
(2014) 10 DEL CK 0220

In the Delhi High Court

Case No : Crl. A. No. 1420 of 2013 and Crl. M.B. No. 259 of 2014

Ruby

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 16-10-2014

Acts Referred:

Juvenile Justice Act, 1986 — Section 15, 19

Penal Code, 1860 (IPC) — Section 302, 34

Uttar Pradesh Children Act, 1951 — Section 2(4), 29

Citation : (2014) 4 JCC 2997

Hon'ble Judges : Pradeep Nandrajog, J; Mukta Gupta, J

Bench : Division Bench

Advocate : Ashu Kumar Sharma, Advocate and Party-in-Person, Advocates for the Appellant; Lovkesh Sawhney, A.P.P, Advocates for the Respondent

Judgement

Mukta Gupta, J.—The appellant and one Jai Ram have been convicted by the learned Trial Court for offence punishable under Sections 302/34 IPC vide impugned judgment dated October 26, 2013 and directed to undergo imprisonment for life and to pay a fine of Rs. 10,000/- vide order dated October 30, 2013. During the pendency of the appeal, the appellant filed bail application being Crl. M.B. No. 259/2014 seeking suspension of sentence on the ground that the appellant was a juvenile at the time of commission of the alleged offence. Along with the application the appellant has placed on record the birth certificate from the Municipal Corporation of Delhi wherein the date of birth of the appellant was noted as August 04, 1993. The said date of birth was registered with the Municipal Corporation of Delhi on December 28, 1993. This date of birth unequivocally proves that the appellant was less than 18 years of age at the time of alleged offence which took place on September 18, 2010. It is trite law that the plea of juvenility can be raised at any stage of the proceedings and even after the proceedings have culminated till the Supreme Court.

2. This plea of juvenility was raised by the appellant during the course of trial as well and the Juvenile Justice Board vide its order dated May 14, 2012 held that

the appellant's date of birth as per the certificate issued by the school was August 04, 1992 and thus she was more than 18 years of age on the date of commission of alleged offence i.e. September 18, 2010. The appellant was held to be not a juvenile which finding was challenged by the appellant before this court in Crl. Revision Petition No. 587/2012. This Court also vide its decision dated January 14, 2013 concurred with the Juvenile Justice Board. However, at the stage of inquiry conducted by the Juvenile Justice Board and the revision petition before this Court, the appellant had not produced her date of birth certificate from the municipal records which have now been produced. We would like to note that the father of the appellant has passed away and the allegations against the appellant are that in connivance with Jai Ram the appellant committed the murder of her mother Ishwanti. Thus with no parents to look after, the appellant was certainly prejudiced and could not have produced all the records during the inquiry and had thus sought ossification test which was declined both by the Juvenile Justice Board and this Court.

3. When the matter came up before this court in the present appeal the appellant produced the certificate of birth issued by the Municipal Corporation of Delhi which was registered on December 28, 1993 depicting her date of birth as August 04, 1993. The certificate mentions the name of the appellant and her parents. This birth certificate has been found to be genuine by the State, in the course of the present proceedings the appellant sought to challenge the order dated January 14, 2013 passed by this Court dismissing the Crl. Revision Petition No. 587/2013 but the same was withdrawn to take a legal remedy against the same. Though this Court will not be sitting in the appeal over the said decision in the present appeal however, once the issue of juvenility has been re-raised along with an additional document which is an authentic document duly verified by the State, we have proceeded to hear the matter. During the course of arguments, learned counsel on instructions from the appellant confined her appeal only on this aspect, we are unable to agree with the contention of the learned counsel for the State that the plea of juvenility of the appellant having attained finality on the earlier inquiry report, this Court cannot re-look into the same. It is well settled that the plea of juvenility can be raised at any stage even after the culmination of the proceedings till the Supreme Court and in the present case since a cogent evidence in the form of birth certificate from the Municipal Corporation of Delhi has been produced by the appellant, we are of the considered view that this plea needs to be reconsidered.

4. As per the Rule 12(3) of the JJ Rules in every case concerning a child or a juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or Board by seeking the 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 or one year."

5. Rule 12(3) of the JJ Rules also states that while passing orders in such cases and regarding a finding in respect of the age either by 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. Thus in the absence of matriculation or equivalent certificate the Court can look into the date of birth certificate from the school first attended and in the absence thereof as well taking into consideration the birth certificate given by a Corporation or a Municipal Authority or a Panchayat. Rule 12 prescribes the procedure to be followed in determining the age however, while following this procedure the rule of evidence with regard to the reliability of the document cannot be given a go by and the best evidence should be relied upon. Thus in case the age mentioned in the matriculation certificate or the date of birth certificate from the school first attended is without the basis of any contemporaneous document and renders unreliable on a prima facie inquiry, the court can take into consideration the birth certificate given by a corporation or a Municipal Authority or a Panchayat if the same is contemporaneous in nature and more authentic.

6. In the present case the appellant has not studied upto matriculation and thus no such certificate is available. As per the school record, the appellant was first admitted on April 24, 1997 and her date of birth was recorded as August 04, 1992 in Class-1st. According to the CW-1 who appeared in the witness box the admission of the girl was on the basis of admission form filled up by Chander Bhan the appellant's father. It is thus evident that the said date of birth was not based on any contemporaneous document or government or public document but merely on the basis of what was filled in by the father. Though Rule 12 prescribes that in the absence of date of birth mentioned in the certificate from the school first attended, the date of birth as mentioned in the Municipal records can be looked into however, in our opinion giving such a strict interpretation to the provision would be contrary to the rule of best evidence and value should be attached more to a document which is more authentic. A school certificate giving the date of birth which is not based on any contemporaneous document cannot have a better evidentiary value than the date of birth mentioned in the municipal records which was got registered immediately after the birth of the child. This material document was neither before the Juvenile Justice Board while

conducting the inquiry into the age nor before this Court at the time of hearing of the revision petition.

7. In the decision reported as *Ashwani Kumar Saxena Vs. State of M.P.*, the Supreme Court held that the age determination inquiry contemplated under the JJ. Act and Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by Corporation or a Municipal Authority or a Panchayat may not be correct but the Court, J.J. Board or a Committee functioning under the JJ. Act is not excepted to conduct such a loving enquiry and go behind those certificates to examine the correctness of those documents, kept during the normal course of business, only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the JJ. Board or the Committee need to go for medical report for age determination.

8. Indubitably determination of age by getting the ossification test done should be last resort in the absence of certificates of matriculation, school first attended or from the municipal record. The appellant has always been contending that the date of birth given by her father in the school was not as per the record which fact has also been proved by the statement of CW-1 who appeared from the school. NO doubt, this Court will not do roving and fishing inquiry however at the same time it will not be rely on unauthentic documents. The genuinity of a document can also be based on the contents thereof and if the Contents of the document/certificate are not found genuine, the same should be discarded, it is a rule of prudence that best evidence should always be accepted.

9. It is trite law that while conducting an inquiry into the age a full-fledged trial is not required to be conducted however, in the absence of complete record there can be an error in the prima facie finding on the plea of juvenility and thus this court is required to relook into the matter specially when this is a beneficial provision and is required to be followed strictly in favour of the juveniles. On the basis of the birth certificate issued by the Municipal Corporation of Delhi which is placed on record as. Ex. "C" we hold that the appellant was a juvenile at the time of commission of alleged offence i.e. September. 18, 2010 being born on August 04, 1993.

10. 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 and another Vs. State of Uttar Pradesh*, 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."

11. In the decision reported as *Jitendra Singh @ Babboo Singh and Another 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 17 1/2 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.

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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."

12. In the present case we find from the nominal roll that the appellant has spent 3 years 1 month and 10 days of actual incarceration beside the remissions when her sentence was suspended by this Court. Even as per Section 15 of the JJ. 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.

13. Consequently, we dispose the appeal and the application by upholding the judgment of conviction however, setting aside the order on sentence as per provisions of Section 19 of the JJ. Act which provides that no disqualification would be attached to the appellant. The appellant who is on bail is set free and her bail bond and surety bond are cancelled.

14. T.C.R. be returned. Copy of the judgment be sent to the Superintendent, Central Jail, Tihar for his record.