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

\+ **CRL.M.A. 14463/2016 in CRL.A. 371/2015**

**%** **Date of decision : 20th September, 2016**

CHANDERJEET KUMAR @ KISHAN ..... Appellant

Through : Mr. Ajayinder Sangwan,
Mr. Tarunesh Kumar,
Mr. Rohan Sharma,
Mr. Narendra Singh,
Ms. Rishima Parashar,
Mr. Kunal Chopra and
Mr. V.P. Singh, Advs.

versus

STATE ..... Respondent

Through : Ms. Aashaa Tiwari, APP along

**CORAM:**
**HON'BLE MS. JUSTICE GITA MITTAL**
**HON'BLE MR. JUSTICE P.S. TEJI**

**JUDGMENT (ORAL)**

**GITA MITTAL, J.**

**Crl.M.A. No. 14463/2016 in CRL.A. 371/2015**

1. The record called for by us on the last date, has been received from the lower court.

2. We have heard learned counsel for the parties. By way of the present application, the applicant has urged that an inquiry had been conducted as to the age of the appellant on the date of commission of the offence. Reliance is placed on a report dated 10th June, 2016 given by the Court of learned Chief Metropolitan Magistrate, North-West, Rohini to the effect that as on 11th February, 2016 when the applicant was subjected to a medical examination, it has been opined that he was at least 22 years of age, as per the report of the inquiry of the Chief Metropolitan Magistrate. The date of offence in the present case is 8th January, 2007. Therefore, after giving benefit of two years on the lower side, the convict would have been below the age of 18 years on that date. Consequently, the applicant has been declared to have been covered within the definition of a juvenile on the date of commission of the offence within the meaning of expression under Section 2(35) of the Juvenile Justice (Care & Protection of Children) Act, 2015.

It is contended that as a result, the convict has to be set at liberty forthwith.

3. It is essential to note a few facts for the purpose of deciding the present application.

4. The applicant was implicated in the case arising out of FIR No.21/2007 registered by the Police Station Saraswati Vihar under Sections 302/384/506/34 of the Indian Penal Code (hereafter 'IPC') as well as under Sections 25/54/59 of the Arms Act registered at Police Station Saraswati Vihar along with two accused persons who remained absconding during the proceedings. After investigation, on 6th August, 2007 a charge-sheet was filed against the applicant alone. The case was registered with regard to an incident dated 8th January, 2007.

5. It appears that the applicant had approached the Delhi Legal Aid Authority (North-West District) with the request that he was a juvenile on the date of commission of the offence. Based thereon, the Delhi Legal Services Authority (North-West District) ('DLSA' hereafter) sent a letter to the Chief Metropolitan Magistrate ('CMM' for brevity) on 23rd June, 2014. On 25th June, 2014, based on this letter, the CMM initiated an age inquiry of the convict.

DLSA's letter dated 23rd June, 2014 is not forthcoming on the record placed before us.

6. In this inquiry, on 4th July, 2014, the Chief Metropolitan Magistrate had clarified that in case no valid document as per the Juvenile Justice Rules was available, the Investigating Officer would stand permitted to get the bone age test of the convict conducted from an approved government hospital.

7. The inquiry officer filed his report on 8th July, 2014 and sought one more opportunity to conduct the inquiry into the age of the convict which was allowed.

8. On 8th July, 2014, the investigating officer sought further time to verify the age of the convict.

9. On the 9th July, 2014, the CMM also noted that the case against the appellant was pending in the Sessions Court under Section 302 of the IPC which proceedings were listed on 10th July, 2014. Consequently, the CMM directed the *Ahlmad* of the court to send the file to the Sessions Court. The court also directed that the reports filed by the Investigating Officer alongwith the statement of Ram Avtar Mandal in the age inquiry be also sent.

10. We find that these important proceedings before the CMM, which critically impacted the Article 21 constitutional rights of the appellant unfortunately got buried in the record. And completely oblivious of the letter of the DLSA dated 23rd June, 2014 or the proceedings initiated pursuant thereto by the CMM, the Sessions Court proceeded with the trial. This case reflects the callousness or the ignorance on the part of the police of the importance of the issue. Also of the fact, that rights of the child are completely non-negotiable. Even, if he/she may stand implicated for commission of a heinous crime. The SHO of the police station concerned, who having conducted the age inquiry, would have known about it. Yet, he also made no effort to inform the trial court about the same.

11. The record of the CMM contains a report dated 9th July, 2014 submitted by Inspector Dharamvir Singh, SHO of Police Station Saraswati Vihar, Delhi containing the statement of Shri Ram Avtar Mandal, father of the appellant recording the years of birth of his children. As per this report, the appellant was born in the year 1988, however, his exact date of birth was not known. Inspector Dharamvir Singh had also reported that no documentary

proof of the date of birth of the appellant was available. The police did not place the above facts before the Sessions Court. It has also made no effort to comply with the directions of the Chief Metropolitan Magistrate dated 4th July, 2014 giving them the opportunity to conduct the ossification test of the applicant and to confirm his age.

12. The judicial record placed before us notes that neither the convict nor his counsel had appeared during the said proceedings before the Chief Metropolitan Magistrate. The court, however, has not cared to examine as to whether any notice was issued to the convict or his counsel by the CMM or that they were ever required to appear for the purposes of the inquiry.

13. The record also shows that on an earlier occasion the appellant had filed an application under Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 before the Trial Court complaining that his claim of juvenility had been wrongly denied. This application was rejected on 20th May, 2014.

14. The rejection of the application was premised on the finding of the learned Judge that the appellant had not disclosed his

approximate age at the time of the alleged incident in the application and further for the reason that at the time of recording of his examination under Section 313 of the CrPC on 10th September, 2010, the appellant had disclosed his age as 24 years. Another reason for rejection of the application by the Sessions Court was that the court was of the view that it had become *functus officio* after pronouncement of the judgment whereby the appellant had been convicted and that it had no jurisdiction to review or alter this order. This order dated 20th May, 2014 was assailed by the appellant by way of ***Crl.Rev.No.475/2014*** before this court. After hearing the matter, the revision was allowed by an order dated 19th August, 2014 by the learned Single Judge holding *inter alia* as follows :

> "The petitioner is aggrieved by the order dated 20.05.2014 wherein his application under Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as "the said Act") seeking claim of juvenility set up by the petitioner had been declined. The ***impugned order*** had dismissed the application on two counts. The ***first reason*** was that the application filed by the convict, (convicted under Section 304 of IPC) did ***not disclose what was the approximate age*** of the petitioner at the time of alleged incident; the Court noted the fact that at the time of his examination under Section 313 Cr.P.C., recorded on 10.09.2010,

petitioner had disclosed his age as 24 years; the second reason for dismissal of the application by the learned Sessions Judge was that the Court had become ***functus officio after pronouncement of the judgment convicting the petitioner under Section 304*** of the IPC and as such did not have jurisdiction to review or alter its order. The State has accepted notice. Submissions and counter-submissions have been heard.

***Section 7A of the said Act is clear and categorical. Sub-clause (1) states that when 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 and take such evidence as may be necessary***. The ***proviso to*** sub-Section 7A is still more explicit as it states that ***this claim of juvenility can be raised before any Court and it shall be recognized at any stage, even after final disposal of the case***.

In this view of the matter, the ***Original Court***, that is, the ***Court which has held the petitioner guilty is not barred from entertaining the application under Section 7A of the said Act. The Sessions Judge*** dismissing the application on these counts ***has committed an illegality. The second reason for dismissal also suffers from an illegality***. This is in view of the judgment pronounced by the Apex Court in ***(2012) 10 SCC 489 Abuzar Hossain vs. State of W.B.*** wherein Justice T.S. Thakur (concurring) had observed that the procedure to be followed in determination of the age includes the physical appearance of the accused. This is one important consideration. Even in the judgment of the Delhi High Court reported in W.P.(C) 8889/2011 titled as Court on its Own Motion versus Dept. Of Women and Child Development and Ors., Committees consisting of the members of the National Commission for Protection of Child Rights had been directed to visit the jails to identify juveniles and it was during one such visit that the case of the petitioner had come up wherein he was

> noticed on his physical appearance to be a minor. It was this, which had led to the filing of the present application. Accordingly, the Sessions Judge refusing to entertain the application of the petitioner on the second count also suffers from an infirmity."
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> (Emphasis supplied by us)

15. After so observing, by the order dated 19th August, 2014, the court had remanded the matter back to the Sessions Judge to deal with the application under Section 7A of the Act after holding the inquiry under the said Act. The parties were directed to appear before the Sessions Judge on 25th August, 2014.

16. The trial court proceeded with the trial on merits. On 10th July, 2014, after closure of evidence, final arguments were addressed on behalf of the appellant as well as his counsel. By the judgment dated 14th August, 2014, the convict stands convicted for commission of the offences with which he stood charged and by the order dated 25th August, 2014 sentenced as detailed above. There was no compliance of the order dated 19th August, 2014 passed in Crl.Rev.No.475/2014.

17. This judgment and order were assailed by the appellant by way of Crl.Appeal No. 371/2015 which was filed on 19th March,

2015. The appeal was drafted on behalf of the appellant through the DLSA counsel. The appellant in this appeal was represented by counsel assigned to him by the Delhi High Court Legal Services Committee who was consequently who have been unaware of the juvenility plea of the appellant before the trial court.

18. This appeal came to be finally dismissed by the judgment dated 5th November, 2015 without the appellate court ever having been informed about the plea of juvenility raised on behalf of the appellant.

19. As a result, despite the requirement of Section 7A and the prohibition contained in the Juvenile Justice (Care & Protection) Act, 2000 the applicant continued to remain incarcerated.

20. In the meantime, an application of the appellant dated 4th November, 2015 was moved by Mr. Sumit Garg, counsel for DLSA, North West, Rohini, Delhi before the Sessions Court. This was during the pendency or the Crl.Appeal.No.371/2015 before this court. It was taken up on 16th November, 2015 when the Sessions Court made the order. Without compliance with the order of the learned Single Judge dated 19th August, 2014 in

Crl.Rev.No.475/2014. No effort was made to check up the record. What pains us is the fact that the proceedings in the case without opening even the bare statute. Certainly, the court was ignorant of the jurisprudence on the important issues involved.

21. The appellant thereafter moved an application dated 17th September, 2015 before the court of Sh. Pankaj Gupta, ASJ, Rohini Courts, Delhi praying for a direction for compliance of the orders of the Chief Metropolitan Magistrate dated 4th July, 2014 and 8th July, 2014 regarding the age inquiry as per Section 12 of the Juvenile Justice Rules.

22. This application was placed before the learned Sessions Judge on ***16th November, 2015***. The following order came to be recorded by the Sessions Judge :-

> "As per the record, file has been requisitioned by the Hon'ble Delhi High Court. ***Counsel from DLSA seeks time to move an application before the Hon'ble Delhi High court*** to intimate about filing of present application and to pray to send back the file to this court. Request is allowed.
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> Put up for consideration on ***07.12.2015***.

23. This order was not only erroneous, but illegal in as much as the police was required to comply with the directions made by the Chief Metropolitan Magistrate as back as on 4th July, 2014 and 8th July, 2014. The learned judge was bound to comply with the order of the learned Single Judge of this court on 19th August, 2014 as noted above.

Further on that date arguments in the appeal in this court were finally concluded and the matter was reserved for judgment on 10th August, 2015 and the final judgment was stood pronounced on 5th November, 2015.

24. The application of the appellant seeking compliance of the orders of the Chief Metropolitan Magistrate, however, was kept pending by the learned Additional Sessions Judge. On 23rd January, 2016, the trial court extracted the proceedings of the Chief Metropolitan Magistrate which were dated 4th July, 2014 and 9th July, 2014 and noted the fact that Crl.Appeal No. 371/2015 stood dismissed by the judgment dated 5th November, 2015; noted that the convict had not raised the plea of juvenility in the appeal before this court and that the convict who had moved the application

under consideration through a counsel assigned by the DLSA had not brought the factum of the filing of the application before the appellate court despite orders passed by it.

After so noting, we are pained by the following directions which were came to be passed :

> "Perusal of record reveals that during the pendency of the trial of this case before the Ld Predecessor of this court. Ld CMM, North-West, Rohini, Delhi, vide order dated 04.07.2014 directed to conduct age enquiry of convict Chanderjeet Kumar @ Kishan. In pursuance thereto, IO filed the report along with statement of Ram Avtar. As such, Ld CMM, North-West, Rohini, Delhi had taken the cognizance on the issue of age enquiry of the convict. However, vide order dated 09.07.2014, Ld CMM, North-West, Rohini, Delhi observing that trial was pending before the Ld Predecessor of this court sent the said record to the Ld Predecessor of this court. However, no side brought the said fact to the notice of the Ld Predecessor of this court nor convict took the plea of juvenility.
>
> Perusal of record also reveals that the convict preferred Criminal Appeal no.371/2015 before the Hon'ble Delhi High Court which was dismissed vide judgment dated 05.11.2015. The said judgment nowhere reveals that the convict took the plea of juvenility before the Appellate Court also. Instead, during pendency of the said appeal, the convict through DLSA counsel moved the present application before this court and had not brought the fact of the filing of the present application to the Hon'ble Delhi High Court despite specific orders passed by this court. In view thereof, the fact remains that Ld CMM, North-West, Rohini, Delhi has already taken the cognizance of issue of age enquiry of the convict.

> Therefore, ***I am satisfied with the submissions made by the Ld APP that present application on the same issue is not maintainable before this court and matter be sent back to the court of Ld CMM, North-West, Rohini, Delhi to take up the issue of age enquiry as per law***.
>
> Therefore, the present application along with complete record be sent to the court of Ld CMM, North-West, Rohini, Delhi to proceed with the case as per law.
> xxx xxx xxx"

25. In compliance of the above, the inquiry was thereafter conducted by the Chief Metropolitan Magistrate, North West, Rohini, District Delhi. The CMM noted on 4th February, 2016 that the investigating officer had not got the ossification test conducted and directed the same. This test was finally conducted on 11th February, 2016 in Sanjay Gandhi Memorial Hospital. It appears that the appellant was subjected to radiological as well as dental examination. Thereafter, as per the radiological examination, his bone age was more than 20 years as on 11th February, 2016 and as per the dental examination, his bone age was opined as more than 18 years**,** as on the date of the examination**.**

26. Both Dr. Bhasin, the Radiologist and Dr. Preet Sahni, Dental Surgeon were summoned and their statements were recorded by the CMM who proved the medical examination and opinion of the

Board as Exh.CW1/A on 25th May, 2016. On 10th June, 2016, the CMM also examined the appellant noting that the appellant did not have any certificate of his having the first school that he attended or matriculation and no documentary proof regarding his date of birth or age is there. The learned CMM took the report of the Medical Board as conclusive proof of the age of the convict and returned the following finding :

> "*As per the reports of the Doctors and the statement given in the Court, on the date of his examination i.e. 11.02.2016, the convict was atleast 22 years of age. The date of offence in the present case is 08.01.2007.* ***Hence giving benefit of two years on the lower side, the convict has to be under 18 years of age on the date of offence.*** *Accordingly, convict is declared juvenile in the present matter*."
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> (Emphasis by us)

27. The Chief Metropolitan Magistrate thereafter directed that the age inquiry conducted by her be placed before the Sessions Court on 23rd June, 2016. This report was finally considered by the learned Additional Sessions Judge on 18th July, 2016. We extract the observations of the learned Additional Sessions Judge in paras 25 and 26 of the long order dated 18th July, 2016 recorded by him :

"25. In the present court, throughout the proceedings, this Court has been well aware of the benevolent legislation i.e. JJ Act. Therefore, this Court afforded the ***opportunity to the accused to raise the plea of juvenility before the High Court. This Court also conceded to the request of Ld. Addl. PP thereby afforded an opportunity to the convict to raise the plea of juvenility before CMM, if otherwise, permissible under the law. Despite that, the convict kept on pressing the plea of juvenility before the wrong forum***.

26. In view of the following judgments and discussions, I am of the opinion that ***once the basis to hold the age enquiry under JJ Act by CMM is not sustainable in law, the enquiry report prepared on that basis is also not sustainable in law.*** The convict had been convicted for the offence u/s 302 IPC i.e. heinous offence and had been sentenced to undergo life imprisonment and the said orders are final as on date. ***Therefore, this Court, despite being aware that JJ Act is a beneficial legislation, in view of the judgment "Parag Bhati" (supra) should not adopt a casual approach and pass the benefit of the same to the convict. Further, if this court does so, the same shall not only disturb the judgment dated 05.11.2015 passed by the High Court but also shall be against the judicial discipline***."

(Emphasis by us)

28. A separate short order was also recorded by the learned Additional Sessions Judge on 18th July, 2016 observing that once the basis holding the age inquiry under the Juvenile Justice Act by the CMM was not sustainable in law, the inquiry report prepared on that basis was also not sustainable in law. A view was taken that as the appellant stood convicted for the offence under Section

302 of the IPC and had been sentenced to undergo life imprisonment which orders were final. Therefore, the court could not pass the benefit of the JJ Act the beneficial legislation to the convict. The learned Additional Sessions Judge was also of the view that if such benefit is given, it would disturb the judgment dated 5th November, 2015 which would be in breach of judicial discipline. The file was directed to be consigned to the Record Room.

29. To say the least, the order dated 18th July, 2016 is in-complete and blatant violation of every pronouncement of the Supreme Court of India and of this Court giving benefit to persons who were juvenile as on the date of commission of the offence as well as the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000. The order dated 18th July, 2016 completely ignores and disregards the decision of this court ***dated 1st August, 2014*** being ***Death Ref.No.5/2010 State v. Jagtar & Ors.*** which cannot be countenanced.

30. In the present case, the order dated 19th August, 2014 passed in Crl.Rev. No. 475/2014 had taken into consideration the fact that

a final judgment stood passed in the trial by the trial court. It had taken care of the objection of the trial court to conduct the inquiry on the ground that the final judgment stood passed by the trial court. The learned Additional Sessions Judge was bound by this judgment. It would appear that he has not cared to read this judgment or peruse the record which was before him.

31. It was not open to the learned Judge in the order dated 18th July, 2016 to be influenced by the fact that the appeal had been finally decided. In any case, even if he nursed any doubt, the court had available, the option to either cause the record of the inquiry placed before the appellate court or have directed either the machinery of legal aid to do so. Directions could have been issued to the investigating officer to have placed the same before this court for appropriate orders and to ensure compliance, the matter could have been fixed on the actual date for filing of compliance report. Instead of doing so, the learned Additional Sessions Judge has closed the inquiry and denied the benefit of the mandatory beneficial provisions of the JJ Act to the appellant.

32. In the present case, so far as the conviction of the appellant for the commission of the offence with which he was charged is concerned, the judgment of the trial court stood upheld by this court by the judgment dated 5th November, 2015.

33. However, in view of the provisions of the Juvenile Justice Act as well as pronouncement of the Supreme Court reported at ***AIR 2015 SC 1770 Abdul Razzaq v State of U.P.***, the appellant would be entitled to the benefit of Section 15 of the JJ Act.

34. There is no dispute to the findings returned in the inquiry conducted by the Chief Metropolitan Magistrate in the order dated 10th June, 2016. No documentary records as postulated in Rule 12 of the JJ Rules are available. The order is premised on a proper medical examination of the appellant.

35. We are informed that the appellant was arrested on 13th January, 2007 and remains incarcerated ever since. As on date, he has undergone over 9 years of imprisonment. The appellant has undergone more than the maximum sentence permissible under the provisions of the JJ Act. In any case, the appellant could not have been kept in the jail meant for adult prisoners but was required to

be kept in the observation home, that too only for the maximum period of three years. As such, the appellant cannot be detained in custody any longer.

It is directed that the appellant be forthwith released from custody, if not wanted in any other case. The appellant would be entitled to the benefits available under the provisions of the JJ Act.

36. Before parting with the case, we are pained to note that the matter has proceeded as if in routine. A Sessions Court has dealt with the case, completely oblivious of the valuable rights of a juvenile under the Juvenile Justice (Care & Protection) Act, ignorant of judicial precedents on the subject and the orders of the learned Single Judge of this court in this very case. This situation suggests a re-visit to training in law relating to juveniles, procedural and substantive.

37. The Registry is directed to send a copy of this order to the Director (Academics), Delhi Judicial Academy for designing a refresher course on juvenile justice and compiling the material for it. This design shall be sent to every District Judge, who if possible, would organise and implement the training at the District

Court Complexes for expediency and to save the time of the judges. The timing of implementation of the training may be staggered to ensure that the programme is undertaken urgently and by every member of the judicial service.

If the court complex does not permit or on account of any other factor, organisation of the training is not possible, it shall be the responsibility of the Delhi Judicial Academy to expeditiously undertake the same.

Copy of this order be sent to the District & Session Judges; the Sessions Judge & the Chief Metropolitan Magistrate concerned.

**GITA MITTAL, J**

**P.S.TEJI, J**

**SEPTEMBER 20, 2016**/kr