, the maximum period for which the appellant could be sent to a special home is a period of three years.

8. Under the given circumstances, the question is what relief should be granted to the appellant at this juncture. Indisputably, the appellant has been in prison for the last many years and, therefore, at this distant time, it will neither be desirable nor proper to refer him to the Juvenile Justice Board. Accordingly, we follow the course adopted in Bhola Bhagat Vs. State of Bihar (1997) 8 SCC 720; sustain the conviction of the appellant for the offence for which he has been found guilty by the Sessions Court, as affirmed by the High Court and at the same time quash the sentence awarded to him.

51. Similar view has been taken by the Coordinate Bench of this court in **Crl. A. No. 72/2010 titled as Rajiv vs. State of NCT of Delhi.**

52. Therefore, appellant No.2 can be set at liberty while maintaining the conviction in his credit.

53. The appellant no. 2 has been found as juvenile, therefore, while maintaining the conviction for the offence punishable under Section 326/324/34 Indian Penal Code, 1860, he is set free. His bail bond and surety bond are discharged.

54. Whereas, appellant on. 1 was below 21 years of age at the time of commission of offence, more so, no conviction ever in his credit, except he paid Rs.200/- as fine under Section 283 of Indian Penal Code, 1860, which does not come in his way, therefore, he is given benefit of Section 360 Cr.P.C.

55. Accordingly, appellant no. 1, Afsar is released on good behaviour by giving benefit of Probation of Offenders Act. Accordingly, he shall furnish the bond of good behaviour for one year, before the trial Court. If the said appellant commit any offence during the bond period, in that case, he shall complete his remaining sentence.

56. Crl. Appeal no. 1192/2011 is accordingly disposed of on the above terms & conditions.

SURESH KAIT, J

MARCH 15, 2012

jjg