

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

**Judgment delivered on: 16.04.2013**

**CRIMINAL APPEAL NO.202/2012**

**MUKESH @ JURRA**

**..... Appellant**

Through: Mr. Rajender Yadav, Advocate.

*versus*

**STATE (GOVT. OF NCT OF DELHI)**

**..... Respondent**

Through: Ms. Richa Kapoor, APP

**CORAM:**

**HON'BLE MR. JUSTICE SANJIV KHANNA**

**HON'BLE MR. JUSTICE SIDDHARTH MRIDUL**

**J U D G M E N T**

**SANJIV KHANNA, J. (ORAL)**

**CRL.M.A. 18964/2012**

1. This is an application under Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000. The appellant Mukesh @ Jurra claims that he was a juvenile, i.e., below 18 years of age on 30.11.2009, the date of the commission of the offence.

2. The appellant has been convicted by the impugned judgment dated 14.11.2011 under Section 392 read with Sections 397, Section 302 of the Indian Penal Code, 1860 (IPC) and Sections 25/27/54/59 of the Arms Act,

1959. By the order of sentence dated 30.11.2011, the appellant has been sentenced to rigorous imprisonment for life and fine of Rs.2000/- for the offence under Section 302 IPC. In default of payment of fine, the appellant is to undergo simple imprisonment for one month. For offence under Section 392/397 IPC, the appellant has been sentenced to Rigorous imprisonment for seven years and fine of Rs.2000/-. In default of payment of fine, the appellant is to undergo simple imprisonment for fifteen days. For the offences under Sections 25/27/54/59 of the Arms Act the appellant has been sentence to rigorous imprisonment for three years and fine of Rs.2000/-. In default of payment of fine, the appellant is to undergo simple imprisonment for fifteen days.

3. It appears that before the trial court the appellant did not take up the plea that he was a juvenile on the date of the offence and this plea has been raised for the first time in the appellate proceeding before us.

4. The appellant during the period 05.02.2008 till 12.01.2010 got involved and was prosecuted in six different FIRs including FIR No.76/2009, PS Mahindra Park registered in the present case. The details of FIRs against the appellant are as under:-

| <b>FIR No.</b> | <b>Sections</b>  | <b>Date</b>     | <b>Police Station</b> | <b>Status</b>                               |
|----------------|------------------|-----------------|-----------------------|---------------------------------------------|
| 40/2008        | S. 326 IPC       | 05.02.2008      | Adarsh Nagar          | Referred to Juvenile Justice Board          |
| 42/2008        | S457/380/511 IPC | 07.02.2008      | Adarsh Nagar          | Referred to Juvenile Justice Board          |
| 79/2008        | 324 IPC          | 06.02.2008      | Shalimar Bagh         | Referred to Juvenile Justice Board          |
| 76/2009        | 392/397/302 IPC  | 01.12.2009      | Mahindra Park         | Present case.                               |
| 5/2010         | 392/397 IPC      | 12.01.2010      | Mahindra Park         | Acquitted by trial court                    |
| 88/2009        | 392/397/307 IPC  | 392/397/307 IPC | Mahindra Park         | Convicted. Appeal pending (Crl.A.1407/2011) |

5. At this stage, we record that in FIR No.5/2010 under Sections 392/397 IPC the appellant was acquitted by the trial court. In FIR Nos.40/2008, 42/2008 and 79/2008, the appellant had pleaded before the trial court that he was a juvenile on the date of commission of the offence. The plea was accepted and the cases were accordingly, transferred/referred to Juvenile Justice Board. However, in the proceedings arising out of FIR No.88/2009, the contention of the appellant herein that he was a juvenile on the date of commission of the offence was rejected. The appellant stands convicted under Section 392/397/307 IPC. Appeal against conviction has been preferred and is pending adjudication before a Single Judge of this court. One of the contention/issue raised in the said appeal is that the appellant

Mukesh @ Jurra was a juvenile on the date of the commission of the offence in the said case.

6. Thus we are faced with two conflicting set of orders of the trial court. In criminal proceedings under FIR Nos.40/2008, 42/2008 and 79/2008, the appellant has been declared as juvenile. However, in criminal proceeding arising out of FIR No.88/2009 he has been treated as an adult, i.e., a person more than 18 years of age on the date of the offence. We note that in FIR Nos.40/2008, 42/2008 and 79/2008, while deciding the plea of juvenility, the trial court had relied upon the school leaving certificate issued by the school first attended by the appellant, i.e., Nigam Prathmik Bal Vidyalaya, Sant Ravidas Nagar, Jahangirpuri, Delhi- 110033. As per the said certificate, the appellant was admitted to study in said school on 18.07.1998 vide admission No.4314 and the date of birth as recorded in the admission register was/is 15.04.1993. The State has verified the said certificate and the admission register. It has been ascertained that the said certificate is genuine and as per the school records.

7. The contention of the State, however, is that the date of birth recorded in the admission register of the school is based on mere oral statement is a guess and it is not based upon any reliable document or material in the form

of a date of birth certificate etc. It is, accordingly, submitted that the ossification test report dated 09.02.2010 which was relied upon by the trial court in FIR No.88/2009 should be the foundation and the basis for determining the age of the appellant on the date of commission of the offence. Team of doctors at Babu Jagjeevan Ram Memorial Hospital, Jahangirpuri have opined that the estimate age of the appellant on the date of examination, i.e., 09.02.2010, was between 20 to 22 years. Thus, if we accept the ossification test report Dated 09.02.2010, then on the date of the commission of the offence in the present case, i.e., 30.11.2009, the appellant would be more than 18 years of age and not a juvenile.

**8.** In order to enable us to form a judicious opinion we have called for the original trial court records relating to FIR No.88/2009 as it was noticed that the photocopy of the ossification test report was illegible and unreadable. We have perused and examined the ossification test report and the reasons given by the medical board, which read as under:-

“Teeth- Total:- 32

**Whether space formed behind IInd Molar:- Yes**

**Status of Third Molar Teeth:** erupted and X-ray by lateral oblique views of mouth show that the root

formation of third molar is complete

**Radiological Examination:** 353 X-ray. Both elbow AP and both wrist AP and both shoulder with medical ends of clavicle AP and Pelvis AP.

Epiphysis of elbow joints, lower ends of Radius & Ulna, -  
?---- process, iliac crest have appeared and fused.  
Epiphysis of medical ends of clavicle have appeared but not fused.

**Opinion:** Estimated age is between 20 to 22 years.”

**9.** Rule 12(3) of the Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009 reads as under:-

“(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 date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

ii. the birth certificate given by a corporation or a municipal authority or a panchayat;

iii. the matriculation or equivalent certificates, if available;

(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.”

The said Rule in clear and categorical terms stipulates that the date of birth certificate from the school first attended, other than a play school, should be taken into consideration at the time of inquiry for determining the age. In the absence of birth certificate from the school first attended, the birth certificate issued by a corporation or municipal authority or panchayat and in the absence of said certificate, matriculation or equivalent certificate, if available, should be taken into consideration. Ossification report is to be taken into consideration only in the absence of any of the three certificates mentioned in clause (a). It further stipulates that in case the ossification report is ambiguous and exact age cannot be determined, benefit of margin of one year on lower side can be given to the person concerned.

**10.** In the present case, it is the accepted position that in FIR Nos.40/2008, 42/2008 and 79/2008 relying upon the date of birth recorded in the school first attended, other than the play school, the appellant was treated as a juvenile and he was thereafter, referred to the Juvenile Justice Board. We find this view taken by the trial Court in consonance and as per the ratio in the decision of the Supreme Court in *Ashwani Kumar Saxena v. State of M.P.*, (2012) 9 SCC 750, wherein it was held:-

**“32.** “Age determination inquiry” contemplated under Section 7-A of the Act read with 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 needs to 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 needs to 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 abovementioned 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.

**33.** 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 sub-rule (5) of 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 Rule 12. Further, Section 49 of the JJ Act also draws a presumption of the age of the juvenility on its determination.

**35.** We have come across several cases in which the 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.

**Xxxx      xxxx    xxxx**

**38.** We fail to see, after having summoned the admission register of the Higher Secondary School where the appellant had first studied and after having perused the same produced by the Principal of school and having noticed the fact that the appellant was born on 24-10-1990, what prompted the court not to accept that admission register produced by the Principal of the school. The date of birth of the appellant was discernible from the school admission register. Entry made therein was not controverted or countered by the counsel appearing for the State or the private party, which is evident from the proceedings recorded on 11-2-2009 and which indicates that they had conceded that there was nothing to refute or rebut the factum of date of birth entered in the school admission register. We are of the view that the above document produced by the Principal of the school conclusively shows that the date of birth was 24-10-1990, hence, Rules 12(3)(a)(i) and (ii) of the 2007 Rules have been fully satisfied.

**Xxxx      xxxx    xxxx**

**40.** The 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 juvenile 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.

**11.** The learned counsel for the State, on the other hand, has relied upon another decision of the Supreme Court in *Om Prakash v. State of Rajasthan* (2012) 5 SCC 201 , wherein the following observations have been made:-

“3. The Juvenile Justice Act was enacted with a laudable object of providing a separate forum or a Special Court for holding trial of children/juveniles by the Juvenile Court as it was felt that children become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. But when an accused is alleged to have committed a heinous offence like rape and murder or any other grave offence when he ceased to be a child on attaining the age of 18 years, but seeks protection of the Juvenile Justice Act under the ostensible plea of being a minor, should such an accused be allowed to be tried by a Juvenile Court or should he be referred to a competent court of criminal jurisdiction where the trial of other adult persons are held?

**Xxxx**

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**22.** It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled for this special protection under the Juvenile Justice Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of

common man in the institution entrusted with the administration of justice.

**23.** Hence, while the courts must be sensitive in dealing with the juvenile who is involved in cases of serious nature like sexual molestation, rape, gang rape, murder and host of other offences, the accused cannot be allowed to abuse the statutory protection by attempting to prove himself as a minor when the documentary evidence to prove his minority gives rise to a reasonable doubt about his assertion of minority. Under such circumstance, the medical evidence based on scientific investigation will have to be given due weight and precedence over the evidence based on school administration records which give rise to hypothesis and speculation about the age of the accused. The matter however would stand on a different footing if the academic certificates and school records are alleged to have been withheld deliberately with ulterior motive and authenticity of the medical evidence is under challenge by the prosecution.

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**32.** Drawing a parallel between the plea of minority and the plea of alibi, it may be worthwhile to state that it is not uncommon to come across criminal cases wherein an accused makes an effort to take shelter under the plea of alibi which has to be raised at the first instance but has to be subjected to strict proof of evidence by the court trying the offence and cannot be allowed lightly in spite of lack of evidence merely with the aid of salutary principle that an innocent man may not have to suffer injustice by recording an order of conviction in spite of his plea of alibi.

**33.** Similarly, if the conduct of an accused or the method and manner of commission of the offence indicates an evil and a well-planned design of the accused committing the offence which indicates more towards the matured skill of an accused than that of an innocent child, then in the absence of reliable documentary evidence in support of the age of the accused, medical evidence indicating that the accused was a major cannot be allowed to be ignored taking shelter of the principle of benevolent legislation like the Juvenile Justice Act, subverting the course of justice as statutory protection of

the Juvenile Justice Act is meant for minors who are innocent law-breakers and not the accused of matured mind who use the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him.

**34.** The benefit of benevolent legislation under the Juvenile Justice Act obviously will offer protection to a genuine child accused/juvenile who does not put the court into any dilemma as to whether he is a juvenile or not by adducing evidence in support of his plea of minority but in absence of the same, reliance placed merely on shaky evidence like the school admission register which is not proved or oral evidence based on conjectures leading to further ambiguity, cannot be relied upon in preference to the medical evidence for assessing the age of the accused.

**12.** We have considered the contention of the learned Additional Public Prosecutor, but regret the same cannot be accepted in the present case. We noticed that the date of birth in the school records has been accepted by the State in three FIRs. It will lead to a big anomaly if we accept the date of birth as mentioned in the school records in these cases but reject the same when it comes to the present case. Secondly, we find that the appellant was admitted to the said school in July 1998 at the age of about five years. The date of birth given at that time and as recorded in the school record was 15.04.1993. This appears to be reasonable and plausible as children are generally admitted to a school at the age of about 4 to 5 years. The ossification test report dated 09.02.2010 is also an estimate/opinion given by the doctors on the basis of dental and bone/radiological examinations. Ossification test is

not foolproof. Exact age determination by ossification test/medical test may not be possible especially after the age of 16/18 years. As noticed above, the ossification test report itself gives a margin of two years, i.e., it states that the age ranges between 20 to 22 years. Rule 12(3) of the applicable Juvenile Justice Rules, 2009 stipulate that reliance upon medical opinion is the last resort, if and when certificates mentioned in clause (a) are not available.

**13.** With regard to the molar teeth and its eruption, *Modi's Medical Jurisprudence and Toxicology*- 23<sup>rd</sup> Edition at page 281-282 has observed that in various studies, it is noted that 3<sup>rd</sup> molar teeth was observed in boys at the age of 14-15 years. Thus, 3<sup>rd</sup> molar teeth exist even in younger children below the age of 18 years. The ossification report also states that there was gap after molar teeth. Similarly with regard to the observations vis-a-vis the fusion of bones there is an element of flexibility and debate in medical steam. Fusion can take place at difference ages depending upon diet, environmental variations and other physical characteristics etc. In fact, there is variation in the age of fusions of bones depending upon the area/location to which the boy or girl belongs. As observed in the case of *Ashwani Kumar (supra)* in case of any genuine doubt or ambiguity or in border line cases,

benefit has to be given to the accused on the question whether he should be treated as juvenile or not.

**14.** In *Rajindra Chandra v. State of Chhatisgarh*, (2002) 2 SCC 287, it has been held that while dealing with the question of determination of the age of the accused for the purpose of finding out whether he is a juvenile or not, 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 views may be possible on the said evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. In *Bhoop Ram v. State of U.P.*, 1989 (3) SCC 1, the Supreme Court has held that in absence of any material to throw doubt on the date of birth recorded in school records, the trial court cannot brush aside the same in a light manner. In fact, medical opinion is based only on an estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out.

**15.** We accordingly accept the date of birth 15.04.93 mentioned in the school certificate issued by the school first attended. The appellant was therefore a juvenile on the date of the offence, i.e., in the night intervening 30.11.2009/1.12.2009

**16.** We have spoken to Mukesh @ Jurra in the court and he states that he disputes his conviction and wants to contest the same. In these circumstances, we deem it appropriate and proper that the matter should be transferred to the Juvenile Justice Board. The appellant will appear before the Juvenile Justice Board on 23.04.2013. We record that Mukesh @ Jurra has also expressed desire to be counseled. He has stated that he wants to develop and learn skills so that in future he will be able to earn his livelihood. Raju, brother of Mukesh @ Jurra is present in court and he has also spoken to Mukesh @ Jurra in this regard. The said aspect will be kept in mind by the Juvenile Justice Board. The appellant will be shifted from Rohini Jail and kept in the Special Home, provided he is not required to be kept in the adult prison pursuant to an order/direction in any other case.

**17.** The application is accordingly allowed. The conviction and sentence are set aside. The appeal will be treated as disposed of. Electronic compilation of the trial court record along with the Trial court record will be sent to the Juvenile Justice Board.

**SANJIV KHANNA, J**

**SIDDHARTH MRIDUL, J**

**APRIL 16, 2013/mk**