CASE NO.:
Appeal (crl.) 489 of 2006

PETITIONER:
Jitendra Ram @ Jitu

RESPONDENT:
State of Jharkhand

DATE OF JUDGMENT: 25/04/2006

BENCH:
S.B. Sinha & P.K. Balasubramanyan

JUDGMENT:
J U D G M E N T
[Arising out of S.L.P. (Crl). No. 3494 of 2005]

S.B. Sinha, J :

Leave granted.

The appellant herein was convicted for commission of an offence punishable under Sections 302 and 201 of the Indian Penal Code (for short, IPC') and sentenced to undergo rigorous imprisonment for life.

The case of the prosecution is as under :

A First Information Report was lodged by the informant Lal Hare Murari Nath Sahdeo at about 14.00 hrs. on 19.11.1985 alleging that at about 07.30 A.M. on the previous day i.e. 18.11.1985 Fagua Mahto, deceased, took his five bullocks for grazing along with the cattle of other villagers, as he was a herdsman. He brought the bullocks earlier after grazing. The informant is said to have not found two of his bullocks in the said evening. He enquired thereabout; whereupon Fagua Mahto informed him that two oxen were taken by Jitendra Ram @ Jitu Harizan, the appellant herein for thrashing paddy. He went to the house of the accused, who denied to have taken the said two oxen. Lakhan Lohar (PW-13), however, at about 07.30 P.M. on the same evening informed Lal Ranvijay Nath Sahdeo (PW-8), the cousin of the first informant that the appellant herein sold the said oxen in the market to Sahban Ansari and Hanif Ansari, who examined themselves as PW-18 and PW-19 respectively. The appellant, however, denied the sale of two oxen to the said persons and threatened the first informant. Fagua Mahto went missing. When the first informant visited the house of Hanif Ansari and Sahban Ansari, he was informed that the appellant had taken away the said two oxen and kept his cycle as a security. On suspicion that something might have happened to Fagua Mahto, a search was made and the appellant was brought to the school of the village. He was interrogated, whereupon he is said to have confessed to have murdered Fagua Mahto and concealed his dead body in a pit of 'Chamautha River Tetardaht'. Acting on the basis of the said statement of the appellant about 100 villagers are said to have reached the place of occurrence where the dead body of the said Fagua Mahto was allegedly concealed by the appellant. The appellant was thereafter handed over to Mukhia Lal Gopal Nath Sahdeo, who examined himself as PW-5. Before the said witness also the appellant is said to have confessed his guilt. A First Information Report was, thereafter, lodged. He in the trial eventually was found guilty.

The appeal preferred by him was also dismissed. He is, thus, before us.

The sole contention raised by Mr. Shekhar Prit Jha, the learned counsel for the appellant, is that the appellant on the date of commission of the said offence was a minor within the meaning of the provisions of the

Bihar Children Act, 1982 (for short, 'the Act'). The learned counsel would contend that the appellant had disclosed his age at the first opportunity, namely, when the bail petition was moved before the Patna High Court and, inter alia, relying on or on the basis of the said statement he was released on bail by an order dated 09.05.1986. It was further submitted that even while the appellant was examined by the learned trial judge under Section 313 of the Code of Criminal Procedure (Cr.P.C.) his age was estimated as 28 years. The High Court also in its impugned judgment noticed the submissions made to the effect that having regard to the said estimate of age being 28 years by the trial court on 17.12.1998 while the appellant was being examined under Section 313 Cr.P.C. he was a juvenile as on the date of commission of the offence i.e. 18.11.1985. The said question has, however, not been gone into by the High Court.

According to the learned counsel if once it is found that the appellant was a juvenile within the meaning of Section 2(h) of the Juvenile Justice Act, 1986 or a child under the provisions of the Act, he was entitled to the protection thereunder and in that view of the matter, he could have also been sent to the Juvenile Home in terms of Section 9, or Special Home in terms of Section 10, or Observation Home in terms of Section 11 of the Act and in any event could not have been sentenced to imprisonment for life.

Furthermore, it was the Juvenile Court alone, which was competent to pass an order against him and in that view of the matter the entire judgment of conviction and sentence passed against the appellant would be vitiated in law.

It was furthermore submitted that the estimate of age by the court is final and binding and in that view of the matter, the appellant could not have been sentenced to undergo imprisonment for life.

When the offence was committed, since the Juvenile Justice Act, 1986 had not come into force, the provisions thereof would have no application; the Bihar Children Act, 1982 was, however, applicable in this case. In terms of the provisions of the said Act, a child means a boy who has not attained the age of 16 years.

The Children's Court was to be constituted under Section 5 of the Act, but it is not in dispute that such court had not been constituted at the relevant time. The provisions of Juvenile Justice (Care and Protection of Children) Act, 2000, it appears, have been given effect to in the State of Jharkhand only in or about July 2005. Before the trial court, the appellant did not raise any plea that he was a juvenile. It is true that such a plea was raised while moving an application for bail for the first time; but from a perusal of the order passed by the Patna High Court dated 06.05.1986, it would appear that the ground that the appellant was a child itself was not the only one on which the order granting bail to the appellant was passed. The said order dated 06.05.1986 reads as under :

"Heard learned counsel for the petitioner
and the State.

It has been submitted that there is no
evidence except the extra judicial confession made
by the petitioner and that the petitioner had pointed
out the place from where the dead body was
recovered.

It is further submitted that the petitioner is
below 16 years of age.

In the circumstances, the petitioner is
directed to be enlarged on bail on furnishing bail
bond of Rs.8,000/- with two sureties of the like
amount each to the satisfaction of Sri D.D. Guru,

Judicial Magistrate, Lohardaga, in Bhandra P.S. Case No.33/85 (G.R.294/85)".

The appellant was examined under Section 313 Cr. P.C. where his age was estimated to be 28 years. The said estimated age was recorded by the trial court again on 09.04.1999 being 28 years. In the judgment of the trial court again the aforementioned age was mentioned.

In absence of any plea having been taken by the appellant, it is not disputed, that the court at no stage had gone into the question as regard the age of the appellant.

Sub-section (1) of Section 32 of the Act provides for presumption and determination of age in the following terms :

"32. Presumption and determination of age.- (1) Where it appears to a competent authority that a person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a child, the competent authority shall make due inquiry as to the age of that person and for that purpose shall take such evidence as may be necessary and shall record a finding whether the person is a child or not stating his age as nearly as may be."

The statute, therefore, has imposed a duty upon the competent authority to make an enquiry as to the age of that person who appears to be a child to him. No such enquiry was, however, made presumably because no such plea was raised. At that time, it also might not have occurred to the court that the Appellant was a child. Section 33 of the Act lays down the circumstances which are required to be taken into consideration in making an order under Section 32 of the said Act. In the year 1999, evidently the trial court did not consider the question of estimating his age in terms of the provisions of the Act.

The learned counsel for the appellant has not made any submission on merit of the matter. We have, however, gone through the judgments of the learned trial judge as also the High Court and we do not find any infirmity therein.

The provisions of a beneficial legislation should ordinarily be given effect to. However, we may notice that the appellant is literate. Presumably he attended some school. However, no certificate of his date of birth or any other proof as regard his date of birth is available on records. No other material apart from the estimate of the court has been brought to our notice. In the absence of any material on record, we cannot arrive at a definite conclusion that the appellant as on the date of commission of the offence was a child within the meaning of the said Act.

In Krishna Bhagwan v. The State of Bihar [(1989) PLJR 507], N.P. Singh, J., (as His Lordship then was), speaking for a Full Bench of the Patna High Court, opined :

"\005Section 32 vests power in the Juvenile Court to make due enquiry in respect of the age of the accused on the date of the commission of the offence and for that purpose such Court has to take evidence as may be necessary and to record a finding whether the accused in question was a juvenile. It need not be pointed out that it is not possible for this Court to determine the age of an accused on the date of the commission of the

offence because that has to be determined on the basis of the evidence to be adduced and other materials in support thereof being produced. This determination should not be based merely on written opinion of the doctors produced before this Court. Prosecution has right to cross-examine such medical or forensic experts who have given their opinion about the age of the accused in order to demonstrate that the accused was not a juvenile on the date of the commission of the offence. This is necessary because by the time the plea is taken before the appellate court in almost all the cases the accused concerned must have ceased to be a juvenile due to lapse of time making it more difficult for the appellate court as well as the Juvenile Court to determine as to what was his age at the time of the commission of the offence. In my view, in such a situation, the Courts including Juvenile Court should get the accused held guilty of serious offences, examined by a Medical Board and should determine the age of such accused on basis of the materials on the record including the opinion of the Medical Board. Once the legislature has enacted a law to extend special treatment in respect of trial and conviction to juveniles, the Court should be jealous while administering such law so that the delinquent juveniles derive full benefit of the provisions of such Act but, at the same time, it is the duty of the Courts that the benefit of the provisions meant for juveniles are not derived by unscrupulous persons, who have been convicted and sentenced to imprisonment for having committed heinous and serious offences, by getting themselves declared as children or juveniles on the basis of procured certificates. According to me, if the plea that the accused was a child or juvenile on the date of the commission of the offence is taken for the first time in this Court, then this Court should proceed with the hearing of the appeal, as required by section 26 of the Juvenile Act and should record a finding in respect of the charge which has been levelled against such an accused. If such an accused is acquitted, there is no question of holding any enquiry in respect of the accused being a child on the relevant date but, if the finding of the guilt recorded by the Court below is affirmed and this Court on the basis of materials on record is prima facie satisfied that the accused may be a child/juvenile within the meaning of the relevant Act on the date of the commission of the offence, it should call for a finding from the Children's Court/Juvenile's Court in accordance with section 32 of the Act. If the finding so received is accepted by this Court, then this Court in terms of section 26 of the Juvenile Act should pass an order directing the Juvenile Court to pass orders in accordance with sections 21 and 22 of the Act."

We with respect agree to the said approach.

The said decision has been noticed by this Court in Gopinath Ghosh v. State of West Bengal [(1984) Supp. SCC 228].

We may, however, notice that in Ramdeo Chauhan alias Raj Nath v. State of Assam [(2001) 5 SCC 714], as regards applicability of the provision of Section 35 of the Indian Evidence Act, 1872 vis-'-vis a school register, it was stated :

"It is not disputed that the register of admission of students relied upon by the defence is not maintained under any statutory requirement. The author of the register has also not been examined. The register is not paged (sic) at all. Column 12 of the register deals with "age at the time of admission". Entries 1 to 45 mention the age of the students in terms of years, months and days. Entry 1 is dated 25-1-1988 whereas Entry 45 is dated 31-3-1989. Thereafter except for Entry 45, the page is totally blank and fresh entries are made w.e.f. 5-1-1990, apparently by one person up to Entry 32. All entries are dated 5-1-1990. The other entries made on various dates appear to have been made by one person though in different inks. Entries for the years 1990 are up to Entry 64 whereafter entries of 1991 are made again apparently by the same person. Entry 36 relates to Rajnath Chauhan, son of Firato Chauhan. In all the entries except Entry 32, after 5-1-1990 in column 12 instead of age some date is mentioned which, according to the defence is the date of birth of the student concerned. In Entry 32 the age of the student concerned has been recorded. In column 12 again in the entries with effect from 9-1-1992, the age of the students are mentioned and not their dates of birth. The manner in which the register has been maintained does not inspire confidence of the Court to put any reliance on it. Learned defence counsel has also not referred to any provision of law for accepting its authenticity in terms of Section 35 of the Evidence Act. The entries made in such a register cannot be taken as a proof of age of the accused for any purpose."

We are, however, not oblivious of the decision of this Court in Bhola Bhagat v. State of Bihar [(1997) 8 SCC 720], wherein an obligation has been cast on the court that where such a plea is raised having regard to the beneficial nature of the socially-oriented legislation, the same should be examined with great care. We are, however, of the opinion that the same would not mean that a person who is not entitled to the benefit of the said Act would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit. Each case has to be considered on the basis of the materials brought on records.

The aforementioned decisions have been noticed by this Court in Zakarius Lakra and Others v. Union of India and Another [(2005) 3 SCC 161], wherein a Bench of this Court while entertaining an application under Article 32 of the Constitution of India opined that although the same was not maintainable, having regard to the decision of this Court in Rupa Ashok Hurra v. Ashok Hurra [(2002) 4 SCC 388], the review petition should be allowed to be converted into a curative petition. [See also Raj Singh v. State of Haryana \026 (2000) 6 SCC 759].

We, therefore, are of the opinion that the determination of the age of the appellant as on the date of the commission of the offence should be done afresh by the learned Sessions Judge.

For the reasons aforementioned, this appeal is allowed and the matter is remitted to the learned Sessions Judge with a direction to consider the matter as regard the age of the appellant as on the date of commission of the offence and in the event, he is found to be a child and/or juvenile within the meaning of the Act and the Juvenile Justice Act to deal with the accused accordingly. If he is found not to have been a child as on the date of the commission of the offence, the present conviction will stand.