
(2010) 11 AHC CK 0324
In the Allahabad High Court
Case No : Criminal Revision No. 595 of 2008

(Smt.) Leena Katiyar

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 12-11-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167, 53
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 7A
Penal Code, 1860 (IPC) — Section 201, 302, 364A, 62B
Uttar Pradesh Juvenile Justice (Care and Protection of Children) Rules, 2004 — Rule 22(5)

Citation : (2010) 11 AHC CK 0324

Hon'ble Judges : Naheed Ara Moonis, J

Bench : Single Bench

Judgement

Naheed Ara Moonis, J.—The instant revision has been preferred by the complainant (revisionist) against the judgment and order dated 24.1.2008 passed by Additional Sessions Judge /Special Judge (D.A.A.) Farrukhabad in S.S.T. No. 40 of 2007 arising out of Case Crime No. 467 of 2007 under Sections 364A/302/201 IPC Police Station Kotwali Fatehgarh whereby the accused opposite party No. 2 has been declared juvenile and the application u/s 62B has been allowed. It was further directed that the opposite party No. 2 be sent to government observation home after changing his custody from Superintendent District Jail Fatehgarh and the trial of the opposite party No. 2 who has been declared juvenile be separated from other accused persons and for framing the charges record be placed on 8.2.2008.

2. Initially this matter came up before another Bench of this Court and the Hon'ble Single Judge was pleased to pass the order on 7.3.2008 directing the learned Counsel for the parties to file counter and rejoinder affidavits by 17.3.2008. Till then the proceedings in Sessions Trial No. 40 of 2007 and the operation of the order impugned were stayed.

3. Briefly the facts of the case are that the opposite party No. 2 who is stated to

be involved in the aforesaid case moved an application No. 62 B dated 16.10.2007 that at time of incident i.e. 11.4.2007 , the opposite party No. 2 (Happy @ Shivam @ Harsh) was less than 18 years of age and according to Juvenile Justice (Care & Protection of Children)Act 2000 , the opposite party No. 2 whose date of birth is 10.7.1989 is only 17 years ,9 months and one day old is a minor. In support of juvenility ,the opposite party No. 2 filed High School Certificate and prayed that his case cannot be heard together with other accused persons therefore, his trial may be separated and may be transferred to the Juvenile Justice Board Farrukhabad. In addition to High School Certificate, the opposite party No. 2 had adduced school leaving certificate ,Identity card of High School Examination,Mark Sheet of High School examination, certificate of Intermediate Examination and the mark sheet of Intermediate Examination ,photo copy of the passport certificate, birth registration certificate from Nagar Palika Parishad Farrukhabad , character certificate issued by Principal ,Ram Lal Singh Higher Secondary School Paharpur Shahjahanpur , service book of his father, identity card issued by Venkateshwar Degree College New Delhi ,death certificate of Harsh , alleged elder brother of opposite party No. 2 and lastly the medical certificate of District Jail Fatehgarh wherein his date of birth is mentioned as 17 years. Besides documentary evidence, Mahendra Pal Singh C.W.2 and Kasim Husain C.W.3 were examined who gave oral evidence in support of his case. They had proved the school register, transfer certificate of High School & Intermediate , date of birth certificate of opposite party No. 2 and the death certificate of Harsh , the brother of opposite party No. 2. C.W.4 Om Prakash Katheriya who is the father of the opposite party No. 2 was also examined. On behalf of the complainant (revisionist) Shivi George Officer Incharge Saint Anthony School Fatehgarh was produced . He proved that Harsh, the brother of the opposite party No. 2 received education from his College where the date of birth of Harsh is 2.12.1986 . Harsh was admitted in K.G. in his school in the year 1990. The opposite party No. 2 was produced for the first time on 1.5.2007 before the court below and at that time he was the student of Vaikanteshwar Degree College New Delhi where his date of birth is mentioned as 10.7.1989. On the strength of aforesaid evidence , the contention on behalf of the revisionist before the court below was that Happy alias Shivam alias Harsh is the name of one person . He was major at the time of incident therefore, his application for declaring him juvenile is unfounded, vague and cryptic . There is no justification to get the trial of the opposite party No. 2 separated from other accused persons. The court below keeping in view the provisions of Rule 22 (5) of U.P. Juvenile Justice (Care & Protection of Children) Rule 2004 and also taking into account the oral and documentary evidence as well as the case law cited on behalf of both the parties arrived at the conclusion the opposite party No. 2 was juvenile at the time of incident arrived . The date of birth of the opposite party No. 2 was 10.7.1989 at the time of incident i.e. 11.4.2007. Since the opposite party No. 2 was found to be less than 18 years in accordance with Juvenile Justice Act 2000 he was declared juvenile ,therefore, the matter was sent to the Juvenile Justice Board for trial by the impugned order dated 24.1.2008.

4. Main thrust of learned Counsel for the revisionist that the revisionist who is an unfortunate mother of the victim and had lodged first information report against the opposite party No. 2 and others persons has been deprived of justice as the order passed by the court below is based on wrong appreciation of facts ,wrong appraisal of evidence and illegal application of law therefore, the order passed by the court below is per se erroneous and untenable. It has also been submitted by the learned Counsel for the revisionist that when the application was moved claiming juvenility of the opposite party No. 2 and the affidavit was filed on his behalf by his mother Chandra Mukhi it was specifically claimed that his date of birth according to High School examination is 10th July 1989 and the application has been mentioned to have been moved by applicant Shivam alias Happy alias Harsh. This assertion of the opposite party No. 2 is hit by Section 7A of the Juvenile Justice Act 2000. Anyone who claims one's own right should be definite . In case the opposite party No. 2 in his affidavit asserted that he is Shivam alias Happy alias Harsh at the later stage it cannot be said that Harsh is not Shivam alias Happy and Harsh is elder brother of the opposite party No. 2. This fact was never raised and asserted in the application/affidavit dated 16.2.2007. Learned Special Judge allowed the arguments advanced before him with regard to those new facts by allowing to say that the accused Shivam alias Happend alias Harsh is elder brother of Shivam alias Harsh who had died much earlier. The claim of his being juvenile is also untenable as it was never pleaded either in the bail application moved before High Court or before the court below and even when he was produced first for being taken on remand u/s 167 Code of Criminal Procedure on subsequent dates. Such claim was never made praying for bail before any court of law therefore, the plea of juvenility raised by the opposite party No. 2 after consultation and deliberation so that the presiding officer had passed the order dated 1.5.2007 for transporting him to New Delhi to negative the steps to be taken for police remand by the investigating agency u/s 167 Code of Criminal Procedure By filing affidavit in support of the application claiming for juvenility ,the mother of the opposite party No. 2 had not claimed that the name of the accused is not Harsh which has been signed and duly verified by her . Before moving application before this Court on 16.6.2007, the name of the accused is mentioned as Happy alias Shivam alias Harsh. It was also argued by the learned Counsel for the revisionist that the claim must be definite ,certain and crystallized . At one place the opposite party No. 2 had adduced the High School certificate showing that he is minor , on the other hand there is clear admission of the opposite party No. 2 that he is possessing National Credit Card (VIZA) issued by ICCI Bank ,Master Card issued by City Bank as well as SBI Cash Card and Shoppers Card of City Bank . These cards are issued under the Negotiable Instrument Act and the entries therein also admissible under the Evidence Act . These cards are only issued under the Instrument Act who is able to contract and the persons who has attained the age of majority . The opposite party No. 2 is having the aforesaid cards therefore, he is admittedly major. The opposite party No. 2 has taken two contradictory stands which has altogether been ignored by the Special Judge that the accused had

initially pleaded that he is major and is having various credit cards of Bank. But subsequently changes his stand by stating that he is minor below than 18 years age and he is juvenile offender . It has been laid down by Apex Court that a party cannot claim contradictory stand in the same case . Such a claim should be discarded altogether.

5. The next point submitted by learned Counsel for the revisionist is that at the time of issuance of ration card ,application was moved by the mother of the opposite party No. 2 showing respective age of the family members wherein the age of the opposite party No. 2 is mentioned as 20 years which is not in consonance with the age as mentioned in the High School certificate. The entry as mentioned in the Municipal Record regarding birth taken on 25.6.2003 as claimed by him is 10.7.89 therefore, the entries were not made in discharge of ordinary course of business because birth of a person can be entered in the record within 21 days from the date of birth. The registration of birth of opposite party No. 2 has been made in violation of principles of Birth & Death Act 1969 as in case the birth is to be registered after the expiry of one year from the date of birth, it can be done by the order of the Magistrate Ist class and deposit of late fee is also provided for such registration. In the present matter, there was neither any specific order of the Magistrate nor is there any receipt of making payment as late fee for registration. These documents of municipal corporation are also forged and sham . The order of entering date of birth has been made after lapse of fourteen years which itself creates doubt about the genuineness of the documents. It has further been contended that there are glaring irregularities in the municipal record since there are several over writings and cuttings which entails doubt about the malpractice committed by the authorities concerned at the instance of the father of opposite party No. 2 who was examined as C.W.4 Om Prakash Katheriya. The court below was swayed away by the erroneous and bogus entries and accorded the benefit of juvenility ignoring the gravity of the charge against the opposite party No. 2. The court below instead of discarding the documents showing over writings and cuttings in the register had accepted the same for determining the age of the accused opposite party No. 2. The court below has completely over sighted that the entries had been made after lapse of 14 years of the birth of opposite party No. 2 having cuttings and over writings in the municipal record which were not signed or initialled by anyone . Learned Counsel below has relied upon the age as mentioned in the pass port which was neither correct nor authentic rather it was made on the basis of guess therefore, it has no evidentiary value. The court below has wrongly placed onus upon the prosecution while the revisionist has proved that the accused opposite party No. 2 was not juvenile at the time of occurrence rather the opposite party No. 2 has been declared as juvenile offender which is totally against the own admission of the opposite party No. 2. The court below ought to have examined the witnesses who could prove the claim of the accused who had wrongly placed the burden upon the prosecution which is against the settled preposition of law as laid down by the Apex Court in a catena of decisions.

6. Shivi George, C.W.1 who was the officer incharge of Saint Anthony Senior Secondary School Fatehgarh was examined first who had categorically stated that his age was described to be 2.12.1986 in the school record. This plea was in accordance with provisions of Rule 22 (5) of Juvenile Justice (Care & Protection of Children) Rules for establishing that the claim of the juvenility set up by the accused is not tenable. Subsequent thereto, the opposite party No. 2 was given considerable time to change his stand in which he had succeeded in his foul design. If the opposite party No. 2 would have discharged his burden of proving his case, C.W.1 Shivi George would have been required to be examined by the revisionist for proving that the date of birth as claimed by the opposite party No. 2 is not correct . The court below was completely misled in examining and appreciating the documents adduced by the revisionist first and had made wrong appraisal of the documents led on behalf of the opposite party 2 on account of which he had given undue benefit to the accused opposite party No. 2 by observing that the revisionist had failed to discharge his onus of proof while the burden of proof with regard to age was upon the accused opposite party No. 2 which opposite party No. 2 had failed to prove by adducing admissible and cogent evidence . No adverse inference can be drawn by the court below while there is conflicting and contradictory evidence led from the side of the opposite party No. 2. The finding recorded by the court below is intrinsically erroneous and is also against the verdict of Hon"ble Apex Court therefore, the order passed by the court below being patently erroneous may be set aside.

7. Next submission advanced by learned Counsel for the revisionist is that the medical report also confirms that the age of accused opposite party No. 2 was about 21 years. The said report was based upon the ossification test of the bones which was done by the panel of five doctors . The report given by the medical board on 27.11.2007 discloses that the opposite party No. 2 was aged about 21 years . The report of medical examination is also an essential document to ascertain the age of a person . In this regard the rules have been framed under U.P. Juvenile (Care & Protection) Rules 2004 . Rule 22 (5) (iv) of the said rule envisages that in the absence of a birth certificate given by the corporation or municipal authority or date of birth certificate from the school first attended or municipal corporation or equivalent certificate if available ,the medical opinion given by duly constituted medical Board would be relant for determining age of a person as to whether he is juvenile or not. Therefore, the medical board constituted by a team of five doctors including Chief Medical Officer has on the basis of ossification test of bones found the age of the opposite party No. 2 as to be 21 years but the court below completely ignored the opinion and report of the medical board and has not recorded any conclusion with regard to the opinion given by the medical expert which is most vital piece of evidence. The learned court below has completely misinterpreted the medical jurisprudence and the textology of Modi, Jhalla and Cox which contain definite opinion about the age of person on the basis of fusion of bones of a person. The court below was completely misled in looking the opinion of expert . There are several decisions

to this effect that there can be a variation of one year or two either side with the opinion regarding age based on the ossification test ,if the test is done for multiple joints with overlapping age of fusion , the margin of error can be reduced and this margin can be reduced to six months because of advanced medical technology like X.ray machines and computerised result therefore, this margin can be reduced to six months . The court below in utter disregard of the text book of medical jurisprudence has also not given cogent reasons for discarding the same . When the medical board was consist of expert body ,due weight ought to have been given to the said report which has confirmed that the age of the opposite party No. 2 is 21 years . The court below has completely ignored the gravity of the offence in which the opposite party No. 2 is involved therefore, the order passed by the court below is untenable and is liable to be set aside.

8. Per contra learned Counsel appearing on behalf of the opposite party No. 2 has controverted the contention of the learned Counsel for the revisionist by submitting that the order passed by the learned court below is perfectly just and legal and is based on appreciation of evidence adduced by the parties therefore, there is no illegality in arriving at the conclusion that the opposite party No. 2 was minor at the time of incident and therefore, his case was rightly separated from other accused persons.

9. Heard submissions advanced by learned Learned Counsel for both the parties at length and taken through the record.

10. The present revision has been filed against the order of Court of Sessions u/s 53 of the Act which provides that the High Court may at any time either of its own may or on an application received on that behalf call for record of any proceedings in which any competent authority or court of sessions has passed the order for the purpose of satisfying itself as to legality or propriety of any such order and may pass any such order in relation thereto as it thinks fit therefore, while exercising such revisional power this Court cannot convert itself to an appellate court and reverse the finding of fact arrived at by the trial court on the basis of evidence or material on record except where the High Court is not satisfied as to the legality or propriety of the order passed by the trial court . The trial court has not given any cogent reason for discarding categorical finding recorded by the Medical Board that the opposite party No. 2 is 21 years of age though the opinion of the Board was based on clear fusion of joints and is confirmed by the established norms in the field of medicine and radiology . As expert opinion becomes primary evidence for reaching to a conclusion about age of the accused. Learned Counsel for the revisionist has raised certain points viz .own admission of the mother of opposite party No. 2 about his identity and age mentioned in the municipal record and contradictory stand of the opposite party No. 2 with regard to having credit cards and availing bank facilities yet claiming to be juvenile on the basis of High School certificate. The disproving of some evidence of the revisionist and acceptance of some evidence adduced by

the opposite party No. 2 in support of his claim that he was a juvenile at the time of commission of alleged offence need reconsideration as this Court would not substitute its own finding for that of the trial court by re-appreciating the evidence which cannot be decided by this Court in exercise of revisional jurisdiction, therefore, this matter is remitted to the trial court to pass fresh orders in accordance with the procedure prescribed under the Act of 2000 after considering the objections raised by the learned Counsel for the revisionist and learned Counsel for the opposite party No. 2 . Learned Counsel for both the parties are at liberty to raise all the issues/ points before the trial court which will be considered and decided by the trial court in true perspective by giving ample opportunity to rebut the same . The trial court will pass appropriate orders in accordance with law without being influenced by the order passed by this Court.

11. This revision is disposed of as above.