

(2006) 10 AHC CK 0168

Allahabad High Court

Case No: None

Mohammad Haneef

APPELLANT

Vs

The State of U.P.

RESPONDENT

Date of Decision: Oct. 13, 2006**Acts Referred:**

- Constitution of India, 1950 - Article 39
- Criminal Procedure Code, 1973 (CrPC) - Section 313, 392
- Penal Code, 1860 (IPC) - Section 302

Citation: (2006) 10 ADJ 359 : (2007) CriLJ 1373 : (2007) 3 RCR(Criminal) 28**Hon'ble Judges:** R.C. Deepak, J; M.C. Jain, J; K.K. Misra, J**Bench:** Full Bench**Final Decision:** Dismissed

Judgement

M.C. Jain, J.

The present appeal is directed against the judgment and order dated 31.8.1979, passed by Sri R.P. Pandey, the then Sessions Judge, Bahraich, whereby he convicted the accused appellant Mohammad Hanif u/s 302 I.P.C. and sentenced him to imprisonment for life in Sessions Trial No. 12 of 1979.

2. A Division Bench comprising of Hon"ble D.K. Trivedi and Hon"ble Kundan Singh JJ heard it and delivered separate judgments. There was difference of opinion between Hon"ble Judges as to whether the appellant was a child at the time of the occurrence, though both of them upheld his conviction. Hon"ble D.K. Trivedi J. was of the opinion that he was a child on the date of incident and was entitled to the benefit of U.P. Children Act whereas Hon"ble Kundan Singh, J. was of the opposite view. So, the difference of opinion between the two Judges centred around this question. Hon"ble Kundan Singh J. also passed an additional order for constituting larger Bench as per the proviso of Section 392 Cr.P.C. which reads as under:

Provided that if one of the Judges constituting the Bench, or where the appeal is laid before another Judge under this section, that Judge, so requires, the appeal shall be re-heard and decided by a larger Bench of Judges.

3. Under these circumstances, larger Bench of three Judges came to be constituted. Earlier, the appeal was before Full Bench comprising of Hon"ble B. Kumar, Hon"ble Shobha Dixit and Hon"ble Virendra Saran, JJ. Thereafter Full Bench comprising of Hon"ble N.K. Mitra, C.J., Hon"ble R.R.K. Trivedi and Hon"ble Virendra Saran JJ was seized of the matter. Arguments before that Full Bench concluded on 28.3.2000 and the judgment was reserved. It appears, however, that the judgment could not be delivered. By subsequent order dated 5.11.2004 passed by Hon"ble M. Katju, Acting C.J. (as he then was) this Bench came to be constituted.

4. Shortly stated, the prosecution case was that Mohammad Umar alias Piyare Miyan had a wood stall in Mohalla Qazipura, opposite to Tea Stall of Khairulla within Police Station Kotwali, City Bahraich. Ghasitey alias Abdul Rehman (deceased), was working as servant on that wood stall. On 28.9.1978 Ghasitey handed over Rs. 300/- representing the sale proceeds of wood to Mohamma Umar in the evening. The incident took place the following day on 29.8.1978 at about 6.30 A.M. The accused appellant Mohd. Hanif was taking tea at the Tea Stall of Khairulla. At that time, Ghasitey reached there. The accused appellant asked him to hand over the earning of 28.9.1978 to him. Ghasitey replied that he had given the entire sale proceeds to his father Mohammad Umar in the preceding evening. However, the accused appellant Mohammad Hanif commanded him to go and bring the money from his father Mohammad Umar as he had to go to Kanpur. Ghasitey told him to go to his father personally and take the money. The accused appellant insisted but Ghasitey did not agree. Then the accused appellant threatened him and asked him to go and bring the money, else he would be killed then and there. Ghasitey still did not agree to go to Mohammad Umar for collecting the money. The accused appellant caught hold of Ghasitey and gave him kick and fist blows. Babu alias Mazibulla, Mohd. Ismail, Hamid and others, residents of Mohalla Nazirpur, Laddan r/o Mohalla Qazipur and Mahmood and others intervened in that scuffle. All of them scolded the accused appellant and separated him and Ghasitey. Meanwhile, the accused appellant took out a knife and gave a blow on the head of Ghasitey and thereafter ran away from the spot issuing threats to the witnesses. On receiving the injury, Ghasitey fell down on the ground and became unconscious. With the help of others, the informant Sattar Khan took him to hospital where he was declared dead by the doctor. Sattar Khan-brother of the deceased then lodged an F.I.R. at 8.30 A.M. on 29.9.1978 at Police Station Kotwali, District Bahraich.

5. Investigation was taken up by Laik Ahmad PW 6 who proceeded to the place of occurrence in the company of the informant. He recorded the statements of the witnesses, prepared the site plan and collected the bloodstained and simple pieces of metallad road with the preparation of memos therefor. He then went to the hospital and prepared the inquest report of the deceased and sent the dead body for post mortem

examination which was conducted by Dr. R.K. Srivastava PW 4 on 30.9.1978 at 9 A.M. The deceased was aged about 25 years. The first ante mortem injury found on his person was punctured wound of the size of 3 cm x 1 cm x 6 cm on the head. The second injury was contusion 1 cm x 1/2 cm on the top of right shoulder.

6. At the trial, the prosecution examined six witnesses out of whom Sattar Khan PW 1, Abdul Ahmad PW 2 and Baboo PW 3 were the witnesses of fact. Dr. R.K. Srivastava PW 4 had conducted autopsy on the dead body of the deceased. Head Constable Nagendra Bahadur Singh PW 5 had prepared the chik report and made entry regarding registering of the case and Laik Ahmad PW 6 was the Investigating Officer.

7. In his statement u/s 313 Cr.P.C, the accused appellant denied the prosecution version and stated that he had been falsely implicated due to enmity. Though he admitted that the deceased used to work as labourer at wood stall, but stated that he did not stay in the night at the stall. _____

8. On appraisal of evidence, the trial judge held the accused appellant to be guilty u/s 302 I.P.C. for committing the murder of Ghasitey and sentenced him to life imprisonment.

9. We have heard Sri Mahendra Pratap, learned Counsel for the accused appellant and Sri M.C. Joshi, learned A.G.A. from the side of the State.

10. We have thoroughly examined the evidence of Sattar Khan PW 1, Abdul Ahmad PW 2 and Baboo PW 3. All of them categorically testified that the accused appellant first assaulted the deceased with kicks and fists and then caused the fatal injury to him with knife. Learned Counsel for the accused appellant could not point out anything to castigate the testimony of these three eyewitnesses which could render them unreliable. Instead, the learned Counsel for the accused appellant confined his submission to the question that the accused was a child on the date of the incident. Upon it depended the answer to another important aspect as to whether he could be sentenced to imprisonment. To be short, this is the sole controversy to be resolved in the present appeal.

11. So, we agree with the learned trial judge that the accused appellant was guilty of the offence punishable u/s 302 I.P.C. for committing the murder of Ghasitey alias Abdul Rehman on the given date, time and place. We concentrate on the principal controversy referred to above.

12. To begin with, summarising earlier rulings, 5-Judges Bench of the Apex Court held in the case of Pratap Singh v. State of Jharkhand and Anr. 2005 SCC 742 that it is the date of the commission of the offence (and not the date when the offender is produced before the competent authority or the Court) for determination of his age whether he was juvenile or otherwise. So, the date of commission of the offence is the crucial and material date in this regard which, in the present case would be 29.9.1978.

13. Another related question should be dealt with here that the plea of age can be raised at any stage. It is settled by a series of decisions. One of such cases is [Gopinath Ghosh Vs. The State of West Bengal](#), in which the apex Court allowed the appellant to raise such plea there (before the Supreme Court) keeping in view the beneficial provisions of the socially progressive statute read with Article 39(f) contained in Part IV of the Directive Principles of State Policy of the Constitution of India. The said Article 39(f) is as under:

39. Certain principles of policy to be followed by the State.-The State shall, in particular, direct its policy towards securing-

(a)...

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

14. The underlying idea is that in respect of crime committed by a child, the matter is to be treated with a compendious approach. The reason is that the object of the statute dealing with juvenile offenders is to provide for the care, protection, treatment, development and rehabilitation of delinquent juveniles. There is special thrust on the reformation of such offenders, lest they come in contact with hardened criminals in jail following their footsteps for the rest of the life. Such a statute is not only a beneficial legislation but also a remedial one.

15. So far as the present case is concerned, the accused appellant claimed himself to be a child under 16 years of age right from the beginning. It is not a case where such a plea was raised at belated stage. It is found that the accused appellant made surrender application before the Chief Judicial Magistrate, Bahraich on 30.9.1978. Bail application on his behalf was moved on 13.10.1978 in which it was clearly stated that he was well below the age of 16 years. Thereafter, bail application was moved before the Sessions Judge which was supported by an affidavit of Mohammad Siddiq dated 17.10.1978 (Ex.Ka-16). Herein also it was averred that the accused was aged about 15 years only. The same fact was mentioned in the bail application (Ex.Ka-17) in paragraph 7.

16. We should mention here that the learned Counsel for the accused appellant tried to support the juvenility of the accused on the date of the incident on the basis of his scholar register and transfer certificate of Azad Inter College, Bahraich on the record of the lower court in which his date of birth is recorded 1.7.1964. However, for practical purposes it has to be ignored and the question of age is to be determined on other evidence and circumstances surfacing on record. The reason is that this document was not proved before the lower court according to law. There is nothing to indicate as to who issued it and what was the basis of recording his date of birth as 1.7.1964 in it.

17. Proceeding further, it is to be pointed out that the statement of the accused appellant was recorded u/s 313 of the Code of Criminal Procedure on 21.8.1979. In it, the accused

appellant categorically stated that his age was 15 years and 2 months. However, the trial judge made an endorsement that he appeared not less than 22-24 years in age. The point of the matter is that there was no evidence on record to show that the statement of the accused regarding his age was not correct or that he was more than 16 years of age. We are of the definite view that the note about his age recorded by the Sessions Judge could not be taken as the correct age as it was based on his personal guess work.

18. In the case of *Rahul v. State of U.P.* 1976 SCC 613 the Supreme Court held that the accused's statement regarding age could not be discarded without any cogent evidence. Relevant observations of the Supreme Court may be quoted:

It is true that the Sessions Judge on looking at the appellant thought that he must not be less than 24 years of age, and the High Court also, on seeing the appellant personally, took the view that the estimate of age given by the Sessions Judge was correct, but the Sessions Judge as well as the High Court were not right in substituting their own estimate on the basis of such estimate rejecting the statement made by the accused as to his age. Appearance can often be deceptive.

19. Moreover, Rule 50 of the General Rules (Criminal) reads as under:

If the court considers the age given by a witness or accused to be an under estimate or an over estimate it should form its own estimate and mention it also in the record. If the accused is charged with an offence punishable with death and that court considers the age given by him to be an under estimate, or an over estimate, it may order medical examination of the accused about his age and should direct the State Counsel to produce documentary evidence of his age, if any, is available.

20. The Sessions Judge did not order for medical examination of the accused about his age. Nor did he direct the State Counsel to produce any documentary evidence of his age, if any, was available. The estimate of age noted by the Sessions Judge was a rough estimate based on the general appearance of the accused whereagainst there was definite statement of the accused that he was 15 years and 2 months old on the date of his statement and such was his consistent case right from the beginning. The rough estimate given by the Sessions Judge about his age could not eclipse or overshadow all other facts and circumstances regarding the age of the accused.

21. An order was passed by the Full Bench on 21.2.2000 that for assessing the correct age of the appellant, it was necessary to hold an enquiry. For that purpose, it was also necessary to cause him to be medically examined. The Chief Medical Officer, Lucknow was directed to medically examine the accused appellant Mohd. Hanif and to give his report about his age. The Chief Medical Officer, Lucknow produced medical examination report regarding the age of the accused appellant Mohammad Hanif. Dr. H.P. Kumar, Chief Medical Officer, Lucknow was also examined before this Court as CW 1 on 15.3.2000 and an additional statement of the accused Mohammad Hanif u/s 313 Cr.P.C.

was also recorded on the same date. The medical examination report dated 25.2.2000 has been marked as Ex.C-1. According to it, he was aged about 35 years on the date of examination (25.2.2000). The accused appellant was advised X-ray of clavicle, sternum and skull. X-ray had been done on 24.2.2000 by Dr. S.K. Hasan, Radiologist, Balrampur Hospital, Lucknow. He was again produced before the Chief Medical Officer (CW 1) on 25.2.2000 with Radiologist's report. On appearance and on the basis of the Radiologist's report, his age appeared to be about 35 years. X-ray report has been marked as Ex.C-2 and X-ray plates as Ex.C-3 to C-6. This way, he must have been aged about 13 years on the date of the incident dated 29.9.1978. However, on the basis of status of fusion of his relevant bones, he (Dr. H.P. Kumar, CW 1) stated that he could be near 40 years of age but in cross-examination, he stated that the age of the accused appellant could be about 35 years as mentioned in his certificate. We should point out that there is not even a whisper in the certificate issued by this witness that the age of the accused could be 40 years. Actually, his statement that this age could be 40 years also was merely theoretical in nature being based on the view of Dr. Modi in his Medical Jurisprudence which is to the following effect:

Owing to the variations in climatic, dietetic, hereditary and other facts affecting the people of the different states of India, it cannot be reasonably expected to formulate a uniform standard for the determination of the age of the union of epiphysis for the whole of India.

22. Therefore, the vague statement of the doctor that the age of the accused appellant could be 40 years also, cannot be accepted. We veer around the conclusion that the age determined to be 35 years on the basis of the X-ray plates and report (as mentioned in the medical examination certificate) prepared by the C.M.O. Lucknow was the correct age of the accused appellant. The Supreme Court has held in the case of [Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others](#), that judicial notice can be taken that the margin of error in age ascertainment by radiological examination is two years on either side. With such margin the accused appellant could not be more than 15½ years on the date of incident (29.9.1978).

23. U.P. Children Act, 1951 was in force at the relevant time on 29.9.1978. Section 2(4) of the U.P. Children Act 1951 (U.P. Act No. 1 of 1952) defines a child to mean a person under the age of 16 years. Section 27 of the said Act says that notwithstanding anything contained to the contrary in any law, no court shall sentence a child to transportation or imprisonment for any term or commit him to prison in default of payment of fine. Section 29 provides, so far as it is material, that if a child is found to have committed an offence punishable with imprisonment, the Court may order him to be sent to an approved school for such period of stay as will not exceed the attainment of the age of 18 years by the child. The Supreme Court has held in the case of Bholas Bhagat v. State of Bihar AIR 1998 SC 236 that the benefit of Children Act should not be refused on technical grounds.

24. In the instant case also, the benefit of Children Act should be afforded to the accused appellant Mohammad Hanif. Though he was under 16 years of age at the time of this

incident, but must be around 41 years presently. Therefore, he cannot be sent to an approved school now.

25. Though the accused appellant cannot be sentenced to imprisonment for any term even in default of payment of fine as per Section 27 of the U.P. Children Act 1951, it would be just and proper to impose upon him a fine of Rs. 25,000/- u/s 302 I.P.C. The same should be paid as compensation to the wife of the deceased Ghasitey and in the eventuality of her not being there, to the complainant (Sattar Khan PW 1-brother of the deceased). Appropriate direction shall also be given that if the fine is not paid, the same shall be recovered from the property of the accused appellant.

26. In net conclusion, we finally order as under:

27. The appeal is dismissed and the conviction of the accused appellant Mohammad Hanif u/s 302 I.P.C. for committing the murder of Ghasitey alias Abdul Rahman is confirmed. However, we do not pass any sentence of imprisonment against him as substantive punishment because he is entitled to the benefit of the Children Act, 1951. Instead, we sentence him to pay a fine of Rs. 25,000/- u/s 302 I.P.C. This amount of fine shall be deposited by the accused appellant Mohammad Hanif within a period of two months. In the eventuality of the same not being paid by him within the stipulated time, it shall be recovered from his property. After the amount of fine is recovered, the same shall be paid as compensation to the wife of the deceased Ghasitey alias Abdul Rehman. If she is not there, it shall be paid to the complainant -Sattar Khan PW 1-brother of the deceased. It is again made clear and reiterated that if the accused appellant fails to deposit the fine, the same shall be recovered from his property.

28. Chief Judicial Magistrate, Bahraich shall report compliance within 2½ months from the date of receipt of a copy of this judgment which shall be sent by the office forthwith alongwith the record of the lower Court.