Shah Sueb Ahmed Alias Raju Vs. the State

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Court : Delhi

Decided On : Jan-31-1985

Reported in : 28(1985)DLT275; 1985(8)DRJ298

Judge : Charanjit Tatwar, J.

Acts : Indian Penal code, 1860 - Sections 393; Children Act, 1960 - Sections 32

Appeal No. : Criminal Appeal Nos. 123 and 124 of 1984

Appellant : Shah Sueb Ahmed Alias Raju

Respondent : The State

Advocate for Pet/Ap. : I.U. Khan, Adv

Judgement :

Charanjit Talwar, J.

(1) The appellant, Shah Sueb Ahmed, has challenged the legality of the judgment dated 19th May, 1984, of an Additional Sessions Judge, Delhi, whereby he was convicted under Section 394 Indian Penal Code and under Section 398 read with Section 394 of the Indian Penal Code. He has also challenged the order of the same date imposing a sentence of seven years' rigorous imprisonment along with a fine of Rs.2000.00 for having committed the said offence. In default of payment of fine he was directed to undergo further rigorous imprisonment for two years.

(2) In criminal Appeal No. 124 of 1984 he has challenged his conviction and sentence under Section 27 of the Arms Act. By this judgment both the appeals are being disposed of.

(3) Mr. I.U. Khan, learned counsel for the appellant, has at the outset raised a plea that the court of Additional Sessions Judge was not competent to try the appellant as he was less than 16 years of age on the date of commission of the offence. To appreciate this contention a few relevant facts may be noticed. The date of on which the appellant is alleged to have committed the offence is 10th November, 1982. An application was filed by him on 16th November, 1983, before the trial Court alleging that as his date of birth was 26th August 1969, he be tried by the Children Court for the offence turn which he had been charged. This application was filed at a stage when the prosecution witnesses were being examined. Along with the application a photostat copy of the application which was filed by the appellant's father in the School at Varanasi on 8th July, 1976, showing the date of birth to be 26th August 1969, was annexed. On that very date, i.e., the date on which the application was filed the learned Additional Sessions Judge recorded the statement of appellant's father. The appellant was sent to police hospital for necessary x-ray examination. The appellant's father was permitted to summon the Principal of Adarsh Nursery and Primary School Varanasi, for producing the original application for admission in that School, copy of which had been annexed with the application. The application was disposed of by order dated 7th December, 1983. The trial Court was of the view that as the school in which the appellant was studying accepts the age given by the parent of the student without any verification, the application form showing that the date of birth of the appellant was 26th August 1969, was of no value. It was held 'The school record seems to be totally unreliable in so far as the determination of age of the accused/applicant is concerned'. According to the assessment of the learned Additional Sessions Judge the accused appeared to be more than 17 years of age as he had 'grown black coloured thick moustaches and sparse beard on his chin and cheeks. According to Modi's Medical Jurisprudence and Texicology hair begin to appear on the chin and upper lip between 16 and 18 years. It is a common knowledge that the hair begin to appear in brownish colour and it is much later that the colour of hair gets changed into black. Even otherwise, the accd. apparently appears to be

more than 17 years of age.'

(4) Reliance was placed by the trial Court on the report of the Radiologist who had opined the applicant's age to be around 18 years. On that material, the learned Judge observed 'In my opinion, the accd. was definitely more than 16 years of age on the date when the alleged offence was committed in November, 1982. The application is, thereforee, rejected'.

(5) Learned counsel assails the above findings. He submits that the trial Court ought not to have substituted its own assessment in regard to the age of the appellant. His plea is that although the Radiologist's report was not exhibited and the appellant'had. no opportunity to cross-examine him, yet even if 'that report is taken to be correct, the age of the appellant on the date of the occurrence could not be held to have been over 15 years. The submission is that in view of the direct evidence produced on behalf of the appellant that in the year 1976 his date of birth had been given as 26th August, 1969 and without there being any other evidence produced by the prosecution to 'rebut it, the appellant ought to have been held to be a child. These pleas need consideration.

(6) In Raisul v. State of U.P., : 1977 CriLJ1555 , it has been held that the courts should not substitute their own assessment in regard to age of the accused. In the said case the Sessions Judge looking at the appellant took the view that he could not be less than 25 years of age. The High Court also after having looked at the appellant took the view that the estimate of age given by the Sessions Judge was correct. In the said case the appellant had given his age to be about in 18 years at the time of commission of the offence. Their Lordships held that the rejection of the statement of the appellant as to his age by the two Court below was not correct. It was observed 'Appearances can often be deceptive. We must, thereforee proceed on the basis that the appellant was below 18 years of age when he committed the offence.'

(7) In view of this authority the finding of the learned Additional Sessions Judge that the appellant apparently appeared to be more than 17 years of age on 7th December, 1983, is not to be kept in view while deciding the question of his age. The report of the Radiologist which is dated 16th November, 1983, shows that on

that date the appellant was 18 years old. Mr. Khan submits that it is to be taken for granted that the margin of error in age ascertained by radiological examination is two years on either side. He relies on the observations of the Supreme Court in Jaya Mala v. Home Secretary, Government of Jammu and Kashmir, 1982 Cr. L.J.1777 to the effect that it is a notorious fact and one can take judicial notice that the margin of error in age found out by a radiologist is two years.

(8) According to the report dated 16th November, 1983, on which reliance has been placed by the Additional Sessions Judge, the appellant could have been between 15 years to 19 years of age on the date of the occurrence, i.e , 10th November, 1982. The plea of the appellant that be was less than 16 years of age on that date cannot be thus brushed aside. I may note here that the appellant had given his age as 17 years on the date when his statement under Section 313 of the Code of Criminal Procedure was recorded. The learned Additional Sessions Judge in his order on 7th December, 1983, however, has noticed that the appellant had given his age to be 19 years on the day whet the charge was framed against him. The opening sentence of the charge reads: I.S.M. Aggarwal, Addl. Sessions Judge, Delhi, do hereby charge you Sueb Ahmed S/o. Shah Altab Hussain, aged 19 years as under: 'State of the accused under Section 313 opens as under:

Statement of accused Shah Sueb Ahmed S/o. Shah Altaf Hussain age 17 years, student of 10th Class, resident of S-4/46, A/I, Ardali Bazar, Banaras (Varanasi) under Section 313 Cr. P.C. (W.O)'

The age given in the charge-sheet cannot be said to have been stated by the accused-appellant herein. It appears to me that the age of the appellant was probably given by the police. The age given by the accused in his statement under Section 313 of the Code of Criminal Procedure is to be taken to be his version. I may note here that before passing the order dated 7th December, 1983 whereby the application dated 16th November, 1983, of the appellant was rejected, the learned trial Court had examined two witnesses on 5th December, 1983 A.W. 1 is Mrs. U. Issa s, Principal of the School in which the appellant had studied from 1976 to 1979 Her testimony shows that there can be no doubt that in the form

submitted by the father of the appellant on 8th July, 1976 whereby he was seeking admission of his son in Class Iii his date of birth has been given as 26th August, 1969 The reason given by the learned trial Court for holding that the school record was totally unreliable for determining the age of the appellant cannot be upheld simply because the School did not require any verification regarding the age. This was the normal practice. In any case it cannot be held that the appellant's age had been filled in this form by way of 'Peshbandi'. Even if his age as shown in the admission form may be a year or two less than the actual one, even then the appellant would be less than 16 years of age on the date of the commotion of the offence, The report of the radiologist, as noticed above, was submitted on 16th November, 1983 i.e., almost a year after the occurrence. Keeping that report solely in view it has to be held that the appellant might have been between 5 to 19 years of age. It could not have been conclusively held, as it has been found out by the Additional Sessions Judge, that the appellant on the date of commission of the offence, was definitely above the age of 16 years.

(9) There is another aspect. The appellant on 13th March, 1984, stated that he was 17 years of age. The prosecution has not rebutted that fact. Keeping in view the Radiologist report and the assertion of the appellant that he was only 17 years on 1.3th March, 1984 the trial Court in view, could have proceeded on the basis that the appellant was less than 16 years of age when he allegedly committed the offence.

(10) There being a doubt that the appellant was not above the age of 16 years at the time of the commission of the offence, he ought to have been firstly sent before the competent authority under Section 32 of the Children Act for determination of his age. The trial by the Additional Sessions Judge was thus without jurisdiction. In that view of the matter, the judgment of conviction and orders of sentence imposed upon his in both these cases have to be quashed, I order accordingly. The appellant be set at liberty forthwith if not required in any other case. The prosecution, however is at liberty to take action in accordance with the provision of the Children Act.