

Mohd. Wasim Vs. State

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Court : Delhi

Decided On : May-16-2012

Judge : S. Ravindra Bhat & S.P. Garg

Appeal No. : Crl.M.A.9630 of 2011 in Crl.A.1008 of 2011

Appellant : Mohd. Wasim

Respondent : State

Judgement :

S.P. Garg, J.

1. By an order dated 09.12.2011 on the Appellant's application under Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 claiming juvenility on the day of occurrence (28.03.2006), this Court directed the Trial Court to hold an enquiry for determination of his age. The Trial Court examined CW-1 (Appellant's father), CW-2 (Appellant himself), CW-3 (Ram Niwas), Inspector, Food and Supply Office, CW-4 (R.K.Anand), CW-5 (Dr.Shivani Mehra) and CW-6 (Dr.Sanjeev Lalwani). After appreciating the evidence and considering the rival contentions of the parties, the Trial Court concluded that the approximate age of the Appellant on the date of incident i.e. 28.03.2006 was between 19 to 24 years.

2. Learned counsel for the Appellant challenged the findings of the Trial Court and vehemently argued that he was less than 18 years of age, on the date of incident. He further contended that the Trial Court fell into grave error in ignoring the

ossification report (Ex.CW-5/A of Dr.Shivani Mehra) by which the Applicant's age was determined between 21 to 22 years as on 09.01.2012. The counsel urged to ignore the report (Ex.CW-6/A) prepared at AIIMS as it did not consider that medial end of clavicle bone fuses at the age of 22. The report of the Radiologist of AIIMS to set the age as 25 years is an undue exaggeration without any basis. He relied upon page No.199 of Dr.R.M.Jhalla and V.B.Raju's Medical Jurisprudence where it is stated that at the age of 21, medial end of clavicle appears and it fuses at the age of 22 in case of human males. He further argued that if two views are possible, then, the view favouring the accused has to be adopted. Since the age has been opined in between 25 to 27, (in Ex.CW-6/A), benefit of 2 years is to be given for calculating the age of the Appellant. He further contended that the Applicant had disclosed his age 25 years at the time of recording his statement under Section 313 Cr.P.C. at the first opportunity. He is entitled to the protection and in any event could not have been sentenced to imprisonment for life.

3. Learned APP supported the findings of the Trial Court and urged that the Appellant was than 19 years on the date of incident and was not juvenile. He and his family members suppressed material documents i.e. Ration Card, Voter I-Card, Electoral Rolls etc. deliberately to conceal the exact age. During enquiry, the police was able to lay hands on these documents and examine official witnesses to prove those documents. He further contended that the medical report proved by Dr.Sanjeev Lalwani from AIIMS is authentic as it considered physical, dental and ossification test, to estimate the age of the Applicant. He relied upon 'Lal Bahadur vs. The State?(Crl.R.145/2003 decided on 25.07.2003) where in such cases, this Court reduced margin of error in ascertaining the age to six months on either side.

4. We have considered the submissions of both the parties and have scrutinized the records. The Appellant was convicted by the Trial Court by the impugned judgment dated 21.07.2011 for committing the offences punishable under Sections 364-A/506/120-B IPC and sentenced to undergo imprisonment for life with fine of `75,000/-. The appeal against the impugned judgment is pending before this Court. Before the Trial Court, the Appellant did not raise any plea that he was a juvenile. In the absence of any such plea, the Trial Court at no stage had gone into the question as regards the age of the Appellant in terms of provisions of the Act.

Appellant's father moved an application (CM.A.9630/2011) and by order dated 31.10.2011 this Court required him to furnish the following particulars :

(1) "the numbers of children, the sequence of their births and their approximate dates and/or years of birth;

(2) copies of Ration Card or any other documents, revealing the number of family members and their relative ages, their places of birth, date of marriage of the appellant's parents;

(3) any other proof of date of birth, such as School Certificate, Voter ID Card (including the appellant's parents as well as other sibling details). The affidavit shall be filed within a week and copy thereto shall be furnished to learned APP. The affidavit shall also enclose the relevant documents which are adverted to by it."

5. On 29.11.2011, instead of furnishing the required particulars, the learned counsel under instructions from the Applicant withdrew the application to file a proper application supported by his affidavit. Subsequently, the accused/Appellant filed his affidavit dated 01.12.2011 claiming that his parents did not have any documentary proof in their possession to show his age. Needless to say, no document was filed along with the application to show his date of birth or specific age on the date of incident.

6. In the enquiry too, both the Applicant (CW-2) and his father (CW-1) in their depositions denied to having any document i.e. Ration Card, Driving Licence, Passport and Birth Certificate etc. to prove the exact age. They further did not give any specific date of birth or approximate age of the accused on the date of incident. In nutshell, there is bald statement of both CW-1 and CW-2 that the Appellant was juvenile.

7. The Court examined CW-3 (Ram Niwas) who brought original record from the Food and Supply Office, Circle-22, 2 Battery Lane, Rajpur road, Delhi from where CW-2 (Appellant's father) had got issued Ration Card for himself and his family members. He testified that pursuant to the application dated 25.04.2005 (Ex.CW-

3/A) for renewal of previous Ration Card No.B726964, a new Ration Card No.APL59303213 (Ex.CW-3/B) was issued to Ajij Ahmed (Appellant's father). He had attached a photo copy of the voter identity card issued by the Election Commission and had mentioned the year i.e. 1980 when his son (Appellant Mohd.Wasim) was born. The testimony of the official witnesses remained unchallenged. The accused did not challenge the existence of these documents.

8. The Court also examined CW-4 (R.K.Anand) who brought the Electoral Roll of Assembly constituency No.22 Ballimaran for the period 2002 to 2012. As per record, the Appellant (Mohd.Wasim son of Ajij Ahmed), aged 21 years was a voter in 2002 in the said constituency and his name appeared at sl.No.835. Sl.No.833 to 838 showed names of his family member as registered voters. The computerized generated Electoral Roll was exhibited (CW-4/A). Similarly, the Electoral Rolls of 2005, 2007, 2008, 2012 in which the accused's age was shown 24 years, 26 years, 27 years and 31 years, respectively were exhibited (CW-4/B to CW-4/E). CW-4 elaborated in his deposition that Election Officer (ER Branch), Kashmiri Gate, Delhi issued a soft copy of the Electoral Roll from the period 2002 to 2007 in the Pen drive on their request letter (Ex.CW-4/F) and thereafter, a printout was taken from the office computer. Again, the accused did not elicit anything in the cross-examination to doubt his assertions.

9. From the un-rebutted testimony of official witnesses (CW-3 and CW-4), it is apparent that the accused was a regular registered voter since 2002 and also his name appeared in the Ration Card without break. To hide the truth, a false claim was made in the affidavit denying any such document in the Appellant's possession. There is no reason to doubt the genuineness and authenticity of these public documents, issued at the behest of the accused or his father to avail certain benefits. Adverse inference is to be drawn against the accused for withholding and suppressing these vital documents.

10. The Ration Card (Ex.CW-3/A) fixes the age of the accused more than 25 years on the date of incident. The Electoral Rolls are consistent showing his age 21, 24, 25 and 31 in the year 2002, 2005, 2006 and 2012 respectively. These documents categorically establish that the accused was more than 18 years on the date of

occurrence.

11. After considering the physical, dental and radiological examination, the age of the accused was opined between 25-30 years on the date of examination i.e. 23.01.2012 by the Medical Board at AIIMS (Ex.CW-6/A). It is not disputed that the determination of age on the basis of ossification test is only an estimation and not conclusive. In practice, such determination is extremely difficult and cannot fix age with certainty because it is considered an inexact science where the margin of error can be 2 or 3 years on either side. Relying on the judgment of this Court „State of NCT of Delhi vs. Shiva and ors.?(Crl.L.P.172/2008), the counsel contended that the margin of error in age ascertained by radiological examination is two years on either side and the benefit of such margin of error should have been given to the Appellant. We are un-persuaded with this argument. According to the authorities referred on medical jurisprudence, benefit of margin of error of two years on either side at the maximum can be given in case of determination of age based on ossification test. It is however not so, in case of radiological examination for multiple joints. In a case ‘State of U.P. vs. Chhoteyal? (Crl.A.769/2006 decided on 14.01.2011), the Supreme Court observed that :

“There was no such rule much less an absolute one, that 2 years have to be added to be age determined by a doctor.” It further observed that, “merely because the doctor?s evidence showed that the victims belong to the age group of 14 to 16, to conclude that the 2 years?age has to be added to the upper age limit is without any foundation.”

12. In the case of „Lal Bahadur vs. the State?(Crl.R.145/2003 decided on 25.07.2003) this Court extracted the passage from Jhala and Raju’s Medical Jurisprudence :

“If ossification test is done for a single bone, the error may be two years either way. But if the test is done for multiple joints with overlapping age of fusion, the margin of error may be reduced. Sometimes this margin is reduced to six months on either side.”

And held :

“In the present case, the radiological examination of the petitioner was done for multiple joints, which is evident from the report of the Medical Board. According to the petitioner’s own plea, he was just short of eight days in completing 18 years on the date of alleged commission of offence by him. Learned counsel for the petitioner contended that even if the age of the petitioner is to be ascertained in the light of medical report, by giving the benefit of margin of two years, on the date of alleged commission of offence, he would be found to be less than 18 years of age, and thus, a juvenile. While advancing such an argument, learned counsel for the petitioner appears to have taken the age as reflected in the medical report exactly at 21 years losing sight of the fact that it is actually above 21 years, which implies that it could be anything above 21 years. Taking into account radiological examination in respect of multiple joints, in view of above extracted passage from Medical Jurisprudence by Jhala and Raju, the margin of error in ascertaining the age of the petitioner could be reduced to six months on either side.....”

13. Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 does not indicate to allow any such benefit. Rule 12(3)(b), however, empowers the Court or the Board or as the case may be the committee, for the reasons to be recorded, if considered necessary to give benefit to the child or juvenile by considering his/her age on the lower side within the margin of one year.

14. In ‘Jitender @ Jitu vs. State’(Crl.M.A.15749/2010 and Crl.A.438/2010) this Court considered the age (between 25 and 28 years) determined by the duly constituted Medical Board and for the reasons recorded gave benefit of one year under Rule 12(3)(b).

15. In the presence of authentic and comprehensive report (Ex.CW-6/A), the Trial Court rightly preferred it (to the medical report (Ex.CW-5/A) prepared by Dr.Shivani Mehra at RML Hospital).

16. Considering the above factual and legal position, we are of the view that two years margin on either side cannot be given. The Medical Board determined his age between 25 to 27 years on the basis of physical, dental and radiological examination. The only question to be considered is whether we should exercise discretion in giving the benefit of one year on the lower side to the Appellant.

17. It is apparent from the Rule 12(3)(b) that the relaxation of one year is not automatic but it should be granted after considering all the evidence available on record.

The observation of Hon'ble Supreme Court in 'Jitender Ram @ Jitu vs. State of Jharkhand? (2006) 9 SCC 428 are instructive :

“Once the legislature has enacted a law to extend special treatment in respect of trial and conviction to juveniles, the courts should be jealous while administering such law so that the delinquent juveniles derive full benefit of the provisions of such Act but, at the same time, it is the duty of the courts that the benefit of the provisions meant for juveniles are not derived by unscrupulous persons, who have been convicted and sentenced to imprisonment for having committed heinous and serious offences, by getting themselves declared as children or juveniles on the basis of procured certificates.”

18. In the instant case, the accused and his family members did not produce the documents in their power and possession and concealed the age of the Appellant. It is not believable that during all the years the accused or his family members did not cast their vote or did not draw any ration. The State produced and proved these documents during enquiry; the existence of these documents remain unchallenged. Considering the conduct of the Appellant and his family members in withholding the official documents, and the position of law on the subject, we are not inclined to give relaxation of one year under Rule 12(3)(b), which does not in any manner inhibit the Court from taking into account all available materials. The substantive power or jurisdiction under Section 7-A to hold inquiry and make determinations can be seen along with Rule 12. However, the latter, being only a rule, cannot preclude the Court from considering the effect of all materials brought on record during the inquiry.

19. In the light of above discussion, we find no merit in the application, and the same is dismissed.