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

Judgment Pronounced on: 08th May, 2019

+ CRL.A. 38/2005

DILIP

..... Appellant

Through: Mr.Ashish Kumar Das, Advocate.

versus

STATE

..... Respondent

Through: Mr.Rajat Katyal, APP for State.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

MANMOHAN, J (ORAL)

1. The present appeal has been filed under Section 374(2) of the Code of Criminal Procedure, 1973 challenging the judgment dated 27.10.2004 and order on sentence dated 29.10.2004 passed by the Additional Sessions Judge, Karkardooma Courts, Delhi in S.C. No. 125/2003.
2. The prosecution story in brief is that on 25th September, 2001, the deceased Sanjay had gone to Hanuman Mandir and after taking prasad was playing with Rajiv, nephew of the appellant. It is the case of the prosecution that the appellant subsequently came there and the deceased was last seen in the company of the appellant alongwith one Arjun. On 26th September, 2001, the father of the deceased lodged a missing report.

3. Later on the appellant was arrested and after a full trial convicted by the trial court under Sections 302/201/34 of the Indian Penal Code and was sentenced to life imprisonment.
4. In the present criminal appeal, the appellant had filed an application under Section 2(k) read with Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000.
5. Upon a direction passed by this Court, an Ossification test of the appellant was carried out at Dr. Ram Manohar Lohia Hospital, Delhi.
6. In the report dated 21st February, 2006, the Medical Board concluded that the age of the appellant, as on that date, was approximately 21 years. Accordingly, on the date of the incident i.e., 25th September, 2001, the appellant was aged about 16 years and 7 months. Consequently, on the date of the incident the appellant was a minor as he was below 18 years of age.
7. A Co-ordinate Division Bench of this Court in **Ruby vs. State, 2014 SCC Online Del 2073** has held as under:-

“11. The issue thus arises as to 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. In the decision reported as AIR 1986 SC 1329 Bhoop Ram vs. State of U.P. the Supreme Court held:

“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 CriLJ 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."

12. In the decision reported as 2013 (9) Scale 18 Jitendra Singh @ Babboo Singh & Anr. vs. State of U.P when the conviction of the appellant for offence was sustainable the Supreme Court discarded the school certificate on the ground that as per the school certificate the appellant therein would have been only 13 years and 8 months old and thus the question of his harassing the deceased who happens to be his wife would not arise as he would be a adolescent. The court looked into the medical examination conducted by the Board of Doctors which determined the age of the appellant therein to be around 17½ years old on the date of occurrence. It was held that the appellant was above 16 years of age on the date of commission of offence but certainly below 18 years and hence entitled to the benefit of the 2000 Act, no matter the later enactment was not on the statute book on the date of the occurrence.

The Supreme Court further 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.

.....

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.”

8. We find from the nominal roll that the appellant has spent 4 years 2 months and 23 days in custody—which is much more than the maximum sentence that could be imposed by the Juvenile Justice Board. Accordingly, no useful purpose would be served by sending the present case to the Juvenile Justice Board.
9. Consequently, we dispose of the appeal by upholding the judgment of conviction, but set aside the order on sentence in accordance with Section 19 of the Juvenile Justice (Care and Protection of Children) Act, 2000 which provides that no disqualification shall be attached to the appellant. The appellant who is on bail is set free and his personal bond is cancelled. However, as per Section 437-A Cr.P.C., the appellant is directed to furnish personal bond in the sum of Rs.5,000/- with one surety of the like amount to the satisfaction of the learned Trial Court within a period of two weeks from today, for him to appear before the Supreme Court, as and when the said Court issues notice in respect of the appeal or petition filed against the judgment. The bail bond shall remain in force for a period of six months.
10. Trial court record be sent back. Copy of the judgment be sent to the Superintendent, Central Jail, Tihar, for his record.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

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