

Nazir Vs. State

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Court : Delhi

Decided On : Mar-12-2013

Judge : Siddharth Mridul

Appellant : Nazir

Respondent : State

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI Order reserved on:07.03.2013
Order pronounced on:12.03.2013 CRIMINAL APPEAL NO.1169/2011 NAZIR
Through: Appellant Mr. Ajay Verma with Mr. Shiv Kumar Dwivedi, Advocates.
versus STATE Through: Respondent Mr. Sanjay Lao, APP. CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE SIDDHARTH
MRIDUL SIDDHARTH MRIDUL, J.

CRL.M.A.12912/2012 1. The present order will dispose of the above application under Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (Act, for short) read with Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (Rules, for short). The application has been filed by Nazir, who has been convicted under Section 363, 364, 302 and 201 of the Indian Penal Code, 1860 (IPC, for short). He was sentenced to life imprisonment and a fine of Rs.5,000/- in default thereof simple imprisonment for three months for the offence punishable under Section 302 IPC. He was sentenced to rigorous imprisonment for three years and a fine of Rs.2,000/-, in default thereof simple imprisonment for one month for the offence under Section 363 IPC. He was sentenced to rigorous

imprisonment for five years and a fine of Rs.2,000/- in default thereof simple imprisonment for one month for the offence punishable under Section 364 IPC. He was further sentenced to rigorous imprisonment for two years and a fine of Rs.2,000/- in default thereof simple imprisonment for one month for the offence punishable under Section 201 IPC.

2. By way of order dated 27.07.2012 production warrant was issued for appearance of Nazir. He was produced in Court on 29.08.2012 and had stated that he has an elder brother, who had got married about one and a half year back. He also stated that he has three younger sisters and that none of them have been to school. As per the nominal roll the age of the applicant/appellant is about 22years. The FIR was registered in the year 2009. By order dated 29.08.2012, a preliminary inquiry was directed to be conducted by the State to verify the age of the applicant/appellant. Status report was received and thereupon it was directed that an inquiry is to be conducted by the trial court in terms of Section 7A of the Act read with Rule 12, to ascertain the age of the appellant at the time of the commission of the offence. Trial court records were transmitted for the said purpose.

3. Mr. Suresh Chand Rajan, Additional Sessions Judge/ Special Judge (NDPS)-III, directed that a medical board be constituted and an ossification test be conducted. The ossification test was conducted on 26.10.2012. Mr. Rajan has submitted the inquiry report. In the concluding paragraph, he has recorded his opinion that the appellant was a juvenile on the date of occurrence.

4. After the copy of the report was received, along with the evidence and material, the same was circulated and made available to the counsel for the appellant and the State. We have also heard the learned counsel to determine and decide whether the report should be accepted and to dispose of the application.

5. The trial judge has examined 6 witnesses to ascertain the age of the appellant. CW-1 to CW-5 are doctors who have assessed the appellant on the basis of general physical, dental and radiological examinations. CW-1 Dr. Nidhi Madan has deposed that on examination of the appellant, she was of the opinion that the appellant was not less than 17 years. However she could not determine the upper

limit and the matter was referred to the board for final opinion. CW-2 Dr. Rakesh Kumar is a radiologist and has stated that on examination of different bones and after performing general physical, dental and radiological examination, he was of the opinion that the age of the appellant was about 20-22 years on the date of examination. CW-3 Dr. Sunil Kakkar is the Chairman of the medical board constituted for determination of the age of the appellant. He has stated that the appellant was examined by the members of the board dentally and physically and they submitted their report. He has perused the same and was of the final opinion that the age of the appellant was about 20-22 years on the date of examination. CW-4 Dr. Rishi Kanava is a physician and he has deposed that the appellant was examined dentally and physically by the board and the final opinion of the board was that the appellant was about 20-22 years on the date of examination. CW-5 Dr. Ashwani Kumar is the radiographer from DDU Hospital and had taken six X-rays of various parts of the body of the appellant and prepared X-ray report Ex.CW-5/A. The final report of these witnesses is Ex.CW-1/A. The report Ex.CW-1/A has concluded that the appellant is between 20-22 years of age on the date when the ossification report was prepared.

6. CW-6, Savita Bharti is a clerk from Nagar Panchayat Ramkola, District Kushinagar, UP and has produced the register for family registration which is said to contain details including date of birth of the family members of residents in the area of Nagar Panchayat Ramkola. She has deposed that in the year 2007 the details of the family members of Sagir Ahmed, son of Sanulullah, were registered with their office and details of the family members including their date of birth was entered in the registration register maintained in their office. As per the record, Sagir Ahmed and his wife Munni Khatoon have five children, namely, Naseem (son), Mazir (Son), Salma Khatoon (daughter), Reshma (daughter) and Apsari (daughter) and their date of births are 02.11.1988, 11.10.1989, 02.05.1991, 31.10.1993 and 02.09.2002 respectively. The attested copy of the said entry is Ex.CW-6/A bearing signatures of the Chairman, Nagar Panchayat Ramkola. She has identified the certificate given by the Chairman Sh. Mahender Prasad Guar regarding the date of birth of Mazir, son of Sagir Ahmed and the same is exhibited as Ex.CW-6/B. She has deposed that the registration register is maintained in their office ward. In her cross-examination it was revealed that the date of birth of Mazir

was entered on the basis of information given by his father whose signatures were obtained in the register. She has stated that she is unaware whether any document was produced in support of the claim regarding date of birth of the family members of Sagir Ahmed. Voluntarily she has also stated that she was not present at the time of registration of the above mentioned entries and admitted that except the registration register she had not brought any other document showing the date of birth of Mazir.

7. Section 7A of the Act states that when a claim of juvenility is raised before a Court or the Court is of the opinion that the accused person was juvenile, on the date of the commission of the offence, the Court shall make an enquiry and take such evidence as may be necessary. The claim of juvenility has to be determined as per provisions of the Act and the Rules made thereunder.

8. Rule 12(3) of the Act prescribes the following documents and evidence to be taken into consideration for the purpose of determination of age. Rule 12 reads as under: Rule 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 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 subrule (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.

9. Learned counsel for the State has argued that Rule 12 postulates a particular hierarchy prescribing the relevance of the documents that are required to be produced to determine the age of an accused. According to Rule 12(3)(a) the first document that has to be considered is the matriculation or equivalent certificate. If absence thereof, the birth certificate issued from the school first attended other than a play school is to be looked into. If such birth certificate is also not available then the Court is required to consider the birth certificate given by a corporation or municipal authority or panchayat. In case all the aforementioned documents are not available, it is then and only then that the Court can seek medical opinion to determine the age of the accused.

10. The fact that the appellant has not been to any school is not disputed. Therefore, Rule 12 (3)(a)(iii) assumes significance. Learned counsel has contended that the entries in the registration register of the panchayat would be the determinative factor to ascertain the age of the appellant. The entry shows the date of birth of Nazir to be 11.10.1989, which means that he was nearly 20 years of age on the date of occurrence.

11. The trial court has disbelieved the testimony of CW-6. As per her statement, the details of family members of Sagir Ahmed were registered in the year 2007, however, the record of the relevant time i.e. the entries made during the years 1988, 1989, 1991, 1993 and 2002 showing the birth of each child have not been produced. These entries were made at one day for all the family members. It was therefore apparently a mere estimation and a guess work, about 18 years after the birth of Nasir. According to these entries, the appellant is stated to be born in the year 1989. Birth of the first and second child i.e. the appellant is attributed to be after a gap of one year where as birth of the third, fourth and the fifth children is after a considerable gap. Further from perusal of Ex.CW-6/A i.e. the entries in the register, the name of the child born on 11.10.1989 is mentioned as Mazir whereas the name of the appellant is Nazir. There is no clarification forthcoming on this discrepancy. We have perused the relevant entry in the registration register as well as the testimony of CW-6. CW-6 Savita Bharti, has categorically stated that the said entries were recorded in the year 2007. Thus, the registration register is not a contemporaneous document that can be relied upon to conclusively establish the age of the accused.

12. Even otherwise, the entry in the registration register is not a document in terms of Rule 12(3)(a)(iii), since it is not a birth certificate given by a corporation or a municipality or a panchayat. It is trite to say that a birth certificate normally comes into existence at the time of birth of the incumbent and it is therefore, a contemporaneous record of the date of birth of the said incumbent. The aforesaid entries in the registration register which were made in the year 2007 are not contemporaneous. Furthermore, the entries made in the registration register were not based upon the production of any document in that behalf by Sagir Ahmed, the father of the appellant. Therefore, the possibility of their being random dates as a

product of imperfect memory of an illiterate man cannot be ruled out.

13. We also notice that the first born of Sagir Ahmed is stated in the registration register to have been born on 02.11.1988 and Nazir, the second born has been entered in the register to have been born in the succeeding year on 11.10.1989. The births are too proximate and in a period of less than one year. This also creates a doubt about the veracity of the entries in the registration register.

14. Therefore, we are of the opinion that it would be improper to rely upon and take into consideration the entries in the registration register regarding the date of birth of the appellant. The cumulative effect of the evidence that has come forth by way of highly belated entries regarding date of birth of the appellant, the insufficiency of documentary evidence regarding claim of the date of birth of children of Sagir Ahmed and the doubt regarding the identity of the appellant, is that the said evidence does not inspire confidence and is liable to be rejected.

15. In the case reported as *Om Prakash v. State of Rajasthan and Anr.*, (2012) 5 SCC 201, the Supreme Court while dealing with a claim of juvenility has considered a case of speculative documentary evidence and has emphasised on the importance of medical opinion supported by scientific evidence. It was observed:

16. Learned Counsel for the accused-Respondent on his part contended that medical opinion could be sought only when matriculation or equivalent certificate or date of birth certificate from the school was not available and since in the present case the admission certificate of the accused from the school record is available which states the date of birth to be 30.6.1990, the school certificate ought to be allowed to prevail upon the medical opinion.

17. We are unable to appreciate and accept the aforesaid contention of Learned Counsel for the Respondent since the age of the accused could not be proved merely on the basis of the school record as the courts below in spite of its scrutiny could not record a finding of fact that the accused, in fact, was a minor on the date of the incident. Hence, in a situation when the school record itself is not free from ambiguity and conclusively prove the minority of the accused, medical opinion

cannot be allowed to be overlooked or treated to be of no consequence. In this context the statement of NAW-3 Dr. Jagdish Jugtawat, the medical jurist who conducted the ossification test of the accused and opined before the court that the accused was 19 years of age is of significance since it specifically states that the accused was not a juvenile on the date of commission of the offence. The statement of NAW-1 Dr. C.R. Agarwal, Asstt. Professor in Radiology also cannot be overlooked since he opined that on the basis of x-ray films, the age of the accused is above 18 years and below 20 years. Thus, in a circumstance where the trial court itself could not arrive at a conclusive finding regarding the age of the accused, the opinion of the medical experts based on x-ray and ossification test will have to be given precedence over the shaky evidence based on school records and a plea of circumstantial inference based on a story set up by the father of the accused which prima facie is a cock and bull story.

18. It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled for this special protection under the Juvenile Justice Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice. Hence, while the courts must be sensitive in dealing with the juvenile who is involved in cases of serious nature like sexual molestation, rape, gang rape, murder and host of other offences, the accused cannot be allowed to abuse the statutory protection by attempting to prove himself as a minor when the documentary evidence to prove his minority gives rise to a reasonable doubt about his assertion of minority. Under such circumstance, the medical evidence based on scientific investigation will have to be given due weight and precedence over the evidence based on school administration records which give rise to hypothesis and speculation about the age of the accused. The matter however would stand on a different footing if the academic certificates and school records are alleged to have been withheld deliberately with ulterior motive and

authenticity of the medical evidence is under challenge by the prosecution.

16. Therefore, the resort to the ossification test conducted for determination of the age of the appellant wherein the appellant is opined to be between 20 to 22 years is justified and proper. The offence in question was committed, as per the prosecution version, on 19.09.2009. Going by the medical opinion, the appellant would be a juvenile or less than 18 years of age, on the date when the alleged offence was committed.

17. In view of the aforesaid factual position, we accept the application and hold that the appellant was a juvenile, on the date of commission of offence. Accordingly, the conviction and sentence of the appellant is set aside. We may also note that the appellant has not accepted his conviction and is contesting the same. The appellant has suffered incarceration for a period of three years and four months. The appellant shall be dealt with in accordance with the provisions of the Act. The proceedings are accordingly forwarded to the Juvenile Justice Board. The appellant shall be produced before the Juvenile Justice Board on 14.03.2013, in terms of the aforesaid order. A copy of this order will be sent to the Jail Superintendent, Tihar for compliance. The application stands disposed of CRL.A. 1169/2011 In view of the order passed in Crl.M.A. No.12912/2012 as above, the appeal stands disposed of. SIDDHARTH MRIDUL, J.

SANJIV KHANNA, J.

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