

Faeem vs.state

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Court : Delhi

Decided On : Jan-08-2019

Appellant : Faeem

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. 980/2004 and Crl.M.A.9483/2009 IN THE MATTER OF: FAEEM STATE Date of Decision:

08. 01.2019 Appellant Through : Mr. Sumeet Verma & Mr. Satyam Sharma, Advocates versus Respondent Through Ms. Aashaa Tiwari, APP CORAM: HON'BLE MS. JUSTICE HIMA KOHLI HON'BLE MR. JUSTICE MANOJ KUMAR OHRI MS. HIMA KOHLI, J.

(ORAL) 1. The present appeal is directed against the judgment dated 06.04.2004, passed by the learned ASJ in SC No.95/2003, arising out of FIR No.90/2000 registered at PS Geeta Colony under Sections 302/324/120B/34 IPC. The appellant herein was arrayed in the case as accused No.1. Under the impugned judgment, the appellant and two co-accused were convicted for the offence punishable under Sections 302/3

IPC. Vide order dated 08.04.2004, on the point of sentence, each of the three co-accused were sentenced to life imprisonment for the offence punishable under Sections 3

IPC and were directed to pay fine of Rs.20,000/- each. In default of payment of

fine, the accused were sentenced to undergo SI for 2 years each. They were also sentenced to CrI.A.980/2004 Page 1 of 16 undergo RI for 2 years each for the offence punishable under Sections 3

IPC. Both the sentences were directed to run concurrently.

2. The present appeal directed against the impugned judgment and order on sentence was admitted for regular hearing on 07.12.2004. In the year 2009, the appellant moved an application (CrI. M.C. 9483/2009) praying inter alia for quashing the order of sentence and for referring his case to the Juvenile Justice Board for disposal, as a case under Juvenile Justice (Care and Protection of Children) Act, 2000 (in short, J.

J.

Act, 2000). Notice was issued on the said application on 07.08.2009 and vide order dated 27.01.2010, it was directed that the issue raised in the application would be taken up at the time of hearing the appeal.

3. Mr. Sumeet Verma, learned counsel for the appellant states that in the meantime, the appellant had been released on bail vide order dated 07.07.2009. As per the Nominal Roll on record, as on 12.06.2009, the appellant had undergone the sentence for a period of 8 years 7 months and 9 days and earned remission for a period of 1 year 7 months and 10 days.

4. Learned counsel for the appellant states on instructions that the appellant does not propose to challenge the impugned judgment of conviction on merits and wishes to confine the relief in the appeal to quashing of the order on the point of sentence by extending him the benefit of the J.J.

Act on the ground that he was a minor at the time of commission of offence. To substantiate the said submission, learned counsel places reliance on the bone ossification test conducted on the appellant at the Deen Dayal Upadhyaya Hospital, New Delhi. A copy of the Ossification Test Report dated 20.04.2001 (Ex.PW-1/A) has been enclosed with the application. As per the said report, the appellants age was less than 21 CrI.A.980/2004 Page 2 of 16 years and more than

17 years. Learned counsel for the appellant points out from the record that the date of the crime was 19.10.2000 and the impugned judgment was rendered by the trial court after three years and five months on 06.04.2004, wherein it has been erroneously observed that on the date of the offence, the J.J.

Act, 2000 had not come into force. He states that the statute had been notified on 01.04.2001 and it was very much in force on the date of the judgment.

5. On the application of the said enactment to pending cases, learned counsel for the appellant places reliance on Section 20 of the J.

J.

Act, 2000 that deals with the special provisions in respect of pending cases to urge that the said provision would apply in all pending cases or criminal proceedings regarding a Juvenile in conflict with law and for the determination of the juvenility of such a juvenile, he refers to the explanation appended to Section 20 that states the same had to be evaluated in terms of clause (l) of Section 2 of the Act that defines a juvenile in conflict with law, even if the said juvenile ceases to be so, on or before the commencement of the Act. Section 7 A of the J.

J.

Act, 2000 has also been quoted by learned counsel. The said provision prescribes the procedure to be followed when a claim of juvenility is raised before any court.

6. For purpose of ready reference, it is considered expedient to reproduce Sections 7 A and 20 of the J.

J.

Act that state as follows:-

"Section 7A- Procedure to be followed when claim of juvenility is raised before any Court: (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a Crl.A.980/2004 Page 3 of 16 juvenile on the date of commission of the offence, the court shall make an inquiry, take such

evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be: Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act. (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 orders and the sentence, if any, passed by a court shall be deemed to have no effect.

20. Special provision in respect of pending cases. Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence. CrI.A.980/2004 Page 4 of 16 Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile. Explanation. In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (l) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.

7. Coming next to the relevant Rules, i.e., the Juvenile Justice (Care and Protection of Children) Rules, 2007 (in short J.

J.

Rules) the attention of this Court is drawn to Rule 12 (3) (b) that prescribes the procedure to be followed for determination of age and contemplates the nature of enquiry required to be conducted by the Court or the Board in every case relating to a child or a juvenile in conflict with law. The said provision reads as under:-

"Rule-12

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose. Crl.A.980/2004 Page 5 of 16

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking 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 of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and

either of the evidence specified in any of the clauses (a)(i), Crl.A.980/2004 Page 6 of 16 (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.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule

(3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub- rule

(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

8. In support of his argument that a claim of juvenility can be raised at any stage before any court, learned counsel has cited Hari Ram vs. State of Rajasthan (2009) 13 SCC211 that states as follows: Crl.A.980/2004 Page 7 of 16 49. The effect of the proviso to Section 7-A introduced by the amending Act makes it clear that the claim of juvenility may be raised before any court which shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in the Act and the Rules made thereunder which includes the definition of "juvenile" in Sections 2(k) and 2(l) of the Act even if the juvenile had ceased to be so on or before the date of commencement of the Act.

50. The said intention of the legislature was reinforced by the amendment effected by the said amending Act to Section 20 by introduction of the proviso and the Explanation thereto, wherein also it has been clearly indicated that in any pending case in any court the determination of juvenility of such a juvenile has to be in terms of Section 2(l) even if the juvenile ceases to be so "on or before the date of commencement of this Act" and it was also indicated that the provisions of the Act would apply as if the said provisions had been in force for all purposes and at all material times when the alleged offence was committed.

51. Apart from the aforesaid provisions of the 2000 Act, as amended, and the Juvenile Justice Rules, 2007, Rule 98 thereof has to be read in tandem with Section 20 of the Juvenile Justice Act, 2000, as amended by the Amendment Act, 2006, which provides that even in disposed of cases of juveniles in conflict with law, the State Government or the Board could, either suo motu or on an application made for the purpose, review the case of a juvenile, determine the juvenility and pass an appropriate order Under Section 64 of the Act for the immediate release of the Crl.A.980/2004 Page 8 of 16 juvenile whose period of detention had exceeded the maximum period provided in Section 15 of the Act i.e. 3 years.

52. In addition to the above, Section 49 of the Juvenile Justice Act, 2000 is also of relevance and is reproduced hereinbelow: 49. Presumption and determination of age.-(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be. (2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person. 53. Sub-section (1) of Section 49 vests the competent authority with the power to make due inquiry as to the age

of a person brought before it and for the said purpose to take such evidence as may be necessary (but not an affidavit) and shall record a finding as to whether the person is a juvenile or a child or not, stating his age as nearly as may be.

54. Sub-section (2) of Section 49 is of equal importance as it provides that no order of a competent authority would be deemed to have become invalid merely on account of any subsequent proof CrI.A.980/2004 Page 9 of 16 that the person, in respect of whom an order is made, is not a juvenile or a child, and the age recorded by the competent authority to be the age of the person brought before it, would, for the purpose of the Act, be deemed to be the true age of a child or a juvenile in conflict with law.

55. Sub-rule (3) of Rule 12 indicates that the age determination inquiry by the court or Board, by seeking evidence, is to be derived from: (i) the matriculation or equivalent certificates, if available, and in the absence of the same; (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; 56. Clause (b) of Rule 12(3) provides that only in the absence of any such document, would a medical opinion be sought for from a duly constituted Medical Board, which would declare the age of the juvenile or the child. In case exact assessment of the age cannot be done, the court or the Board or as the case may be, the Child Welfare Committee, for reasons to be recorded by it, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on the lower side within a margin of one year.

57. As will, therefore, be clear from the provisions of the Juvenile Justice Act, 2000, as amended by the Amendment Act, 2006 and the Juvenile Justice Rules, 2007, the scheme of the Act is to give children, who have, for some reason or the other, gone CrI.A.980/2004 Page 10 of 16 astray, to realise their mistakes, rehabilitate themselves and rebuild their lives and become useful citizens of society, instead of degenerating into hardened criminals.

58. Of the two main questions decided in Pratap Singh case [(2005) 3 SCC551:

2005. SCC (Cri) 742]., one point is now well established that the juvenility of a person in conflict with law has to be reckoned from the date of the incident and not from the date on which cognizance was taken by the Magistrate. The effect of the other part of the decision was, however, neutralised by virtue of the amendments to the Juvenile Justice Act, 2000, by Act 33 of 2006, whereunder the provisions of the Act were also made applicable to juveniles who had not completed eighteen years of age on the date of commission of the offence.

59. The law as now crystallised on a conjoint reading of Sections 2(k), 2(l), 7-A, 20 and 49 read with Rules 12 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1-4-2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted. (emphasis added) 9. Learned counsel for the appellant submits that in the instant case, the appellant was not in possession of any matriculation or equivalent certificate and nor is there any date of birth certificate from the school that he had first attended. Further, the appellants birth certificate, issued by a civic/municipal authority or a panchayat is also un-available. It may be CrI.A.980/2004 Page 11 of 16 clarified here that the appellant did file a copy of his birth certificate before the trial court but a glance at the same reveals that it had been issued on 05.03.2001, i.e., after the date of the offence. For this reason, learned counsel for the appellant states that he does not propose to rely on the said document. Instead, he proposes to rely only on the undisputed ossification test report dated 26.04.2001, prepared at the Government Hospital, referred to above.

10. We are of the opinion that having regard to the language used in Section 20 of the J.

J.

Act, 2000 the appellant is well entitled to claim the benefit of Rule 12 (3) (b) of the J.J.

Rules, 2007. This is irrespective of the said enactment coming into force on 01.04.2001, which is anterior to the date of the commission of offence. Further, Rule 12 (3) of the J.

J.

Rules, 2007 makes it perfectly clear that for the purpose of determining the age of a juvenile in conflict with law, the requirement is to firstly examine his matriculation or equivalent certificate and if the same is unavailable, then examine the date of birth certificate issued by the school that was first attended by the juvenile and if the said document is also not available, then rely on the birth certificate issued by any corporation or municipality authority or a panchayat. Rule 12(3) (b) contemplates that only in the absence of the aforesaid three documents, shall an opinion be sought by the concerned court from a duly constituted Medical Board that will declare the age of the juvenile or the child and the said report shall be treated as conclusive proof of age regarding the child or the juvenile in conflict with law.

11. In the instant case, due to the absence of any of the three sets of documents prescribed under Rule 12(3) of the J.J.

Rules, a bone Crl.A.980/2004 Page 12 of 16 ossification test had to be conducted on the appellant, wherein it was opined that his age as on the date of examination, i.e., on 20.04.2001, was less than 21 years and more than 17 years. It is in the above background that it has been urged by learned counsel for the appellant that the appellant must be extended the benefit of the J.

J.

Act, 2000 and the Rules by taking his age to be on the lower side, within a margin of one year. To substantiate the said submission, learned counsel has relied on *Jitender @ Jitu vs. State* 2011 (124) DRJ1(DB) and *Abdul Razzaq vs State Of U.P* AIR 2015 SC1770 12. We have perused the judgments cited by the learned counsel for the appellant. In the case of *Abdul Razzaq (supra)*, the Supreme Court has cited its earlier decision in *Hari Ram vs. State of Rajasthan* reported as 2009

(13) SCC211 wherein it has been clarified that the proviso appended to Section 7A of the J.

J.

Act, 2000 leaves no manner of doubt that the claim of juvenility may be raised before any Court and the same shall be recognized at any stage, even after final disposal of the case and such a claim shall be determined in terms of the provisions contained in the J.

J.

Act, 2000 and the Rules made thereunder including the definition of a "Juvenile" in Sections 2(k) and (l) of the Act, even if the juvenile has ceased to be so on or before the date of commencement of the Act. In other words, the object of this beneficial legislation is to ensure that regardless of the date of its notification, the advantage given therein can be extended to a juvenile even in a pending case in any court, for the purposes of determining his juvenility. Further, the Supreme Court has observed in Abdul Razzaq (supra) that clause (b) of Rule 12 (3) contemplates that in the event an exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for reasons to be recorded Crl.A.980/2004 Page 13 of 16 by them, may, if considered necessary, give the benefit to the child or juvenile by considering his/her age on the lower side with a margin of one year. The underlying purpose of the said legislation is to assist those children who have gone astray, to enable them to realise their mistakes, rehabilitate them and rebuild their lives and help them become useful citizens of the Society, instead of degenerating into hardened criminals.

13. That delay will not be a ground to reject the claim of juvenility, was highlighted by the Supreme Court in Abuzar Hossain @ Gulam Hossain vs. State of West Bengal (2012) 10 SCC489 In Union of India vs. Ex- GNR Ajeet Singh (2013) 4 SCC186 the Supreme Court observed as follows:-

"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 judgement/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. (emphasis added) CrI.A.980/2004 Page 14 of 16 14. In *Jitender @ Jitu* (supra), a Division Bench of this Court had taken a cue from the views expressed by the Supreme Court in the case of *Hari Ram* (supra) and observed that as on the date of the incident i.e. 19.08.2004, the appellant in the said case was below 18 years of age and would therefore, be covered by the definition of a juvenile, as contemplated in Section 2(l) of the J.

J.

Act. Giving the benefit of the Act to the juvenile, by virtue of Section 7A and recording that he had been in custody for a duration beyond the prescribed limit under the Act, i.e. three years, the maximum period of detention permissible under the Act, he was set at liberty.

15. Even in the instant case, keeping in mind the fact that the date of the incident was 19.10.2000 and on the date the ossification test conducted on the appellant, i.e., on 20.04.2001, it was opined by experts that his age was less than 21 years and more than 17 years, which means he would have been 16 years on the date of the offence. If the benefit of one year margin on the lower side is extended to the appellant, his age would have been 15 years on the critical date. Taking into consideration the fact that the opinion given by the Medical Board gives the range of age, that is less than 21 years but over 17 years, we are of the opinion that the benefit of one- year margin on the lower side ought to be given to the appellant. On doing so, we find that the appellant would be entitled to claim the advantage of juvenility under the Act. Ordered accordingly. 16 Having regard to the fact that as on 12.06.2009, the appellant had remained in custody for a period of 8 years 7

months and 9 days, which is far in excess of the maximum prescribed period of 3 years for which a juvenile could have been incarcerated under the J.

J.

Act, 2000 while Crl.A.980/2004 Page 15 of 16 maintaining the order on conviction as the appellant has decided not to assail the same on merits, it is deemed appropriate to set aside the order on sentence. The appellants sentence is limited to the maximum period of 3 years. Having already undergone custody for a period in excess of 3 years, the appellant is free.

17. The appeal is partly allowed and disposed of along with the pending application on the above terms. (HIMA KOHLI) JUDGE (MANOJ KUMAR OHRI) JUDGE JANUARY08 2019/ sm/j Crl.A.980/2004 Page 16 of 16

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