

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Decided on: November 23, 2022

+ **CRL.A. 35/2005**

..... Appellant
Represented by: Mr.Adit S.Pujari, Advocate with
Mr.Chaitanya Sundriyal, Advocate.

versus

STATE Respondent
Represented by: Mr.Prithu Garg, APP for the State
with SI Kailash, P.S.I.P.Estate.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MR. JUSTICE ANISH DAYAL

MUKTA GUPTA, J. (ORAL)

1. By this appeal, the appellant has challenged the impugned judgment dated 5th July 2004 convicting him for offences punishable under Sections 452/302 IPC as also the order on sentence dated 9th July 2004 passed by the learned Additional Sessions Judge, directing him to undergo life imprisonment and a fine of ₹2000/-, in default whereof, simple imprisonment for 1 month for offence punishable under Section 302 IPC and rigorous imprisonment for 3 years with fine of ₹1000/- in default whereof, to undergo simple imprisonment for 15 days for offence punishable under Section 452 IPC.

2. During the pendency of the present appeal, the appellant took the plea

of juvenility before this Court and filed an application being CrI.M.A. 36973/2019 under Section 9(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 [in short, the 'J.J.Act'] seeking determination of the age of the appellant at the time of alleged offence. Since the Hon'ble Supreme Court in the decision reported as (2009) 13 SCC 211 Hari Ram Vs. State of Rajasthan and Anr. held that the benefit of the increase of the age of the juvenility to 18 years introduced by the Act of 2000 will apply retrospectively, it was thus to be determined whether the appellant had completed 18 years of age on the date of alleged commission of offence to avail the benefit of the J.J. Act. Keeping in view the said mandate, this Court remanded the matter to the learned Trial Court exercising the jurisdiction under Section 311 and 391 CrPC read with Section 165 of the Evidence Act to determine the age of the appellant as on 6th November 1999 by resorting to Section 9(2) and Section 94 of the J.J.Act.

3. Section 94(2) of the J.J.Act reads as under:

“94. Presumption and determination of age:

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age

determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order”.

4. Even as per the provisions of Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007, the only difference was that the matriculation certificate got precedent over the date of birth certificate from the school (other than play school) first attended. In the present case, since neither the date of birth from the school first attended nor matriculation certificate nor the birth certificate issued by the municipal corporation/ authorities is available, the only course opened to ascertain the age was by seeking medical opinion from the duly constituted medical board which has been done by the learned Additional Sessions Judge pursuant to the order dated 11th December 2019 of this Court.

5. Additional evidence recorded by the learned Additional Sessions Judge has been received in the form of CW1 to CW5 who have also exhibited the ossification test report of the appellant as Ex.CW1/A, as per which, age of the appellant was held to be between 30 and 40 years as on 18th December 2019. In this regard, Dr.Daya Ram Haldwani (CW1), Dr.Swati Gupta (CW2), Dr.Monisha Pradhan (CW3) and Dr.Priya Kumar (CW4), members of the Medical Board which conducted physical, radiological and dental as also orthopedic examinations of the appellant, were examined and cross examined by the appellant. The appellant also had submitted his Aadhar Card and PAN Card whereby his date of birth was mentioned as 1st January 1983. However, the said documents were not on

the basis of any record from the school or municipal authority. Hence, in terms of Section 94 of the J.J.Act, the age of the appellant will have to be ascertained as per the ossification test conducted and opined by the Medical Board to be between 30 to 40 years as on 18th December 2019, which makes the age of the appellant on the date of incident i.e. 6th November 1999 to be between 10 years to 20 years.

6. Considering the fact that the upper age limit cannot be taken to the detriment of the appellant and as per the lower limit, the appellant was a minor at the time of alleged incident, he is entitled to the benefit of juvenility. The appellant was convicted for offences punishable under Sections 302/452 IPC as noted above. Maintaining the conviction of the appellant for the said offences, which is not being challenged on merits before this Court, the order on sentence is set aside. In any case, the conviction of the appellant, for offences punishable under Sections 302/452 IPC will have no disqualification at any stage against the appellant in terms of Section 24 of the J.J.Act.

7. As per the nominal roll of the appellant, the appellant had been in custody for nearly 5 years and 5 months when his sentence was directed to be suspended vide order dated 13th April 2005. Even as a juvenile the period of protective custody for rehabilitation that could be awarded was three years. Hence, this Court finds no ground to remand the matter to the Juvenile Justice Board on the order on sentence in terms of the decision of the Hon'ble Supreme Court reported as (2013) 11 SCC 193 *Jitendra Singh Vs. State of U.P.*

8. Appeal is accordingly disposed of.

CRL.M.A. 36973/2019 (under Section 9(2) of the J.J.Act)

1. In view of the order passed in the appeal, the application is disposed of as infructuous.
2. Order be uploaded on the website of this Court.

**(MUKTA GUPTA)
JUDGE**

**(ANISH DAYAL)
JUDGE**

NOVEMBER 23, 2022/akb

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