

Hari Om Vs. State

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Court : Delhi

Decided On : Jan-30-2013

Judge : G.P. Mittal

Appellant : Hari Om

Respondent : State

Advocate for Def. : Ms. Rajdipa Behura

Advocate for Pet/Ap. : Mr. Anil Saxena

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

30. h January, 2013 + CRL. REV. P. 309/2012 HARI OM Through: Petitioner Mr. Anil Saxena, Advocate versus STATE Through: Respondent Ms. Rajdipa Behura, APP CORAM: HON'BLE MR. JUSTICE G.P.MITTAL JUDGMENT G. P. MITTAL, J.

(ORAL) 1. By virtue of this Revision Petition, the Petitioner impugns an order dated 18.05.2012 passed by the learned Additional Sessions Judge(ASJ) whereby the Petitioners plea that he was a juvenile was rejected.

2. It is urged by the learned counsel for the Petitioner that plea of juvenility can be raised by the Petitioner at any stage and even during the pendency of the Appeal. The Petitioner produced sufficient evidence before the learned ASJ to prove that

his date of birth was 13.06.1993 and thus he was aged only 14 years on the alleged date of commission of the offence, that is, 20.03.2007. The learned ASJ was, however, swayed by the fact that as per the ossification test, his age was found to be about 21 years. The learned ASJ, therefore, declined to believe the evidence with regard to his date of birth as given in the certificate issued by the school first attended. Paras 8 to 14 of the impugned judgment are extracted hereunder:

8. On considering the arguments of Ld. counsel for convict Hari Om, Ld. Addl. PP for the State and on analysing the material and evidence on record, I come to the conclusion that it could not be established on record that accused was Juvenile on the date of occurrence. The reasons support my decision are firstly that although CW1 in his examination in chief deposed that as per his school register date of birth of accused Hari Om was 13.06.1993 yet in his cross examination he stated that he could not tell on the basis of which documents accused Hari Om was admitted in class-2nd directly. The said date of birth was disclosed by his parents without giving any document.

9. Secondly, that statement of CW1 is in contradiction of the parents particularly CW4. She stated that on the date of his first admission, the accused Hari Om was got admitted in class-3rd. Accused did not go in any school for studying for class 1st and 2nd . It would be pertinent to mention here that Principal of Paradise Infants Primary School, Barthla district, U.P specifically mentioned that accused was directly admitted in class 2nd .

10. Thirdly, although CW2, Gram Panchayat Adhikari brought the copy of Family Register, Ex. CW2/A showing the date of birth of accused as 13.06.1993, yet in his crossexamination he admitted that neither the affidavit nor another documents is usually supplied for recording date of birth. He admitted that date of birth of accused as mentioned in Col. 8, might be genuine and approximate. He also admitted that there were over writings in Register in column of date of birth. He explained that sometimes, at their visit head (Mukhiya) of family is not available at house and neighbour told the name and date of birth of the child and entries are made on that information. Thus the record of Gram Panchyat and particularly

about the present accused is not beyond any suspicion. The fabrication of record as discussed above is possible.

11. Fourthly, the father of accused Hari Om could not tell the date of birth of any of the children including accused Hari Om. He even could not tell whether sister of accused Manju was one or 1 years younger than her brother Mukesh. He could not tell the date of birth of his daughter Manju and son Hari Om. He could not tell if Hari Om was 1 years younger than Manju. He told the age of his eldest son as 28 to 30 years. He could not tell the date of birth of his daughter Manju but depose that his son Hari Om was born after 4 -5 years from the birth of daughter Manju. CW4 in this regard deposed that Hari Om was about 12-13 years younger than Manju. There is big difference between the age told by both the parents which make their testimonies unreliable.

12. Fifthly, as per Family Register, Mukesh Kumar i.e., brother of accused was born on 05.12.1976. Manju, sister of accused Hari Om was born on 05.09.1979 and convict/accused was born on 13.06.1993 i.e., after the gap of about 14 years. Moreover, there is no explanation regarding the gap of about 14 years in birth of the convict/accused and his sister.

13. Counsel for accused relied on a case *Rajender Chandra v. State of Chhatisgarh & Anr.*, 2002 (1) JCC 26. wherein the Apex Court held that if two views are possible the court should lean in favour of holding the accused to be a Juvenile in border line cases. This decision does not provide benefit to the accused as even after giving of benefit of two/three years, the accused is still above the age of Juvenility. Ld. Defence Counsel also relied on a case *Prem Chand SAO v. State of Jharkhand & Ors.*, 2003 Cri. L.J.

NOC 86. This case does not provide benefit to the accused as the record produced in support of age of the accused was found unreliable and fabricated.

14. In view of the reasons, discussion and evidence on record and particularly discussed here in above, I come to the conclusion that record produced before this court regarding date of birth of accused Hari Om is not reliable and trust worthy. On the other hand ossification report dated 12.07.2007 produced before this court

on 25.07.2007 containing photo of accused is reliable as it is based on scientific evidence. As per this report the radiological age of bones of accused is shown about 21 years. Even after giving benefit of 2-3 years to the accused, as per principles of law laid down in Bajrang Lal v. State of Rajasthan (Rajasthan), 2006(2) F.J.C.C. 261, he was older than 18 years on the date of occurrence i.e., 20.03.2007.

3. The learned APP supports the view taken by the learned ASJ.

4. In Ashwani Kumar Saxena v. State of M.P. (2012) 9 SCC 750.the Honble Supreme Court deprecated the practice of converting an inquiry as envisaged under Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (Act of 2000) into a full-fledged trial under the Code of Criminal Procedure. The Supreme Court explained the scope of 7A of the Act of 2000 and Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (Rules of 2007). Paras 24 to 26 and 42 to 43 of the report are extracted hereunder:24. We may, however, point out that none of the abovementioned judgments referred to earlier had examined the scope, meaning and content of Section 7-A of the Act, Rule 12 of the 2007 Rules and the nature of the inquiry contemplated in those provisions. For easy reference, let us extract Section 7A of the Act and Rule 12 of the 2007 Rules:

7. A. 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 enquiry, 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. (emphasis supplied) 12. 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 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), (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 7-A, 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 subrule (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. (emphasis added) 25 Section 7-A, 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 JJ Act. The criminal courts, Juvenile Justice Board, committees, etc. we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. The 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 the JJ Rules. Few of the expressions used in Section 7-A 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 7-A has used the expressions 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.

26. Rule 12 which has to be read along with Section 7-A 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 re-emphasise the fact that what is contemplated in Section 7-A 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 JJ Act, but Section 2(y) of the JJ Act says that all words and expressions used and not defined in the JJ Act but defined in the Code of Criminal Procedure, 1973 (2 of

1974), shall have the meanings respectively assigned to them in that Code. xxxx
xxxx xxxx 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.

5. Admittedly, the Petitioner did not possess any matriculation or an equivalent
certificate as he was not a matriculate. In order to prove the date of birth certificate
from the school first attended by him, the Petitioner produced CW1 Mr. Vinay
Dubey, Principal of Paradise Infants Primary School, Bhartana, District Etawa,
U.P. CW1 deposed that one Hari Om S/o Deen Dayal was admitted in the school
at Serial No.739 and his name was deleted on 30.06.2003. He proved the
certificate Ex.CW1/A and the duplicate copy of the transfer certificate as
Ex.CW1/B. In cross-examination, the witness deposed that he could not say as to
on what basis the student was admitted in Class Second directly. The Petitioner
also produced her mother Mrs. Shayama Devi as CW4. She proved her affidavit
Ex.CW4/A wherein the date of birth was mentioned as 13.06.1993. She testified in
her affidavit Ex.CW4/A that Hari Om was admitted in the Paradise Infants Primary
School, Bhartana, District Etawa on the basis of the correct date of birth. A perusal
of the admission register Ex.CW1/A reveals that the Petitioner was admitted in the
school at Serial No.739. His date of birth is mentioned as 13.06.1993 and he was
admitted in the Second Standard on 03.06.1999. Despite cross-examination of

CW1, the Principle of the School, the authenticity of this document could be challenged. The school leaving certificate Ex.CW1/B also shows the date of birth of Hari Om as 13.06.1993.

6. The learned APP drew my attention to the cross-examination of CW4 where she admitted that the Petitioner was directly admitted in Third Standard and he did not attend the school in Class I and II and that she herself was teaching her son at home. In my view, much importance cannot be given to this part of the CW4s statement. Admittedly, the child was admitted in the Paradise Infants Primary School, Bhartana, District Etawa in the year 1999. The Petitioner was involved in the offence in the year 2007, that is, almost eight years after the admission. In the year 1999, there was no reason for the Petitioners parents to give wrong age of the Petitioner. Otherwise also, it will be reasonable to hold that a child of six years is admitted in Class Second. If his age is taken 21 years on the date of the commission of the offence, then the Petitioner would be about 13 years at the time of his admission in Class Second. In any case, in view of Rule 12 of the Act, the Court or the competent authority has no option except to accept the certificates in the order of priority as mentioned in Rule 12(3)(a)(i)(ii and (iii) of the Act. The ossification test to determine the age cannot be looked into at all once the date of birth in the school first attended is available. The certificate Ex.CW1/A shows his date of birth as 13.06.1993. Thus, he is about 13 years and 09 months on the date of alleged commission of the offence. The learned ASJ fell into error in giving preference to the ossification test against the date of birth certificate issued by the school first attended.

7. The order dated 18.05.2012 is accordingly set aside and the Petitioner is declared to be a juvenile.

8. The Revision Petition is allowed in above terms.

9. Pending Applications stand disposed of. (G.P. MITTAL) JUDGE JANUARY 30 2013 pst