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

Date of decision: 19.12.2019

+ CRL.REV.P. 1301/2019 & CrI.M.A. 43043-45/2019

PAWAN KUMAR GUPTA

..... Petitioner

Through None.

versus

STATE

..... Respondent

Through

Mr.Sanjay Lao, ASC for the State
with Mr.K.K. Ghai, APP & Mr.Karon
Jeet & Mr.Rai Sharma, Adv.
Insp.Anil Sharma, Insp.Ravi Shanker,
SI Deep Chand SI Ranveer.
SinghMr.Jitendra Kr. Jha, Adv. with
Ms.Seema Kushwaha, Adv. with
parents of Nirbhaya.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (O R A L)

1. Vide the present petition filed under section 397 read with section 482 Cr.P.C., the petitioner/convict seeks direction thereby to set aside the impugned order dated 21.12.2018 passed by Ld. ASJ/FTC, Patiala House Court, New Delhi in FIR No.413/2012 registered at Police Station Vasant Vihar for the offences punishable under sections 120-B IPC and

365/366/376(2) (g)/377/307/302 IPC and/or section 396/395/397/201/412 IPC read with section 120-B IPC.

2. It is pertinent to mention here that learned counsel for the petitioner mentioned at 10:30 a.m. and sought adjournment and accordingly, since notice is not issued in the absence of counsel for the State, the matter was adjourned for 24.01.2020 and thereafter, he left the court. Immediately thereafter, Mr.Sanjay Lao, learned Additional Standing Counsel for the State appeared and mentioned that the issue of juvenility which is challenged in the present petition has already been decided by the Hon'ble Supreme Court, thus, the present petition is not maintainable. He further submits that the petitioner is adopting delay tactics and wanted to drag the matter so that execution of the death sentence may not take place, date for which is to be decided very soon.

3. Accordingly, this Court directed Mr.Mahesh Raturi, Assistant Court Master of this Court that let a message be sent to Advocate Shri A.P. Singh, who has filed the present petition. Accordingly, he sent a text message on mobile phone nos.9810368152 and 9210215708 maintained by Shri A.P. Singh, Advocate at 11:27 a.m. Thereafter, in addition to the text message, the above-named ACM called on the aforementioned numbers and his call

was answered once but immediately disconnected and thereafter, his call went unanswered. Thereafter, mail sent on his e-mail address apsingh.adv.off@gmail.com by the ACM to Shri A.P. Singh, Advocate is as under:

“This is Court Master to Justice Suresh Kumar Kait. Your item is listed as Item No.59. Our ACM is calling you informing you that the matter would be taken up immediately but your assistant first talked to our ACM and then disconnecting the phone. It is directed by court to appear at 02:30 p.m. failing which the matter would be taken up for final disposal.”

4. Despite, none appeared on behalf of the petitioner till 02:30 p.m. However, keeping in view of the facts and circumstances of this case and urgency, this Court decided to dispose of the matter, in the absence of counsel for the petitioner, who preferred not to appear for the best known to him.

5. It is stated in the present petition that the petitioner filed an application under section 7A Juvenile Justice Board (Care and Protection of Children) Act, 2000 (hereinafter referred to as ‘J.J. Act’) read with Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2007 (hereinafter referred to as ‘J.J. Rules’) for age determination of petitioner before the Principle Magistrate/Member, Juvenile Justice Board II, Prayas,

Delhi Gate, New Delhi, from office of the Superintendent Central Jail No. 2, Tihar, New Delhi vide Petition No. F-2/SCJ-2/CJ02/AS(Ct)/2018, however, after hearing by Board/member, the same was transferred to ASJ, Patiala House Court, New Delhi for necessary disposal.

6. It is stated through this petition that Ld. District & Sessions Judge while passing the order dated 21.12.2018, did not pay heed towards the facts of the case and applied the law contrary to the facts, in light of J.J. Act read with Rule 12.

7. Further stated that the order passed by the Ld. District Sessions Judge is not only bad in law but against the principle of natural justice.

8. Facts of the present case, as narrated in the petition, are that petitioner was a juvenile at the time of alleged commission of offence and that the said fact has been verified from the School Leaving Certificate and mark sheet of the petitioner, which was issued in his favour by Gayati Bal Sanskar Shala, Narayanpur, Tanda, Distt. Ambedkar Nagar, U.P., in which the date of birth of the petitioner is 08.10.1996, whereas, date of alleged incident is 16.12.2012. Therefore, petitioner on the date of alleged commission of offence was 16 years 2 month and 8 days. Thus, he was juvenile on the date

of alleged offence. The above-mentioned certificate and mark sheet of the petitioner issued by Gayati Bal Sanskar Shala, Narayanpur, Tanda, Distt. Ambedkar Nagar, U.P has been found to be genuine by the investigating officer in the present case.

9. It is also stated that the petitioner never moved any application under section 7 A of J.J. Act. It is well settled law that there is no prohibition in law for filing such an application before any Court and at any stage. The provision of section 7A of the J.J. Act itself is very clear that a claim of juvenility may be raised before any Court and it shall be recognized at any stage, even after final disposal of the case. Accordingly, an application under section 7A of J.J. Act filed before the Trial Court is always maintainable and Trial Court has the jurisdiction to take evidence as provided under the said section and determine the age of the petitioner. To strengthen his submission, the petitioner has relied upon the case of ***Abdul Razzak vs. State of Uttar Pradesh: 2015 (3) Scale 659.***

10. Further stated that the order dated 19.01.2013 passed by learned MM is bad in law as learned MM could not have relied upon the age verification report of the petitioner filed by the investigating officials in the said respect. Moreover, ossification test of petitioner was not conducted by the

investigating officials and no order was passed by the Ld. MM in this regard. Since the petitioner was a juvenile on the date of occurrence of the offence, he is entitled to the benefit of above-stated provisions of the Act.

11. However, the police officials in this case had pressurized the father of petitioner who being an illiterate man, had signed wherever he was asked to and that he otherwise never gave any statement to the police official about the age of his son/petitioner. Pursuant to the *Writ Petition(C) No.8889/2011*, titled as *Court on Its Own Motion vs. Department of Woman and Child Development, National Commission for Protection of Child Rights (NCPCR)* father of petitioner had visited Tihar Jail and the accused stated him that he was below 18 years of age at the time of commission of offence. Accordingly, requested that the directions may be passed to the concerned authority to conduct ossification test of the accused, so that question of juvenility may be ascertained/decided to impart justice and to respect the spirit of J.J. Act.

12. The challenge in the present petition is to set aside the order dated 21.12.2018, wherein the petitioner claimed juvenility and submitted that at the time of commission of offence and as per the School Leaving Certificate

issued in his favour by the school mentioned above, which reflects his date of birth as 08.10.1996.

13. The learned APP for the State who appeared before the court below, submitted that the application was not maintainable and a review petition filed on behalf of the petitioner before the Hon'ble Supreme Court seeking review of its judgment confirming the death sentence of the convict/petitioner herein, has been dismissed by narrating therein the same facts which were being asserted before the Trial Court that the date of birth of the convict/petitioner is 08.10.1996 and this date of birth is reflected in the school leaving certificate issued by the school mentioned above.

14. Moreover, on the directions of the Hon'ble Supreme Court, the investigating officials had also verified the said School Leaving Certificate from the concerned school authorities and it was reported that at the time of admission of the petitioner in the school, no birth proof documents had been submitted. Accordingly, the Hon'ble Supreme Court had negated the plea of juvenility taken before it by the petitioner vide its order dated 09.07.2018 and in the said order, it is categorically observed by the Hon'ble Supreme Court that in view of the order dated 10.01.2013 passed by learned MM, no grounds are made out for review of its judgment.

15. After considering the rival contentions of the parties, the court below opined that in view of the order of the Hon'ble Supreme Court dated 09.07.2018, the court has no jurisdiction to determine the age of the petitioner in terms of section 7-A of the J.J. Act. Also specifically recorded that in para 43 of the said order, the Hon'ble Supreme Court has categorically held that the learned Trial Court/learned MM on the basis of the material placed before it, has rightly concluded that the petitioner is not a juvenile on the date of commission of the offence. It was further opined that once the convict has raised the plea of juvenility before the Hon'ble Supreme Court and the said court has rejected the same, it is now not open to the petitioner to file a fresh application under section 7-A of the J.J. Act before any court below.

16. The learned Court further observed that no doubt an application under section 7-A of the J.J. Act can be filed before any court at any stage including a stage after the final disposal of the case by the Hon'ble Supreme Court, however, once a convict has chosen to take the plea of juvenility before the Hon'ble Supreme Court during proceedings and the said plea has been rejected by the Hon'ble Supreme Court, the petitioner cannot be

allowed to re-agitate this plea thereafter by filing an application under section 7-A of J.J. Act before any court.

17. Despite above facts, the present petition has been filed.

18. Mr.Sanjay Lao, learned Additional Standing Counsel for the State has drawn the attention of this Court to the affidavit filed by Mr.Hira Lal Gupta who claimed to be the father (Parokar) of the petitioner in support of the present petition and the said affidavit has been attested by Oath Commissioner, Patiala House Courts, Delhi on 26.03.2019, whereas the present petition has been drafted thereafter and filed on 05.04.2019. The petition continued under objections and counsel for the petitioner did not bother to remove the same and to list the matter before the court. Thus, it seems that counsel for the petitioner was not interested to get the matter listed before the court, so that he may take benefit of the same at the appropriate time.

19. This Court deprecates such practice adopted by the advocate. In addition to above, counsel for the petitioner mentioned the present matter at 10:30 a.m. and sought adjournment and the matter was directed to be fixed on 24.01.2020, without any objection. Thereafter, counsel for the victim

and learned Additional Standing Counsel for the State approached and informed this Court that this is delaying tactics of the petitioner just to avoid the execution of the death sentence awarded by the Trial Court, which has been confirmed by this Court as well as by the Hon'ble Supreme Court. Moreover, the review petitions filed by the petitioner and other co-accused persons have already been dismissed by the Hon'ble Supreme Court. Accordingly, this Court sent a text message to Shri A.P. Singh, Advocate on his mobile and on his e-mail address mentioned above, however, he did not bother to report to the Court nor any reply was sent to the messages explaining his inability to appear.

20. It is also pointed out by learned counsel for the victim that the affidavits supporting the condonation of delay applications are dated 10.12.2019 whereas the affidavit supporting the present petition is of 26.03.2019.

21. It is not in dispute that an Advocate files petition on the instructions of the petitioner. It is also not in dispute that the petitioner is a master of facts, however, it is presumed that the Advocate is well-aware of the law and the procedure. If the Advocate comes to know that any document which is

illegal or not upto the mark, he may suggest the client not to place the same on the judicial file, for which the court may take adverse view.

22. In the present case, nowhere it is mentioned by the Advocate who filed the petition that he pointed out the objection regarding the aforementioned affidavit and his client still insisted to file the document on record. Thus, the Advocate deliberately placed these documents on record just to linger on the final execution of the conviction order passed by the Trial Court.

23. Accordingly, while dismissing the present petition being not maintainable, I hereby impose cost of ₹25,000/- upon Shri A.P. Singh, Advocate who played hide and seek with this Court and did not appear before this Court despite communications. The said amount shall be deposited within one week from today in favour of Nirmal Chhaya, Jail Road, Hari Nagar, New Delhi for the welfare of destitute women and children, failing which Registrar General of this Court is directed to recover the amount from abovementioned advocate as per law.

24. In view of above, the petition is dismissed.

25. In addition to above, the order passed by this court be also sent to Delhi Bar Council for necessary action against the advocate named above.
26. Order *dasti* under signatures of the Court Master.
27. Pending applications stand dismissed.

DECEMBER 19, 2019
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(SURESH KUMAR KAIT)
JUDGE

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