

\$~

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

%

Date of decision: 5th October, 2012

+

CRL.M.A. 6282/2012 & CRL.A.1051/2009

DHARAMBIR @ DHARMENDER KALA Appellant
Through Ms. Nandita Rao, Advocate.

versus

STATE Respondent
Through Mr. Sanjay Lao, APP.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE S.P.GARG

SANJIV KHANNA J. (Oral)

Dharambir @ Dharmender @ Kala stands convicted under Sections 302 and 201 read with Section 34 of the Indian Penal Code, 1860 (IPC) by the impugned judgment dated 12th October, 2009. He has been sentenced to life imprisonment and to pay fine of Rs.1,500/- under Section 302 read with Section 34 IPC and rigorous imprisonment of three years and fine of Rs.1,000/- for the offence under Section 201 read with Section 34 IPC. In default of payment of fine of Rs.1,500/- and Rs. 1,000/-, he has to undergo simple imprisonment of two months each. The sentences are to run concurrently. The aforesaid conviction arises out of FIR No.1025/2004, police station Sultan Puri.

2. As per the charge sheet filed and the prosecution version, on 31st

August, 2004, dead body of one Chela Ram was found from a well near MCD flats, Sector-20, Rohini. Later on statement of Sudha, daughter of Chela Ram was recorded, in which she implicated the appellant and her mother-Gianshree.

3. From the aforesaid, it is apparent that the date of occurrence in the present case was 31st August, 2004 or period prior thereto.

4. The contention of the appellant Dharambir is that on the date of occurrence, he was less than 18 years of age. The said contention, it appears, was not raised before the trial court and has been raised for the first time in the present application Crl.M.A.6282/2012. Along with the application, Dharambir has enclosed copy of the school leaving certificate wherein his date of birth has been mentioned as 1st April, 1987. He has also given details of his parents, brothers and sister in sequence.

5. As per the status report filed today, Dharambir's father Kishan Lal is aged about 62 years and his mother is aged about 57 years. Father of Dharambir belongs to village Bhawani Ka Nagla, Police Station Karail, District Mainpuri (U.P.). As per the verification made by the police, Dharambir was born in the year 1987. He was admitted to MCD Government School, Sahipur, Delhi in the year 1992. At the time of admission, Dharambir's date of birth was mentioned and recorded as 1st April, 1987 in the school records. However, at the time

of admission, no birth certificate was submitted by the father of Dharambir. Dharambir studied in the said school from class-I to class-IV. He attended Government School, Nilothi, Delhi and studied in class-V and VI before he left the school in 1998. The date of birth mentioned in the records of Government School, Nilothi, Delhi is 1st April, 1987. Thereafter, Dharambir studied in Government School, village Pooth Kalan, Delhi in class-VI to class-VIII. In the said school's records, the date of birth as mentioned was 1st April, 1987. As per the verification done by the police, Dharambir has a younger sister, whose date of birth is 15th January, 1994.

6. Recently *Ashwani Kumar Saxena Vs. State of M.P.*, Criminal Appeal No.1403/2012 decided on 13th September, 2012, the Supreme Court examined and elucidated upon Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (Act, for short) and Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (Rules, for short). The Supreme Court referred to their earlier decision in *Hari Ram v. State of Rajasthan and Another* (2009) 13 SCC 211, wherein it has been held that claim of juvenility can be raised before any court at any stage and if such a claim is made, the same has to be determined in accordance with the provisions of the Act and Rules even if the accused had ceased to be a juvenile on or before the date of commencement of the Act. An accused, who is juvenile,

would be entitled to the benefit of the Act, if he had not completed 18 years of age on the date of commission of the offence. Reference was made to *Mali and Another v. State of Madhya Pradesh* (2010) 6 SCC 669, *Jabar Singh v Dinesh and Another* (2010) 3 SCC 757, *Dayanand v. State of Haryana* (2011) 2 SCC 224 and *Anil Agarwal and Another v. State of West Bengal* (2011) 2 SCALE 429.

It has been held in *Ashwani Kumar Saxena* (supra) as under:-

“16. Further, it was also held that on a conjoint reading of sections 2(k), 2(l), 7A, 20 and 49 r/w Rules 12 and 98 places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1.4.2001 would be treated as juveniles even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted. With regard to the determination of age, this Court held that the determination of age has to be in the manner prescribed in Rule 12 of the 2007 Rules and opined that the determination of age is an important responsibility cast upon the Juvenile Justice Boards.

17. x x x x x x x

18. x x x x x x x

19. x x x x x x x

20. x x x x x x x

21. x x x x x x x

22. x x x x x x x

23. In *Anil Agarwal and Another v. State of West Bengal* [(2011) 2 SCALE 429], this Court was examining the claim of juvenility made at a belated stage stating that the appellants were minors at the time of the alleged offence and hence should not be tried along with the adult co-accused. The trial court dismissed the appellant's application as not maintainable as it had been filed at a belated stage. The High Court, in revision, while holding that the application had been made belatedly, granted liberty to appellants to raise their plea of juvenility and to establish the same before the Sessions Judge at the stage of the examination under section 313 Cr.P.C.

24. Reversing the finding recorded by the High Court, this Court took the view that Section 7A of the Act, as it now reads, gives right to any accused to raise the question of juvenility at any point of time and if such an issue is raised, the Court is under an obligation to make an inquiry and deal with that claim. The court held Section 7A has to be read along with Rule 12 of the 2007 Rules. This Court, therefore, set aside the order of the High Court and directed the trial court to first examine the question of juvenility and in the event, the trial court comes to a finding that the appellants were minors at the time of commission of the offence, they be produced before the J.J. Board for considering their cases in accordance with the provisions of the 2000 Act.”

7. In the said case the Supreme Court examined Rule 12, which reads as under:-

“Rule 12. Procedure to be followed in determination of Age.- (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with

law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) 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 -

(a) (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;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in subrule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

8. After referring to the said Rule, the Supreme Court observed, elucidated and explained as under:-

“33. We also remind all Courts/J.J. Board and the Committees functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate etc. mentioned in Rule 12 (3) (a) (i) to (iii). The courts in such situations act as a *parens patriae* because they have a kind of guardianship over minors who from their legal disability stand in need of protection.

34. "Age determination inquiry" contemplated under section 7A of the Act r/w Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

35. Once the court, following the above mentioned procedures, passes an order; that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in subsection (5) or Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of the Rule 12. Further, Section 49 of the J.J. Act also draws a presumption of the age of the Juvenility on its determination.

36. Age determination inquiry contemplated under the JJ Act and Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate

from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, J.J. Board or a Committee functioning under the J.J. Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the J.J. Board or the Committee need to go for medical report for age determination.

37. We have come across several cases in which trial courts have examined a large number of witnesses on either side including the conduct of ossification test and calling for odontology report, even in cases, where matriculation or equivalent certificate, the date of birth certificate from the school last or first attended, the birth certificate given by a corporation or a municipal authority or a panchayat are made available. We have also come across cases where even the courts in the large number of cases express doubts over certificates produced and carry on detailed probe which is totally unwarranted.”

9. It was further held as under:-

“42. Legislature and the Rule making authority in their wisdom have in categorical terms explained how to proceed with the age determination inquiry. Further, Rule 12 has also fixed a time limit of thirty days to determine the age of the juvenility from the date of making the application for the said purpose. Further, it is also evident from the Rule that if the assessment of age could not be done, the benefit would go to the child or juvenile considering his / her age on lower side within the margin of one year.

43. The Court in *Babloo Parsi v. State of Jharkhand and Another* [(2008) 13 SCC 133] held, in a case where the accused had failed to produce evidence/certificate in support of his claim, medical evidence can be called for. The court held that the medical evidence as to the age of a person, though a useful guiding factor is not conclusive and has to be considered along with other cogent evidence. This court set aside the order of the High Court and remitted the matter to the Chief Judicial Magistrate heading the Board to re-determine the age of the accused.

44. In *Shah Nawaz v. State of Uttar Pradesh and Another* [(2011) 13 SCC 751], the Court while examining the scope of Rule 12, has reiterated that medical opinion from the Medical Board should be sought only when matriculation certificate or equivalent certificate or the date of birth certificate from the school first attended or any birth certificate issued by a Corporation or a municipal authority or a panchayat or municipal is not available. The court had held entry related to date of birth entered in the mark sheet is a valid evidence for determining the age of the accused person so also the school leaving certificate for determining the age of the appellant.

45. We are of the view that admission register in the school in which the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility.”

10. In the present case Dharambir does not have matriculation or equivalent certificate. In absence thereof, as per Rule 12(3)(a)(ii), the

date of birth certificate from the school, other than a play school, which was first attended is the relevant and material document to decide the date of birth. As noticed above, as per the 'School Leaving Certificate' or the school records first attended by Dharmabir in the year 1992, his date of birth is 1st April, 1987. The said date of birth is also recorded in the schools' records, which were attended to by Dharambir in classes-V to VI and then classes-VI to VIII. As per the inquiry and verifications made by the police, there is nothing to controvert or show that the said date of birth has been manipulated and has been incorrectly recorded. We may note here that in *Ashwani Kumar's* case, the Supreme Court has elucidated upon and explained the nature and type of inquiry, which has to be conducted under Section 7A read with Rule 12, specially, when the date of birth is mentioned in the school records. Relevant portion of the judgment has been quoted above.

11. In view of the aforesaid position and the status report, which has been filed by the police, we accept the application and it is held that Dharambir was a juvenile on the date when the offence was committed and accordingly he is entitled to benefit and protection under the Act.

12. The next question, which arises for consideration, is whether Dharambir should be sent for trial before the Juvenile Justice Board. As

per the nominal roll placed on record, Dharambir has already undergone incarnation of about 8 years and is presently about 26 years of age. As per the nominal roll, he is not involved in any other case.

13. Dharambir, who is produced from jail, states that he accepts his conviction and does not want to be tried afresh before the Juvenile Justice Board.

14. In view of the decisions in ***Chatpal @ Satpal Vs. State***, CrI.A.471/1997 dated 10th February, 2011, ***Mohd. Faruq @ Mohd. Raju Vs. State***, CrI.A.699/2009 dated 18th April, 2011 and ***Mukesh Kumar Yadav Vs. State***, CrI.M.C. 1542/2011 dated 29th November, 2011, we accept the statement made by Dharambir today in the Court. Recently, the Supreme Court in ***Kalu @ Amit vs. State of Haryana*** 2012 (8) SCC 34 held as under :-

“ 24.The instant offence took place on 7.4.1999. As we have already noted Kalu alias Amit was a juvenile on that date. He was convicted by the trial court on 7.9.2000. The Juvenile Act came into force on 1.4.2001. The appeal of Kalu alias Amit was decided by the high Court on 11.7.2006. Had the defence of juvenility been raised before the High Court and the fact that Kalu alias Amit was a juvenile at the time of commission of offence had come to light the High Court would have had to record its finding that Kalu alias Amit was guilty, confirm his conviction, set aside the sentence and forward the case to the Board and the Board would have passed any appropriate order permissible under Section 15 of the Juvenile Act.

25. As noted above, the Board could have sent Kalu alias Amit to a special home for a maximum period of three years and under Section 19, it would have made

an order directing that the relevant record of conviction be removed. Since on the date of offence, Kalu alias Amit was about 17 years, 5 months and 23 days of age, he could have been directed to be kept in protective custody for 3 years under the proviso to Section 16 as the offence is serious and he was above 16 years of age when the offence was committed. But he certainly could not have been sent to jail. Since the plea of juvenility was not raised before the High Court, the High Court confirmed the sentence which it could not have done. None of the above courses can be adopted by years of imprisonment. In the peculiar facts and circumstances of the case, therefore, we quash the order of the High Court to the extent it sentences accused Kalu alias Amit to suffer life imprisonment for the offences under Section 302 read with Section 34 IPC. After receipt of report from the Additional Sessions Judge, Rewari, vide order dated 14.12.2009, we had ordered that Kalu alias Amit be released on bail. If he has availed of the bail order, his bail bond shall stand discharged. If he has not availed of the bail order, the prison authorities are directed to release him forthwith, unless he is required in some other case. Accused Kalu alias Amit shall not incur any disqualification because of this order. Criminal Appeal No.1467 of 2007 filed by the accused Kalu alias Amit is allowed to the above extent. ”

15. Thus, we accept the prayer made in CrI.M.A.6282/2012 and hold that the appellant-Dharambir was a juvenile on the date of the occurrence/offence. However, in view of the statement made by him, his conviction is sustained and he is directed to be released on the sentence undergone. The appellant-Dharambir will be accordingly released, unless he is required to be detained in any other case. The statement made by Dharambir will not be construed as an admission of guilt by the other co-convict Gianshree. Her appeal will be examined

on merits without being influenced by the statement made by Dharambir.

The appeal and application are accordingly disposed of.

SANJIV KHANNA, J.

S.P.GARG, J.

OCTOBER 05, 2012
NA/tr