

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

Date of decision: 20th February, 2013

+ **CRL. A. 778/2009**

CHAND BABU

..... Appellant

Through: Mr. M.M. Rahman, Adv.
Appellant produced from JC.

versus

THE STATE (GOVT. OF NCT OF DELHI) Respondent

Through Ms. Rajdipa Behura, APP for the State.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. The Appeal is directed against a judgment dated 07.09.2009 and order on sentence dated 08.09.2009 whereby the Appellant was convicted for the offences punishable under Sections 366 and 376 of the Indian Penal Code (IPC). He was sentenced to undergo rigorous imprisonment for seven years and to pay fine of ₹3,000/- or in default to undergo simple imprisonment for three months for the offence punishable under Section 366 IPC. He was further sentenced to undergo rigorous imprisonment for ten years and to pay fine of ₹3,000/- or in default to undergo simple imprisonment for three months for the offence punishable under Section 376 IPC.
2. The main ground of challenge raised by the Appellant in the instant Appeal is that on the date of the commission of the offence, the Appellant was a juvenile. A plea with regard to juvenility was raised by the

Appellant before the learned Additional Sessions Judge ('ASJ'). A report with regard to the date of birth certificate issued by the Panchyat was also obtained by the Court, in spite of this, the learned 'ASJ' preferred to get an ossification test done and relied thereon to hold that the Appellant was not a juvenile.

3. It is not in dispute that a plea of juvenility was raised by the Appellant on at least 24.01.2008. Orders dated 24.01.2008 and 18.02.2008 passed by the learned 'ASJ' are extracted hereunder for ready reference:-

"24.1.2008

PW2 has been partly cross examined. Her further cross examination is deferred as she is not feeling well. On her request, case is adjourned for her further cross examination. She is bound down for the next date. Now to come up for PE for 18.2.08.

The accused has also filed an application along with affidavit of his father and age certificate claimed to be issued by Gaon Panchyat. Let the IO verify the date of birth of the accused and submit the report on or before the next date. The advocate for the accused will supply the complete set of the affidavit of the certificate to the IO. Notice be sent to the IO for this purpose for 30.1.08."

"18.02.2008

PW2 and PW3 have been examined and discharged. Now to come up for evidence of remaining public witnesses on 31.03.2008.

A report regarding date of birth of the accused has also been received from his village Nyaya Panchayat. The claim of the accused is that he was juvenile at the time of commission of the crime. Therefore, this case be transferred to Juvenile Court. Before deciding this application, the ossification test of the accused should be conducted. Accordingly, IO is directed to get the ossification test conducted of the accused and file the report on or before next date..."

4. Since as per the ossification test, the Appellant was found to be more than 20 years it seems that no inquiry was conducted nor any finding was given by the learned 'ASJ' with regard to the Appellant's age. However, when this plea was again raised on behalf of the Appellant at the time of final arguments, it was simply rejected on the ground that the Appellant's bone age had been found to be more than 20 years. Para 40 of the impugned judgment which dealt with this contention is extracted hereunder:-

“40. The next contention of Ld. Counsel for accused that the accused was a minor on the date of offence is rejected as IO had filed the bone age report of accused according to which the age of accused was more than 20 years.”

5. At this juncture, I would like to note that ASI Dayanand of PS Nabi Karim verified the date of birth from the Panchayat Register and by his report dated 18.02.2008 he reported the Appellant's date of birth to be 20.05.1990. The name of the Appellant in the Panchayat Register was recorded as Shameem Ahmed. ASI Dayanand recorded the statements of Pradhan, Gram Panchayat (Ms. Aslam Bano), Aziz Ahmed, Maksood Ahmed and Irsad Ali that Shameem Ahmed was nick named as Chand Babu. A perusal of the family Register obtained from the Panchayat and verified by the IO from the Panchayat reveals that Mohd. Shammi had just one son by the name of Shameem Ahmed. IO did not find anything suspicious about the date of birth certificate produced by the Appellant before the learned 'ASJ'.
6. Thus, from the Panchayat Register coupled with the statements of the Pradhan of the Panchayat and neighbours it was established that the Appellant's date of birth was 20.05.1990.

7. The question for consideration is whether the age determined in the ossification test can be taken into consideration when the age is established from the certificate issued by the Panchayat.
8. In *Ashwani Kumar Saxena v. State of M.P.* (2012) 9 SCC 750, the Hon'ble Supreme Court deprecated the practice of converting an inquiry as envisaged under Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (Act of 2000) into a full-fledged trial under the Code of Criminal Procedure. The Supreme Court explained the scope of Section 7A of the Act of 2000 and Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (Rules of 2007). Paras 24 to 26 and 42 to 43 of the report are extracted hereunder:-

“24. We may, however, point out that none of the abovementioned judgments referred to earlier had examined the scope, meaning and content of Section 7-A of the Act, Rule 12 of the 2007 Rules and the nature of the inquiry contemplated in those provisions. For easy reference, let us extract Section 7-A of the Act and Rule 12 of the 2007 Rules:

“7-A. 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 enquiry, 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 thereunder, 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 order, and the sentence if any, passed by a court shall be deemed to have no effect.” (emphasis supplied)

“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. (emphasis supplied)*

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 7-A, 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 of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (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.” (emphasis added)

25 Section 7-A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the JJ Act. The criminal courts, Juvenile Justice Board, committees, etc. we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. The statute requires the court or the Board only to make an “inquiry” and in what manner that inquiry has to be conducted is provided in the JJ Rules. Few of the expressions used in Section 7-A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7-A has used the expressions “court shall make an inquiry”, “take such evidence as may be necessary” and

“but not an affidavit”. The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates, etc. as evidence, need not be oral evidence.

26. Rule 12 which has to be read along with Section 7-A has also used certain expressions which are also to be borne in mind. Rule 12(2) uses the expression “prima facie” and “on the basis of physical appearance” or “documents, if available”. Rule 12(3) uses the expression “by seeking evidence by obtaining”. These expressions in our view re-emphasise the fact that what is contemplated in Section 7-A and Rule 12 is only an inquiry. Further, the age determination inquiry has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The word “inquiry” has not been defined under the JJ Act, but Section 2(y) of the JJ Act says that all words and expressions used and not defined in the JJ Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

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42. In Shah Nawaz v. State of U.P (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 municipality is not available. The Court had held that entry related to date of birth entered in the marksheet 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.

43. 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.”

9. Thus, from the perusal of Rule 12 (3) of the Rules of 2007 it is evident that the certificates as mentioned in this Rule have to be relied in order of precedence. Thus, if a Matriculation certificate is available the date of birth mentioned in any other certificate cannot be gone into. If a Matriculation certificate is not available then date of birth as mentioned in the birth certificate from the school first attended is to be taken into consideration. If the said certificate is also not available then the date of birth certificate given by the Corporation or a Municipal Authority or Panchayat has to be considered. Clause (b) of Rule 12 (3) of the Rules of 2007 regarding medical evidence comes into operation only when the three certificates as mentioned in Rule 12 (3)(a) are not available.
10. Since the genuineness of the certificate issued by the Panchayat was not disputed by the prosecution, rather the same was duly verified and found to be genuine, the ossification test conducted to determine Appellant's age in pursuance of the order dated 18.02.2008 passed by learned 'ASJ' was wholly irrelevant. In fact, the learned ASJ ought not to have ventured to order to get the ossification test done when the date of birth certificate had been produced without first holding an inquiry whether the same was genuine or not. If the learned 'ASJ' would not have passed such an order he would not have lost track of the case that an application claiming juvenility has been moved by the Appellant and the plea of juvenility has to be inquired into and determined by the Court.
11. As per the date of birth certificate issued by the Panchayat, the Appellant was born on 20.05.1990. The alleged offence was committed on

08.05.2007. Thus, it is evident that the Appellant was a few days less than 17 years on the date of commission of the offence and was thus a juvenile.

12. The Appellant was in custody since 09.05.2007 till date. Thus, he has already served sentence of five years and more than eight months till now without any remission.
13. As per provisions of Sections 15 and 16 of the Act of 2000, a juvenile can be sent to a special home for a period of three years. Moreover, as per section 7-A (2) of the Act of 2000, the sentence, if any, passed by a Court shall be deemed to have no effect with regard to a juvenile. Thus, normally when a convict is held to be a juvenile, the case has to be remitted to the Juvenile Justice Board (JJB) for an inquiry whether the juvenile has committed any offence and for passing appropriate orders. However, in this case the Appellant has already remained in custody as stated earlier for five years and nine months. Thus, no fruitful purpose would be served by sending the Appellant to the JJB for an inquiry into the offence.
14. A similar view was taken by a Division Bench of this Court in *Raju v. State (Govt. of NCT) of Delhi*, 184 (2011) DLT 100 (DB). Para 10 of the report is extracted hereunder:-

10. The fact that the petitioner had not raised the plea of juvenility before the trial court or before the Division Bench at the stage of the appeal or even before the Supreme Court would not come in his way of seeking the remedy and relief that is sought by virtue of this petition in view of the clear and express provisions of Section 7-A of the said Act. Once we have determined that the petitioner was a 'juvenile' as on the date of the incident, he has to be given the benefit thereof under the said Act. Sections 15 and 16 of the

said Act clearly indicate that no juvenile can be kept in custody or detained for a period in excess of 3 years. In the present case, the appellant has already been in custody for over 10 years and 4 months as per the nominal roll on record. Therefore, it is clear that the petitioner has been in custody for a period far in excess of the maximum period of 3 years that is contemplated under the said Act. In these circumstances, he is eligible to be released forthwith. Insofar as the sentence is concerned, the same is deemed to have no effect in view of the provision of Section 7-A(2) of the said Act.”

15. The Supreme Court took a similar view in *Satish @ Dhanna v. State of Madhya Pradesh & Ors.* (2009) 14 SCC 187. Paras 5 and 6 of the report are extracted hereunder:-

“5. In Bhola Bhagat v. State of Bihar (1997) 8 SCC 720 this Court after referring to the decision in Gopinath Ghosh v. State of W.B. 1984 Supp SCC 228 and Bhoop Ram v. State of U.P. (1989) 3 SCC 1 held that an accused who was a juvenile cannot be denied the benefit of provisions of the 2000 Act. The course this Court adopted in Gopinath and Bhola Bhagat cases was to sustain the conviction, but at the same time modify the sentence awarded to the convict.

6. At this distant point of time to refer the appellant to the Juvenile Board would not be proper. Therefore, while sustaining the conviction for the offence for which he has been found guilty, the sentence awarded is restricted to the period already undergone. The appellant be released from custody forthwith unless required to be in custody in connection with any other case.”

16. The Supreme Court has reiterated the same view in its later judgments in *Amit Singh v. State of Maharashtra & Anr.* (2011) 13 SCC 744 and *Ashwani Kumar Saxena v. State of M.P.* (2012) 9 SCC 750.
17. In view of the above discussion, the Appellant is directed to be released forthwith, if not, required in any other case.

18. Copy of the order be sent to the Superintendent Jail for compliance.

(G.P. MITTAL)
JUDGE

FEBRAURY 20, 2013
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