

**(2019) 05 DEL CK 0134**

**In the Delhi High Court**

**Case No :** Criminal Appeal No. 971 Of 2001, Criminal Miscellaneous Application  
No. 10607, 10608 Of 2019

Gajinder Singh

APPELLANT

Vs

State

RESPONDENT

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**Date of Decision :** 29-05-2019

**Acts Referred:**

Indian Penal Code, 1860 — Section 34, 302, 392, 397  
Code Of Criminal Procedure, 1973 — Section 173, 482  
Juvenile Justice (Care And Protection Of Children), Act 2000 — Section 7A, 7A(2)

**Citation :** (2019) 05 DEL CK 0134

**Hon'ble Judges :** R.K. Gauba, J

**Bench :** Single Bench

**Advocate :** Akhand Pratap Singh, Bahul Kalra, Kewal Singh Ahuja

**Final Decision :** Disposed Off

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## **Judgement**

1. The appellant along with one another (Arun Kumar) was tried by the court of additional sessions judge in sessions case (26/2000) registered on the basis of report (charge-sheet) under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) submitted upon conclusion of investigation into first information report (FIR) no. 454/1997 of police station Kamla Market and was held guilty, by judgment dated 12.10.2001, on charge for offence under Section 392/34 IPC read with Section 397 of Indian Penal Code, 1860 (IPC). By subsequent order dated 16.10.2001, the trial Judge awarded rigorous imprisonment for five years with fine of Rs. 3,000/- on charge under Section 392/34 IPC besides rigorous imprisonment for seven years with fine of Rs. 3,000/- separately for offence under Section 397 IPC.

2. The present appeal was filed challenging the said judgment and order on sentence in December, 2001. The appeal, however, was not prosecuted diligently, the appellant having avoided appearance, this leading to the appeal being dismissed for non-prosecution by order dated 21.01.2014 of a learned single

judge of this Court, reference having been made in that regard to the ruling of a division bench of this Court in Mukesh vs. State 152 (2008), DLT 201 (DB).

3. In the wake of directions in the order dated 21.01.2014, whereby the trial court had been called upon to take steps to ensure that the appellant was taken in custody to serve the remainder of the sentence (he having been earlier released on bail pending adjudication of the appeal), the appellant was arrested, he having been found to be in judicial custody in another case i.e. FIR No. 27/2009 of police station Special Cell since 11.03.2019. Two applications - Crl.M.A. 10607/2019 (for recall of order dated 21.01.2014) and Crl.M.A. 10608/2019 (for condonation of delay) - have been moved on his behalf. He has been called from jail on production warrant for hearing on the said applications. For reasons set out in the application, the delay is condoned.

4. The registry has placed before the Court a computer generated record of the appeal on the basis of its scanned copy. The learned counsel for the appellant, submitted, at the outset, that he does not press the appeal insofar as it challenged the conviction on merits, his only prayer being for re-visit to the question of sentence, this on the basis of finding which was reported after inquiry confirming the plea raised by the appellant at earlier stages of the appeal as to his juvenility at the relevant point of time.

5. It is noted from the record that the case involved three persons as accused including the appellant herein (he being shown in the array as A-2). The prime accused Raju (A-1) had absconded and was declared proclaimed offender, the proceedings against him not having concluded with the impugned order dated 12.10.2001. The other person who was also brought to trial viz. Arun Kumar (A-3) had been found guilty on the charge under Section 392/34 IPC, he having been awarded rigorous imprisonment for five years with fine of Rs. 3,000/-only. It is pointed out by the additional public prosecutor that Criminal Appeal no. 429/2002 brought by Arun Kumar (A-3) was decided by a learned single judge of this court on 21.01.2014, the same date on which the appeal was disposed of for non-prosecution. In the case of co-convict Arun Kumar (A-3), the learned single judge found sufficient grounds to reduce the rigour of the sentence, treating the period of incarceration (three years nine months) as sufficient to meet the ends of justice.

6. The record of appeal shows that while pressing for suspension of sentence, by application (Crl.M.1543/2003), the appellant herein had taken the plea that on the date of the robbery (03.10.1997) he was less than sixteen years in age, reliance being placed in this regard on certificate of Central Board of Secondary Education (CBSE) reflecting his date of birth to be 08.01.82. The learned single Judge, then in seisin of the matter, by order dated 20.05.2004, had directed the release of the appellant on bail suspending the sentence and, in the meanwhile, an inquiry to be held by the trial Court regarding the age of the appellant and for a report to be submitted within four months thereof. The record further reveals that in the course of inquiry presided over by the additional sessions judge, the

appellant was sent for radiological opinion to Maulana Azad Medical College whereupon he was examined by Dr. Anil Aggarwal (witness no.1), a professor of Forensic Medicine who had given opinion. As per the opinion (Ex.CW-1/A) of the said medical officer, which was submitted by the additional sessions judge with his report dated 01.10.2004, the age of the appellant at that point of time was assessed to be between 21 and 22 years. This would corroborate the plea that on the date of robbery, the appellant was less than 16 years old, as is the import of the date of birth reflected in the CBSE certificate.

7. The appellant was released on bail, the sentence having been suspended on 20.05.2004. The appeal had been admitted and was to come up from regular board. It came up for hearing thereafter for the first time on 09.09.2013. The appellant had not appeared and this led to notices being issued to him and to his surety in addition to notice to his counsel. Since none appeared on his behalf on the next date, bailable warrants were issued, the same returning with report that he was not traceable, this eventually resulting in order dated 21.01.2014 being passed whereby the appeal was dismissed for non-prosecution. It is clear from a bare perusal of the order dated 21.01.2014 (whereby the appeal was dismissed) that the report dated 01.10.2004 of the additional sessions judge (pursuant to earlier directions of this Court) confirming the juvenility of the appellant at the relevant point of time escaped the notice of the learned single judge. This has vitiated the final order whereby the appeal was disposed of. The ends of justice demand that this Court in exercise of its inherent power under Section 482 Cr.P.C. recall the order 21.01.2014 for the added reason that no one should suffer on account of error on the part of the court. Ordered accordingly. In the consequence, the appeal stands restored for consideration on merits.

8. The learned counsel for the appellant refers to an earlier decision of this Court in Crl.Appeal no. 793/2000 Rishi Kapoor Alias Rishi vs. State decided on 12.12.2018 wherein more or less similar fact-situation prevailed. The relevant portion of the said judgment may be extracted as under:-

"8. The offence which is the subject matter of the present case was committed on 14.03.1994. At that point of time, Juvenile Justice Act, 1986 governed the field. The Juvenile Justice (Care and Protection of Children), Act 2000 came to be enacted and brought into force with effect from 28.02.2001. The said law was subsequently amended at least twice and has since been replaced by the Juvenile Justice (Care and Protection of Children) Act, 2015. Be that as it may, immediately after the appeal at hand had been presented, the Act of 2000 had come to be enforced. In terms of the amended law as introduced in February 2001, the expression "juvenile" would mean a person who had not completed eighteen years of age and the expression "juvenile in conflict with law" would similarly mean a juvenile who is alleged to have committed an offence and had not completed eighteen years of age as on the date of commission of such offence. By virtue of Section 7-A, which was inserted in the Act of 2000, by amendment introduced with effect from 22.08.2006, the claim of juvenility could

be raised before any court for benefit of the amended law to be taken any time, there being inclusion of a special provision to take care of pending cases, including at the stage of appeal (Section 20).

9. In Abdul Razzaq (supra), the petitioner had been found guilty of the offences under Section 302 IPC and sentenced to life imprisonment by the court of Sessions. The conviction and sentence was confirmed by the High Court in appeal and the special leave petition, followed by a review petition, was dismissed by the Supreme Court, the last order having been rendered on 20.07.2010. The claim of the said person being a juvenile on the date of commission of the offence, upon inquiry, was found to be correct.

10. Against the above said backdrop, the Supreme Court noted the ruling in an earlier decision reported as Jitendra Singh alias Babboo Singh and Anr. vs. State of Uttar Pradesh, (2013) 11 SCC 193 laying down as under :-

"80. The settled legal position, therefore, is that in all such cases where the accused was above 16 years but below 18 years of age on the date of occurrence, the proceedings pending in the court concerned will continue and be taken to their logical end except that the court upon finding the juvenile guilty would not pass an order of sentence against him. Instead he shall be referred to the Board for appropriate orders under the 2000 Act. Applying that proposition to the case at hand the trial court and the High Court could and indeed were legally required to record a finding as to the guilt or otherwise of the appellant. All that the courts could not have done was to pass an order of sentence, for which purpose, they ought to have referred the case to the Juvenile Justice Board.

81. The matter can be examined from another angle. Section 7-A(2) of the Act prescribes the procedure to be followed when a claim of juvenility is made before any court. Section 7-A(2) is as under:

"7-A.Procedure to be followed when claim of juvenility is raised before any court.-

(1)\*\*\*

(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."

82. 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 (sic no) 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 *expressio unius est exclusio alterius*, it would be reasonable to hold that the law insofar 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. 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 7-A(2) of the Act.

11. It was also noted that in *Union of India Vs. Ex-GNR Ajeet Singh*, (2013) 4 SCC 186 had held that :-

19. The provisions of the JJ Act have been interpreted by this Court time and again, and it has been clearly explained that raising the age of "juvenile" to 18 years from 16 years would apply retrospectively. It is also clear that the plea of juvenility can be raised at any time, even after the relevant judgment/order has attained finality and even if no such plea had been raised earlier. Furthermore, it is the date of the commission of the offence, and not the date of taking cognizance or of framing of charges or of the conviction, that is to be taken into consideration. Moreover, where the plea of juvenility has not been raised at the initial stage of trial and has been taken only on the appellate stage, this Court has consistently maintained the conviction, but has set aside the sentence.

12. Following the said rulings, in case of *Abdul Razzaq (supra)* while leaving the conviction undisturbed, the sentence awarded against him was set aside. On being asked, the learned Additional Public Prosecutor submitted that he had nothing to say in the face of the ruling in *Abdul Razzaq (supra)*.

13. The facts and circumstances being similar to the case of *Abdul Razzaq (supra)*, the same dispensation is followed in the present case. The benefit of amended benevolent law on juvenility has to be accorded. Thus, while maintaining the conviction, the sentence of the appellant is set aside".

9. The learned additional public prosecutor, on being asked, fairly conceded that the decision of Supreme Court in *Abdul Razzaq vs. State of UP* (2015) 15 SCC 637, as indeed the earlier decision in *Jitendra Singh alias Babboo Singh (supra)* will have to be applied to the present case.

10. In the foregoing facts and circumstances, while maintaining the conviction, the sentence of the appellant is set aside. A direction shall be issued to the superintendent jail that the appellant shall not be detained in prison on account of the present case.

11. The appeal is disposed of in above terms.