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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 26th March, 2015

+ CRL.A. 494/2011

RASHID

..... Appellant

Through: Mr.Naresh Talwar, Advocate

versus

STATE GOVT. OF NCT OF DELHI

..... Respondent

Through: Ms.Fizani Hussain, Additional Public
Prosecutor for the State.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. By virtue of this appeal under Section 374 (2) of the Code of Criminal Procedure (hereinafter referred to as Cr.P.C.), the appellant impugns the judgment of conviction dated 14th February, 2011 and order on sentence dated 17th February, 2011 passed by the learned Additional Sessions Judge in Sessions Case No. 190/2008 arising out of FIR No.195/2004 registered with PS Bawana whereby he was convicted u/s 363/366/376 IPC and was sentenced as under:-

(i) To undergo rigorous imprisonment for a period of three years and fine of Rs.5000/- in default to undergo simple imprisonment for a period of six months under Section 363 IPC.

(ii) To undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.5000/- in default to undergo simple imprisonment for a period of one year under Section 366 IPC.

(iii) To undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.5000/- in default to undergo simple imprisonment for a period of one year under Section 376 IPC.

All the sentences were ordered to run concurrently. Benefit of Section 428 Cr.P.C. was given to the convict.

2. Succinctly stated the prosecution case in brief is that on 2nd June, 2004, Riyazuddin, S/o Mohd. Shahzad along with his wife Smt. Gulshan Begum came to police station along with his daughter prosecutrix S and accused Rashid and informed about the commission of rape of his daughter by the accused. Accordingly, DD No.12 was recorded and W/SI Sanjeeta was called from PS Sultanpuri. Prosecutrix S and accused were handed over to her. W/SI Sanjeeta got prosecutrix medically examined and after confirmation of commission of rape upon the prosecutrix, she recorded her statement wherein she disclosed about the commission of rape on her by the accused. On the basis of this statement, the investigating officer got the case u/s 365/376 IPC registered. Accused was arrested. After completing investigation, charge sheet was submitted against the accused. Accused pleaded not guilty to the charge and claimed trial.

3. In order to substantiate its case, prosecution in all examined 14 witnesses. The case of the accused was one of denial and false implication in this case. Learned Trial Court considered the evidence

adduced by the prosecution and arrived at the conclusion that it had come in the deposition of the prosecutrix that accused along with two of his friends kidnapped her and took her to Govt. school near Sector 25 in a Maruti Car. Thereafter two boys ran away and accused committed rape on her. Thereafter, he dropped her at the house of PW5-Pardeshi at Shahbad Dairy. In the morning she disclosed all these facts to her parents. She was taken to police chowki where she gave her statement Ex.PW1/A narrating the entire incident which was reiterated by her in her statement recorded by the Metropolitan Magistrate under Section 164 Cr.P.C. The factum of narrating the incident to her parents finds corroboration from the testimony of PW2 Gulshan (mother of prosecutrix), PW3-Riazuddin (father of prosecutrix), PW4 Smt. Anuradha, Wife of Pardeshi, PW5 Pardeshi and PW9-Roshan (friend of prosecutrix). Besides that, the same also find corroboration from the medical evidence and scientific evidence.

4. Under the circumstances, so far as conviction of the appellant u/s 363/366/376 IPC is concerned, I do not find any infirmity in the same and, therefore, the findings are upheld.

5. Even learned counsel for the appellant during the course of arguments, did not challenge the findings of the learned Trial Court regarding his conviction, however, it was submitted that since the appellant was juvenile on the date of commission of offence, as such, he deserves to be granted benefit of juvenility. Reliance was placed on a report dated 24th December, 2014 submitted by the learned Additional Sessions Judge whereby the appellant was declared to be juvenile.

6. A report has been submitted by the learned Additional Sessions Judge submitting therein that in WP(C) No.8889/2011 '*Court on its own motion vs. Department of Women and Child Development*' the court had appointed the officers of Delhi Legal Services Authority as Nodal Officer for monitoring the cases relating to juvenile. Pursuant to these directions, Sh. Nizamuddin Ahmed Amani had filed an application on behalf of the appellant Rashid u/s 7A of Juvenile Justice Act for conducting inquiry regarding his age. Pursuant thereto inquiry was conducted by examining five witnesses and it was observed that at the time of commission of offence, i.e., in the year 2004, the convict Rashid was aged about 15 years, as such, he was a juvenile. This report has not been challenged by the State. As such, it is proved that on the date of commission of offence, the appellant was juvenile.

7. The question for consideration is how the benefit of juvenility can be extended to the appellant in a case where the offences charged have been proved beyond reasonable doubt by the prosecution.

8. In *Bhoop Ram vs. State of UP*, AIR 1989 SC 1329, Hon'ble Supreme Court observed as under:-

"7. On a consideration of the matter, we are of the opinion that the appellant could not have completed 16 years of age on 3-10-1975 when the occurrence took place and as such he ought to have been treated as a "child" within the meaning of Section 2(4) of the U.P. children Act 1951 and dealt with under Section 29 of the Act, we are, persuaded to take this view because of three factors, The first is that the appellant has produced a school certificate which carries the date 24-6-1960 against the column 'date of birth'. There is no material before us to hold that the school certificate does not relate to the appellant or that the entries therein are not correct in their particulars. The Sessions Judge has failed to notice this

aspect of the matter and appears to have been carried away by the opinion of the Chief Medical Officer that the appellant, appeared to be about 30 years of age as. On 30-4-1987. Even in the absence of any material to throw doubts about the entries in the school certificate, the Sessions Judge has brushed it aside merely on the surmise that it is not unusual for parents to understate the age of their children by one or two years at the time of their admission in schools for benefits to the children in their future years. The second factor is that the Sessions Judge has failed to bear in mind that even the Trial Judge had thought it fit to award the lesser sentence of imprisonment for life to the appellant instead of capital punishment when he delivered judgment on 12-9-1977 on the ground the appellant was a boy of 17 years of age. The observation of the Trial would lend credence to the appellant's case that he was less than 10 years of age on 3-10-1975 when the offences were committed. The third factor is that though the doctor has certified that the appellant appeared to be 30 years of age as on 30-4-1987, his opinion is based only on an estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out. As regards the opinion of the Sessions Judge, it is mainly based upon the report of the Chief Medical Officer and not on any independent material. On account of all these factors, we are of the view that the appellant would not have completed 16 years of age on the date of the offences were committed. It therefore follows that the appellant should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment when he was convicted by the Sessions Judge under various counts.

8. Since the appellant is now aged more than 28 years of age, there is no question of the appellant now being sent to an approved school under the U.P. Children Act for being detained there. In a somewhat similar situation, this Court held in *Jayendra v. State of U.P.* 1982 Cri. L.J. 1000 that where an accused had been wrongly sentenced to imprisonment instead of being treated as a "child" under Section 2(4) of the U.P. Children Act and sent to an approved school and the accused had crossed the maximum age of detention in an approved school viz. 18 years, the course to be followed is to sustain the conviction but however quash the sentence imposed on the accused and direct his release forthwith. Accordingly, in this case also, we sustain the conviction of the appellant under all the charges framed against him but however quash the sentence awarded to him and direct his release forthwith. The appeal is therefore partly allowed in so far as the sentence imposed upon the appellant are quashed."

9. In the decision reported as ***Jitendra Singh @ Babboo Singh & Anr. vs. State of U.P.***, 2013 (9) Scale 18, Hon'ble Supreme Court held:-

"20. A careful reading of the above would show that although a claim of juvenility can be raised by a person at any stage and before any Court, upon such Court finding the person to be a juvenile on the date of the commission of the offence, it has to forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed shall be deemed to have effect. There is no provision suggesting, leave alone making it obligatory for the Court before whom the claim for juvenility is made, to set aside the conviction of the juvenile on the ground that on the date of commission of the offence he was a juvenile, and hence not triable by an ordinary criminal Court. Applying the maxim of expressio unius, est exclusio alterius, it would be reasonable to hold that the law in so far as it requires a reference to be made to the Board excludes by necessary implication any intention on the part of the legislature requiring the Courts to set aside the conviction recorded by the lower Court. The Parliament, it appears, was content with setting aside the sentence of imprisonment awarded to the juvenile and making of a reference to the Board without specifically or by implication requiring the Court concerned to alter or set aside the conviction. That perhaps is the reason why this Court has in several decisions simply set aside the sentence awarded to the juvenile without interfering with the conviction recorded by the Court concerned and thereby complied with the mandate of Section 7A(2) of the Act.

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64 (40). The sum and substance of the above discussion is that in one set of cases this Court has found the juvenile guilty of the crime alleged to have been committed by him but he has gone virtually unpunished since this Court quashed the sentence awarded to him. In another set of cases, this Court has taken the view, on the facts of the case that the juvenile is adequately punished for the offence committed by him by serving out some period in detention. In the third set of cases, this Court has remitted the entire case for consideration by the jurisdictional Juvenile Justice Board, both on the innocence or guilt of the juvenile as well as the sentence to be awarded if the juvenile is found guilty, in the fourth set of cases, this Court has examined the case on merits and after having found the juvenile guilty of the offence, remitted the matter to the jurisdictional Juvenile Justice Board on the award of sentence."

10. Learned counsel for the appellant also placed reliance on Crl. Appeal No. 1467/2007 ***Kalu @ Amit vs. State of Haryana and Crl. Appeal No. 868/2008 Joginder and Anr. vs. State of Haryana*** where also question regarding granting benefit of provision of Juvenile Justice (Care and Protection of Children) Act, 2000 arose and it was observed as under:-

"14. Under Section 14 of the Juvenile Act, it is only the Juvenile Justice Board (for short, "the Board") which can conduct an inquiry as to whether a juvenile has committed the offence or not. Even if the Board comes to the conclusion that a juvenile has committed an offence, he cannot be sentenced and sent to a prison. Section of 15 of the Juvenile Act states what order can be passed regarding a juvenile who has committed an offence. Under Section 15(g), the Board may direct the juvenile to be sent to a special home for a period of three years. Under the proviso, the Board may, for reasons to be recorded, reduce the period of stay to such period as it thinks fit. Section 16 forbids the court from sentencing a juvenile and committing him to prison. Proviso to Section 16 states that where a juvenile who has attained the age of 16 years has committed an offence and the Board is satisfied that the offence committed is so serious in nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under the Juvenile Act is suitable or sufficient, the Board may order such a juvenile to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government. Under Sub-Section (2) of Section 16 on a report received from the Board Under Sub-Section (1), the State Government may order that such juvenile may be kept under protective custody at such place and on such conditions as it thinks fit. However, the period of detention shall not exceed in any case the maximum period provided Under Section 15 i.e. the period of 3 years.

15. Section 17 says that no proceeding can be instituted and no order shall be passed against a juvenile under Chapter VIII of the Code of Criminal Procedure. Section 18 forbids a joint trial of a juvenile and a person who is not a juvenile. Section 19 makes it clear that a juvenile who has committed an offence and has been dealt with under the provisions of the Juvenile Act shall not suffer disqualification, if any, attached to a conviction of an offence. Sub-Section (2) of Section 19 goes a step further. It states that in

case of conviction, the Board shall make an order directing that the records of such conviction shall be removed after the expiry of the period of appeal or a reasonable period as prescribed under the rules, as the case may be.

*16. Section 20 makes a special provision in respect of pending cases. It states that notwithstanding anything contained in the Juvenile Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which Juvenile Act comes into force in that area shall be continued in that court as if the Juvenile Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Juvenile Act as if it had been satisfied on inquiry under the Juvenile Act that the juvenile has committed the offence. The Explanation to Section 20 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of Clause (I) of Section 2, even if the juvenile ceased to be a juvenile on or before 1/4/2001, when the Juvenile Act came into force, and the provisions of the Juvenile Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. As regards Explanation to Section 20 of the Juvenile Act, it would be appropriate to quote observations of this Court in **Hari Ram v. State of Rajasthan and Anr.** , (2009) 13 SCC 211. The observations read thus:*

39. The Explanation which was added in 2006, makes it very clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of Clause

(I) of Section 2, even if the juvenile ceased to be a juvenile on or before 1/4/2001, when the Juvenile Justice Act, 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. In fact, Section 20 enables the court to consider and determine the juvenility of a person even after conviction by the regular court and also empowers the court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Juvenile Justice Act, 2000.

17. It is clear, therefore, that the Juvenile Act is intended to protect the juvenile from the rigours of a trial by a criminal court. It prohibits

sentencing of a juvenile and committing him to prison. As its preamble suggests it seeks to adopt a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation.

*18. The instant offence took place on 7/4/1999. As we have already noted Kalu @ 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 @ 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 @ 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 @ 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 (See **Hari Ram**). As noted above, the Board could have sent Kalu @ 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 @ 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 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 us, at this stage, because Kalu @ Amit has already undergone more than 9 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 @ Amit to suffer life imprisonment for offence Under Section 302 read with Section 34 of the Indian Penal Code.*

11. In the present case, the nominal roll dated 31st August, 2014 reflects that as on 31st August, 2014, the appellant had spent 3 years 11 months and 9 days besides earning remission of 1 year and 3 days. Even as per Section 15 of the J.J. Act, if on an inquiry the Juvenile Justice Board is satisfied that the juvenile has committed the offence then notwithstanding anything to the contrary contained in any other law for the time being in force, the Board has the power of directing the

juvenile to be sent for special Home for a period of three years maximum. This being the situation and the appellant having already spent more than three years in prison, no useful purpose will be served in sending the matter to the Juvenile Justice Board.

12. Consequently, appeal is disposed of while upholding the judgment of conviction, however, setting aside the order on sentence as per provisions of Section 19 of the Juvenile Justice Act which provides that no disqualification would be attached to the appellant.

The appellant be set at liberty if not wanted in any other case.
Copy of the judgment along with Trial Court record be sent back.

Copy of the judgment be sent to the Superintendent, Central Jail, Tihar for information to the appellant and for his record.

(SUNITA GUPTA)
JUDGE

MARCH 26, 2015

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