

State Vs. Vinod@pandit

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Court : Delhi

Decided On : May-31-2013

Judge : Kailash Gambhir

Appellant : State

Respondent : Vinod@pandit

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.REV.P. 547/2011
Judgment delivered on:

31. 05.2013 STATE Petitioner Through: Mr. Naveen Sharma, APP for the State Versus VINOD@PANDIT Through: Respondent Mr. G.C. Mishra, Advocate. CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR 1 By this petition filed under Section 397of Code of Criminal Procedure, 1973 (hereinafter referred to as Cr. P. C.) the State seeks to challenge the impugned order dated 11.3.2011 passed by the Court of Additional Sessions Judge, Delhi whereby the learned Additional Sessions Judge declared the accused respondent a juvenile at the time of commission of the alleged offence.

2. Briefly stating the facts of the present case, the responded is accused in FIR bearing No. 439/09 registered under Sections 302/397/34 IPC and FIR No. 529/09. To prove his juvenility on the date of commission of the alleged offence i.e. on 30.10.2009, the accused respondent had filed before the Court of Additional Sessions Judge, the copy of Scholars Register and Transfer Certificate Form

issued by Smt. Chabbo Devi, Laghu Madhyamic Vidhyalaya, Budhiyapur, Pratapgarh, U.P.as Ex. AW1/A which reflected the date of birth of the accused respondent as 16.11.1993. To prove the said school record, the accused produced AW1, Shri Prem Chand Pandey, the head master of Smt. Chabbo Devi, Laghu Madhyamic Vidhyalaya, Budhiyapur, Pratapgarh, U.P. who produced the original admission register of the school wherein the name of the accused was found registered at Sr. No. 1796 and his date of birth in the relevant column as 16.11.1993. AW1 also deposed that the accused was admitted in the school on the basis of the affidavit of the father of the accused, namely Mr. Dharam Raj Pandey, reflecting the date of birth of the accused as 16.11.1993. (Placed on record as AW1/B) 3. Learned Trial Court after referring to the documents placed on record by the accused and the examination of AW1 reached to the conclusion that the school records produced by the accused were genuine, authentic and reliable piece of evidence for determining the age of the accused respondent. The court also directed, as an abundant precaution, the ossification test of the accused to reaffirm its finding as to the juvenility of the accused on date of commission of offence on the basis of the documents placed on record. As per the ossification test which was conducted by a duly constituted medical board on 2.2.2011, the accused was found between 20-22 years of age at the time of his medical examination. The learned Trial Court relying upon the said test and after giving benefit of two years to the petitioner, thus, reaffirmed its decision reached on the basis of the documents placed on record by the accused and held him to be of less than 18 years of age at the time of commission of the alleged offence.

4. Assailing the said order, Mr. Naveen Sharma, learned APP for the State submitted that the order dated 11.3.2011 passed by the learned Trial Court is manifestly wrong, bad in law and contrary to the facts and evidence on record. He submitted that the learned trial court ignored the fact that during cross examination of AW1, he had admitted that the school was only a recognized school and that at the time of admission, the accused was looking 1-2 years older and when he confirmed the date of birth of the accused, the father of the accused told that the date of birth given by him was correct.

5. He further submitted that the trial court also glossed over the fact that the accused told his age as 21 years at the time of arrest in the present case and 19 years when arrested in 2007 in another case registered under FIR No. 420/07.

6. He also submitted that the record of the school regarding the date of birth of the accused is not a reliable piece of evidence because the date of birth of the accused was entered in the school record only on the basis of the affidavit of the father of the accused and not on the basis of any authentic certificate issued by any registrar of birth, municipality or panchayat etc.

7. He further submitted that the learned trial court committed an error in giving the margin of two years in favour of the accused while calculating the age of the accused at the time of commission of the offence. He submitted that if the age of the accused is considered to be as lower as 20 years as per the Ossification Test, which opined the age of the accused to be between 20-22 years on the date of examination, the accused would be of 18 years 8 months and 14 days on the date of commission of the offence i.e. 30.10.2009 and hence cannot be adjudged to be a juvenile on the date of commission of the alleged offence.

8. Present petition has been strongly opposed by the respondent accused. Counsel for the respondent contended that learned Additional Sessions Judge has not committed any illegality or perversity in passing the order dated 11.3.2011.

9. Counsel submitted that the school certificate is the best primary documentary evidence and the learned Additional Sessions Judge rightly assessed the accused to be a juvenile on the date of commission of the alleged offence on the basis of such genuine and authentic record proved by the respondent.

10. Counsel further submitted that the authenticity of the school certificate cannot be doubted on the ground that the same was prepared only on the basis of the affidavit of the father of the child as the information about the date of birth is primarily and mainly given by the parents of the child, who witness the birth of their child and accordingly furnish the information to school while admitting their child. Counsel further submitted that there is no office of registrar of birth, no municipality or any active panchayat in the villages nor are the people aware of such legal

formalities, therefore, the affidavit of the parents of the child, deposing the age of the child, can be rightly made a basis for providing admission in the school.

11. As far as the contention raised by the counsel for the State that the respondent told his age to be 21 years at the time of his arrest in the present case and 19 years at the time of arrest in the case registered under FIR No. 420/2007 in 2007, the counsel for the respondent submitted that the accused has been falsely roped in FIR No. 420/07 and the police officers recorded the age of the accused to be 19 years incorrectly while taking advantage of the helplessness of the accused in the police custody so as to deprive the respondent of his legal right to claim juvenility.

12. I have heard learned counsel for the parties at considerable length and given my anxious consideration to the arguments advanced by them. I have also gone through the records of the Trial Court.

13. Before I proceed to deal with the rival contentions raised by the counsel for the parties, it would be appropriate to first reproduce the relevant provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and also the Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009 which are applicable to the case in hand as the alleged offence was committed by the accused on 30.10.2009 after the coming into the force of the Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009 on 24.09.2009. The said provisions are reproduced as under: Section 7A of Juvenile Justice (Care and Protection of Children) Act, 2000 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 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 order, and the sentence if any, passed by a court shall be deemed to have no effect. Rule 12 of Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009 Procedure to be followed in determination of Age (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. (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 date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; ii. the birth certificate given by a corporation or a municipal authority or a panchayat; iii. the matriculation or equivalent certificates, if available; (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), (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 parent/ guardian/ 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 off 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.

14. Section 7A of Juvenile Justice (Care and Protection of Children) Act, 2000, thus, makes it clear that a claim as to the juvenility of the accused shall be determined by the courts only in terms the provisions of the said Act or the Rules made thereunder. Rule 12 of the Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009 is similar to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 except the order of priority set out under sub clause (3)(a) of the Rule 12 of 2007. Rule 12 of Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009 envisages the age determination inquiry concerning a juvenile in conflict with law to be conducted by the court or the Juvenile Justice Board, as the case may be. In the order of priority, the first precedence has been given to the date of birth certificate from the school (other than a play school) first attended, if available; and if such a certificate is duly proved on record in accordance with law then such a certificate may itself be sufficient to determine the age of the offender. In the absence of the date of birth certificate from the school (other than a play school) first attended, the second priority has been given to the birth certificate given by a corporation, municipal authority or a Panchayat; and in the absence of these two certificates, the third priority has been given to matriculation or equivalent certificates. Under Rule 12 (3)(b), in the absence of the said three documentary evidence of clause (a), the Court or the Board can seek medical opinion from any duly constituted Medical Board in order to determine the age of offender by conducting an ossification test. This Rule 12(3)(b) further envisages that in case the exact assessment of the age

cannot be done by the Court or the Board then for the reasons to be recorded by the court it may give benefit to the offender by considering his/ her age on lower side within the margin of one year and while passing such order the court may take into consideration such evidence as may be available on record or the medical opinion as the case may be and record a finding in respect of his age based on either of the evidences produced before the court as specified in any of the clause (a)(i),(ii),(iii) or in the absence whereof, the medical evidence in terms of clause (b) which shall be a conclusive proof of the age as regards such a Juvenile in conflict with law.

15. The aforesaid order of precedence attached to the various categories of documents has to be scrupulously followed by the courts and it is only in the absence of a documentary evidence of first category that the court has to look for the documentary evidence of second category or third category and finally the medical proof vide *Ashwani Kumar Saxena v. State of M.P.* reported in 2012 (9) Scale 90. The relevant paragraphs of the said judgment of the Apex court elaborating upon the aspect of the age determination enquiry to be conducted by the courts while deciding the claim of juvenility are reproduced as under:27. Section 7A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the J.J.

Act. Criminal Courts, JJ Board, Committees etc., we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. Statute requires the Court or the Board only to make an 'inquiry' and in what manner that inquiry has to be conducted is provided in JJ Rules. Few of the expressions used in Section 7A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7A has used the expression "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates etc. as evidence need not be oral evidence.

28. Rule 12 which has to be read along with Section 7A has also used certain expressions which are also to be borne in mind. Rule 12(2) uses the expression "prima facie" and "on the basis of physical appearance" or "documents, if available". Rule 12(3) uses the expression "by seeking evidence by obtaining". These expressions in our view reemphasize the fact that what is contemplated in Section 7A and Rule 12 is only an inquiry. Further, the age determination inquiry has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The word 'inquiry' has not been defined under the J.J.

Act, but Section 2(y) of the J.J.

Act says that all words and expressions used and not defined in the J.J.

Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

29. Let us now examine the meaning of the words inquiry, enquiry, investigation and trial as we see in the Code of Criminal Procedure and their several meanings attributed to those expressions. "Inquiry" as defined in Section 2(g), Code of Criminal Procedure reads as follows: "Inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court. The word "enquiry" is not defined under the Code of Criminal Procedure which is an act of asking for information and also consideration of some evidence, may be documentary. "Investigation" as defined in section 2(h), Code of Criminal Procedure reads as follows: Investigation includes all the proceedings under this code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf. The expressions "trial" has not been defined in the Code of Criminal Procedure but must be understood in the light of the expressions "inquiry" or "investigation" as contained in sections 2(g) and 2(h) of the Code of Criminal Procedure.

30. The expression "trial" has been generally understood as the examination by court of issues of fact and law in a case for the purpose of rendering the judgment

relating some offences committed. We find in very many cases that the Court /the J.J.

Board while determining the claim of juvenility forget that what they are expected to do is not to conduct an inquiry under Section 2(g) of the Code of Criminal Procedure, but an inquiry under the J.J.

Act, following the procedure laid under Rule 12 and not following the procedure laid down under the Code.

31. The Code lays down the procedure to be followed in every investigation, inquiry or trial for every offence, whether under the Indian Penal Code or under other Penal laws. The Code makes provisions for not only investigation, inquiry into or trial for offences but also inquiries into certain specific matters. The procedure laid down for inquiring into the specific matters under the Code naturally cannot be applied in inquiring into other matters like the claim of juvenility under Section 7A read with Rule 12 of the 2007 Rules. In other words, the law regarding the procedure to be followed in such inquiry must be found in the enactment conferring jurisdiction to hold inquiry.

32. Consequently, the procedure to be followed under the J.J.

Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. We cannot import other procedures laid down in the Code of Criminal Procedure or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the court exercising powers under section 7A of the Act. Many of the cases, we have come across, it is seen that the Criminal Courts are still having the hangover of the procedure of trial or inquiry under the Code as if they are trying an offence under the Penal laws forgetting the fact that the specific procedure has been laid down in section 7A read with Rule 12.

33. We also remind all Courts/J.J.

Board and the Committees functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate etc. mentioned in Rule 12 (3) (a) (i) to

(iii). The courts in such situations act as a *parens patriae* because they have a kind of guardianship over minors who from their legal disability stand in need of protection.

34. "Age determination inquiry" contemplated under section 7A of the Act r/w Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

35. Once the court, following the above mentioned procedures, passes an order; that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in subsection (5) or Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of the Rule 12. Further, Section 49 of the J.J.

Act also draws a presumption of the age of the Juvenility on its determination. ...

42. In *Shah Nawaz v. State of U.P.* (2011) 13 SCC 75. the Court while examining the scope of Rule 12, has reiterated that medical opinion from the Medical Board should be sought only when matriculation certificate or equivalent certificate or the date of birth certificate from the school first attended or any birth certificate issued by a corporation or a municipal authority or a panchayat or municipality is not available. The Court had held that entry related to date of birth entered in the marksheet is a valid evidence for determining the age of the accused person so

also the school leaving certificate for determining the age of the appellant.

43. We are of the view that admission register in the school in which the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility.

16. The Apex Court in said case has thus extensively dealt with the procedure to be followed by the courts for determination of age of an offender claiming himself to be a juvenile on the date of commission of the offence. A mere opinion by a person as to the accused looking one or two years older than the age claimed by him (as the opinion of the head master in the present case) or the fact that the accused told his age to be more than what he alleges in the case while being arrested by the police officer would not hold much water. It is the documentary evidence placed on record that plays a major role in determining the age of a juvenile in conflict of law. And it is only in the cases where the documents or certificates placed on record by the accused in support of his claim of juvenility are found to be fabricated or manipulated, that the Court, the Juvenile Justice Board or the Committee need to go for medical test for age determination.

17. In the aforesaid background of the legal position, let me now revert back to the facts of the present case. The respondent herein is accused in a murder case facing charges under Sections 302/397/34 IPC. He claims himself to be a Juvenile on the date of the commission of the offence having been born on 16.11.1993. To prove his date of birth as 16.11.1993 he has placed on record the copy of Scholars Register and Transfer Certificate Form issued by the first school attended by him i.e. Smt. Chabbo Devi, Laghu Madhyamic Vidhyalaya, Budhiyapur, Pratapgarh, U.P. as Ex. AW1/A. To prove the said documentary evidence, the petitioner has produced AW1, Shri Prem Chand Pandey, the head master of Smt. Chabbo Devi, Laghu Madhyamic Vidhyalaya, Budhiyapur, Pratapgarh, U.P. This is a school where the petitioner was admitted in Class VI in the year 2003 and studied till class VIII. The said witness AW1 also produced the original admission register of

the school wherein at serial No.1796 the name of the respondent was entered and his date of birth mentioned as 16.11.1993. AW1 had further deposed that the accused was given admission in the school on the basis of the affidavit of the father of the accused. The affidavit of the father of the accused had been placed on record by the accused as Ex. AW1/B. The testimony of this witness has been believed by the Ld. Additional Sessions Judge on the premise that the documents produced by him appeared to be genuine and non-fabricated. The Additional Sessions Judge observed that the affidavit on the basis of which the accused was granted admission in the school was duly attested by the notary namely, Sh. V.R. Singh having registration no. 23(01)/1983.

18. On the perusal of the trial court record, in my opinion the learned trial court rightly placed reliance on the Scholars Register and Transfer Certificate Form issued by the school first attended by the accused (other than the play school) in accordance with Rule 12 of the Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009 so as to determine the age of the accused to be less than 18 years on the date of offence. This court thus does not find any infirmity, illegality or perversity so far as this part of the order dated 11.3.2011 passed by the Learned Additional Sessions Judge is concerned.

19. The learned trial court, however, erred in going a step further by ordering the Ossification Test of the accused to be conducted by a duly constituted Medical Board so as to reaffirm its decision as to the juvenility of the accused on the date of commission of the offence. As already discussed above, if the certificate issued by the school first attended showing the date of birth of the accused is duly proved and appears to be authentic and genuine, then there arises no need to hold any further enquiry and seek medical opinion so as to ascertain the age of the accused.

20. Be that as it may, even if we go by the Ossification Test Report, the same does not come to the rescue of the State as the same is not in conflict with the finding as to the juvenility of the accused arrived at by the trial court on the basis of the documents placed on record by the accused and rather supports the same. The Medical Board submitted the report opining the age of the accused between

20-22 years on 2.2.2011. If the age of the accused is taken as 20 years on 2.2.2011 then his age would be 18 years, 8 months and 14 days on the date of the offence i.e. 30.10.2009 and giving the benefit of margin of error of one year to the accused as per Rule 12(3) (b) of the Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009, his age would be 17 years 8 months and 14 days on the date of the offence. Thus, even the Ossification Test Report, which in fact was not needed to decide the question of juvenility of the accused in the present case, supports the claim of the accused as to his juvenility at the time of commission of the offence. Also, too much reliance cannot be placed on the medical opinion while determining the age of the accused. (vide Babloo Pasi v. State of Jharkhand and Anr., (2008) 13 SCC

133) 21. With the above observations, the petition filed by the State under Section 397 Cr. P.C challenging the correctness and propriety of the impugned order dated 11.3.2011 passed by the learned Additional Sessions Judge stands dismissed.

22. It is ordered accordingly. KAILASH GAMBHIR J.

MAY 31.2013

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