Kaloo Vs State of U.P.

Criminal Jail Appeal No. 58 of 2001

Court: Allahabad High Court

Date of Decision: Sept. 30, 2005

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) â€" Section 161, 208(1), 208(1), 208(3), 208(3)#Evidence Act, 1872 â€" Section 114, 79, 80, 81, 82#Penal Code, 1860 (IPC) â€" Section 300, 302, 304, 304(II)#Uttar Pradesh Criminal General Rules, 1957 â€" Rule 50

Hon'ble Judges: Imtiyaz Murtaza, J; Amar Saran, J

Bench: Division Bench

Advocate: Samit Gopal, Amicus Curiae, for the Appellant; R.K. Singh, A.G.A., for the Respondent

Final Decision: Partly Allowed

Judgement

Amar Saran, J.
This criminal appeal has been preferred from jail by the 1 appellant Kaloo against the judgment and order dated 6.4.2000

passed by the VII Additional Sessions Judge, Mathuta whereby the appellant has been convicted u/s 302 IPC for imprisonment for life together

with a fine of Rs. 2000/- and in default of payment of fine, the appellant will have to undergo further one year"s R.I.

2. In short, the case of the prosecution was that on 29.11.1997 the TV. antenna of Smt. Jagwati had been toppled by a monkey, but she believed

that Smt. Laxmi Devi, wife of Govinda was responsible for knocking down her antenna, as a result a dispute had broken out between the two

ladies over this matter. At about 7.00 P.M. the appellant, who used to reside with Smt. Jagwati, siding with Smt. Jagwati, rushed upstairs where he

gave knife blows injuring Smt. Laxmi Devi. After that Kaloo fled away. Km. Saroj, daughter of Smt. Laxmi and Govinda, were present at the

spot. They rushed Smt. Laxmi Devi to Methodist Hospital, where she died at about 3.00 A.M in the hospital. Earlier also Kaloo used to side with

Smt. Jagwati whenever there was a dispute between the two ladies.

3. A written report of this incident was submitted by Govinda, P.W. 1 on 30.11.1997 at 10.15 A.M. at police station Vrindavan and a case was

registered on that basis by HM Dilevar Singh at case crime No. 359 of 1997 u/s 302 IPC and a chik report was prepared and necessary GD

entries were made by HM Dilevar Singh

4. Vijay Pal Singh, P.W. 6, S.H.O, in charge police station Vrindaban commenced investigation of this case. He recorded the statements of

Govinda and Km. Saroj u/s 161 Cr.P.C. and thereafter he inspected the spot and prepared the site plan on the pointing out of Km Saroj. He also

collected the plain and blood stained "Farsh" (floor) and blood stained clothes worn by the deceased and prepared their recovery memos. On

30.11.1997, the date of incident itself, the investigating officer arrested the appellant Kaloo and he appears to be in jail over since. After

completing the other formalities of the case, he submitted the charge sheet against the appellant Kaloo u/s 302 IPC on 15.12.1997.

5. The prosecution has examined two eye witnesses, Govinda, P.W. 1 and Km. Saroj, P.W. 2, daughter of Govinda. Apart from the aforesaid

two eye witnesses, the prosecution has examined P.W. 3 Dr. R.S. Maurya, who conducted the post mortem examination on the body of Smt.

Laxmi Devi, wife of Govinda, on 1,12.1997 at 3.20 P.M. She was of average built. Rigor mortis was present in lower extremities, but absent in

upper extremities. The Doctor found the following ante mortem injuries:

1. Stitched wound 11.0 cm long on midline abdomen, just below umbilicus.

2. Stitched wound 5.0 cm long on right inguinal area. Right femoral vessel stitched. Surgical dressing present over wound.

6. The peritoneum was stitched. There was 350 ml of clotted blood in the abdominal cavity. The stomach contained 100 gms of pasty liquid and

there was pasty food material and gases in the small intestine. The large intestine also contained gases and faecal matter The death was due to

shock and haemorrhage as a result of ante mortem injuries.

7. However, P.W.3, Dr. R.S. Maurya deposed that out of the two injuries, injury No. 1 (which was a stitched wound on the mid line of the

abdominal just below umbilicus) was a result of operation Injury No. 2 alone was the result of an assault. Injury No. 2 was stitched and it was

opened at the time of post mortem As the wound had already been stitched, he could not specify as to what weapon had caused that injury.

8. Head Moharrir Dilevar Singh, P.W. 4, prepared the chik FIR after the FIR was handed over to him by the informant as mentioned above.

9. Sl Ram Lakhan Anuragi, P.W. 5, who was posted at out post Birla Mandir, police station Govind Nagar on 30.11.1997 handed over the dead

body to constable Shanker Lal, P.W. 7 and constable Raj Kumar for taking it for post mortem after conducting the request

10. Vijay Pal Singh, S.H.O, P.W. 6, in charge police station Vrindavan, investigated the case as described above.

11. P.W. 1, Govinda, husband of the deceased Laxmi Devi reaffirmed the version given in the FIR about the dispute between Smt, Jagwati and his

wife Smt. Laxmi. After Smt. Jagwati"s T.V. antenna had been toppled down by a monkey, which she suspected was an act of Smt. Laxmi an

argument ensued between Smt. Jagwati, who was standing at the ground and the deceased Smt. Laxmi, who was on the roof at that time (7.00

P.M.). His cousin brother Kaloo, who used to reside with Smt. Jagwati, arrived there and started siding with Smt. Jagwati and then assaulted Smt.

Laxmi Devi with a knife, as a result of which Smt. Laxmi sustained injury. Thereafter Kaloo ran away from the spot. This incident was witnessed

by P.W. 1 Govinda and his daughter P.W. 2 Km. Saroj and his aunt. He took his wife to Methodist hospital, where she died at 3.00 A.M. He

thereafter got the report scribed by Gopal and handed over the written report at the police station Vrindavan, which is ext. Ka.1.

12. P.W. 2 Km. Saroj has corroborated the version given by Govinda,"her father. She stated that on the fateful day at about 7.00 P.M. she was

standing near her mother when there was an argument with her elder aunt ""Tai"" (Jagwati). Jagwati"s T.V. antenna had been toppled by a monkey,

but Jagwati was accusing her mother of toppling it, which accusation her mother was denying She and her mother were upstairs whereas her "Tai

Jagwati was below. Kaloo, who used to live in front of her house and also stayed with her ""Tai"" sometimes, arrived when the quarrel was going on.

He was armed with a knife which he plunged in her mother"s stomach and thereafter fled from the spot. She raised a cry. Her mother was

bleeding. Blood had fallen on the roof where her mother was standing and her clothes became blood stained. The clothes was taken into

possession by the investigating officer, who prepared a memo (Ext. Ka 2) of the same of which she was signatory along with two other witness

Shyam- Sunder and Ram Babu. At the time of incident her younger sister and father Govinda were present. After that her mother was taken to

hospital where she died at 3.00 A.M.

13. We have heard Shri Samit Gopal, Amicus Curiae for the appellant and Sri R.K. Singh learned Additional Government Advocate representing

the State.

14. Shri Samit Gopal rightly did not raise any argument on the merits of this case, but he has only advanced two contentions on behalf of the

appellant. One, that as the dispute between the parties took place all of a sudden and there appears to be only one injury on the thigh of the

deceased, the case against the appellant would only be a case of culpable homicide not amounting to i murder for which the appellant could be

punished only u/s 304 Part-II or Part-I. The sentence of almost eight years which the appellant had undergone since 30.11.1997 would suffice and

imprisonment should be reduced to the period already undergone by him.

15. Secondly, according to the statement of the appellant u/s 313 Cr.P.C, which was.recorded on 16.2.2000, he had given his age as 18 years

and there was no note of the Sessions Judge. Mathura to the contrary, hence he should be treated as almost three months under 16 years on the

date of incident, i.e. 29.11.1997.and accordingly he should be given the benefit of Juvenile Justice Act 1986, which was then in force.

16. As the incident in question had taken place in the house of the informant and even the blood was taken from the ""Farsh"" (floor) and the

appellant too was a cousin brother of the informant Govinda, hence there was no reason for the informant and his daughter to have implicated the

appellant if he was not the. assailant and to have spared the real offender for assaulting the informant''s wife.

17. We, therefore, find no reason to disagree with the findings of the Additional Sessions Judge convicting the appellant as above and for not giving

undue importance to the little delay in lodging the FIR on 30.11.97 at 10.15 a.m., when the incident had taken place on 29.11.1997 at 7 p.m. as

Smt. Laxmi was initially taken to hospital in an injured condition where she appears to have been operated before she died at 3.00 A.M on

30.11.1997. Likewise regarding the submissions raised before him, relating to the discrepancies about the place where the report was got scribed

through Gopal or whether it was read out to Govinda, the Sessions Judge has rightly not given much importance to such minor discrepancies in the

evidence, which lend a natural and untutored quality to the testimony. The Sessions Judge has therefore rightly recorded a finding that the P.W. 1

Govinda and P.W. 2 Km. Saroj were present at the time of the incident and it was not material that no independent witness has been examined in

this case. Similarly, some other discrepancies as to the time when the 161 Cr.P.C. statements were recorded, have also rightly not given much

credence by the learned Judge while recording the conviction of the appellant and we concur with his view.

18. So far as the contention of the learned counsel for the appellant that no case u/s 302 IPC is disclosed and only a case of culpable homicide not

amounting to murder punishable u/s 304 IPC is made there appears to be some substance in this contention. The learned AGA, Sri R.K. Singh has

in all fairness not stoutly resisted this contention in view of there being only a single injury on the groin (inguinal region) of the deceased which

resulted in the femoral artery being cut which had to be stitched, but to no avail. The appellant has.also served about 8 years in jail and the incident

appears to have taken place after a sudden quarrel over a trivial dispute, about whether Smt. Laxmi the deceased toppled the antenna of Smt.

Jagwati Or a monkey. Learned Counsel for the appellant pointed out that P.W. 3 Dr; R.S. Maurya has clearly deposed in his cross examination

that injury No. 1 on the deceased Smt. Laxmi was a result of an operation and only the injury No. 2 was caused by assault. The said injury was

open at the time of post mortem. The location of the injury No. 2 was also on the inguinal area and the right femoral vessel had been stitched. No

doubt, in their cross examinations, Govinda, P.W. 1 and Km. Saroj, P.W. 2, have stated that two blows were given to Smt. Laxmi. In view of the

clear and categorical statement of Dr. R.S. Maurya, P.W. 3 that the deceased Smt. Laxmi had received only one injury and the other stitched

wound in the abdomen appears to have been caused during operation, presumably for stitching the femoral vessel which was cut. According to the

learned counsel for the appellant, the appellant appears to have swung his weapon in the heat of a sudden quarrel and unfortunately the blow

landed on the groin cutting the femoral vessel, which resulted in the death of Smt. Laxmi, as the operation proved of no avail.

19. In this connection he placed reliance in the case of Ram Prakash Singh Vs. State of Bihar, , wherein the Hon''ble Supreme Court held that after

a sudden quarrel and hot exchange of words between the deceased and the accused, who were formerly friends, if an accused inflicting a knife

blow without aiming at any particular part of the body and the medical evidence does not show that the injury was, sufficient in the ordinary course

of nature-to cause death, in that case the accused were held liable only u/s 304 Part-II and not u/s 302 IPC.

20. In this connection, it would be useful to quote paragraph 4 of the aforesaid law report:

We find considerable substance in the contention raised by the learned counsel for the appellant. The fact that the accused and the deceased were

friends and were working together in the credit investment bank opened by Ram Prakash Singh is not a dispute. The fact that a hot exchange of

words took place is also deposed by all the three eye witnesses. The evidence further shows that only one knife blow was given by the appellant

without aiming it at any particular part of Ramswarath ''s body. The doctor, who had performed the post mortem examination has not stated that

the injury which was caused to the deceased was sufficient in the ordinary course of nature to cause death. But for the sudden quarrel on that day

there was no other reason for the appellant to cause an injury to his friend. Therefore, in view of the facts and circumstances of this Case it will

have to he held that his conviction u/s 302 IPC is not proper and that he should have been convicted only u/s 304 Part- II IPC

21. In this regard there is also no categorical statement of P.W. 3 Dr. R.S. Maurya that the injury was sufficient in the ordinary course of nature to

cause death. It is only mentioned in the statement of Dr. R.S. Maurya that as a result of the knife blow and excessive bleeding, it was possible that

the deceased could die. it this connection Exception 4 to Section 300 IPC provides that is noteworthy that ''Culpable homicide is not murder if it is

committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender''s having taken undue

advantage or acted in a cruel or unusual manner. More significantly Explanation 1 to the section, reads that it is immaterial in such cases which

party offers the provocation or commits the first assault.

22. In this view of the matter we think it would be proper if the conviction of the appellant u/s 302 IPC is altered to one u/s 304(II) IPC.

23. Learned counsel for the appellant also contended that when the appellant was examined u/s 313 Cr.P.C. on 16.2.2000, he mentioned his age

as 18 years and there is no finding to the contrary by the learned Sessions Judges This would therefore make the appellant 15 years 9 months and

17 days on 29.11.1997, the date of incident. It is noteworthy that the appellant has not claimed the benefit of the Juvenile Justice Act either at the

trial stage or at the time of hearing of the trial. Is it open to the learned Counsel in the High Court to raise this plea at this stage? In support of the

proposition that it will be open for the appellant to raise the plea of being a juvenile even at the High Court stage, on the basis of his age given in the

statement u/s 313, Cr.P.C, even if he had not raised the plea at an earlier stage, learned counsel for the appellant has placed reliance on a Division

Bench decision of this Court in Babu Khan and Anr. v. State of UP. 2000 (41) ACC 244. In that case the Court appears to have observed that

the age mentioned by the accused in his statement u/s 313 Cr.P.C may be considered for deciding the age of the accused on the date of offence, if

there are no observations to the contrary by the learned Sessions Judge, which is mandated by Rule 50 of General Rules (Criminal). It is

contended that if the Sessions Judge has not expressed any doubt about the correctness of the statement as to age made by the appellant and has

not considered the age given by the witness or the accused to be an underestimate or overestimate and has not given his own estimate nor directed

medical examination of the accused then there is no reason why statement of the accused regarding the age be not accepted. It would be useful

here to quote Rule 50 of General Rules (Criminal) in extenso, which reads as follows:

50. Every such record made by a Presiding Officer or an officer of the court shall be legibly written. If in making the record an officer uses a

typewriter he shall sign every page of it and shall initial every correction or alteration therein. On every statement of an accused and deposition of a

witness and on the memorandum of every such statement and deposition the person mentioned, whether examined on commission or otherwise,

shall be indicated by his full name, father''s name, profession or occupation, residence and age. Abbreviations and elliptical forms of expression

shall be avoided particularly abbreviations of names of persons or places.

If the court considers the age given by a witness of accused to be an underestimate or an overestimate 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 the court considers the age given by him to he an

underestimate, or an overestimate, 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.

24. In Babu Khan (Supra) reliance was also placed on the decision of the Apex Court in Bhola Bhagat v. State of Bihar, AIR 1998 SC 236. In

the case of Bhola Bhagat (Supra), an earlier decision of the Supreme Court in State of Haryana v. Bahwant Singh, 1993 Supp. (1) SCC 409, has

been distinguished and the earlier observations in Gopinath Ghosh Vs. The State of West Bengal, and Bhoop Ram v. State U.P 1989 ACC 285

(SC) have been approved and it has been observed that in Balwant ''s case, the decision of the Apex Court in Gopi Nath and Bhoop Ram were

not noticed.

25. In Balwant ''s case (Supra) it had been mentioned that if the plea that the accused was a child had not been raised before the committal court

as well as before the trial court, the High Court could not, merely on the basis of the age recorded u/s 313.Cr.P.C., conclude that the accused was

a child within the meaning of the definition of the expression under the Act on the date of occurrence, in the absence of any other material to

support that conclusion.

26. While Bhola Bhagat (Supra) has frowned on the use of technicalities for defeating the benefits of socially oriented legislations, like the Bihar

Children Act, 1982 and Juvenile Justicel Act, 1986, however the court has not concluded that the age given by the accused in his statement u/s

313 Cr.P.C was final, if there was no adverse comment in regard to the claim of age given by the accused. All that has been observed in Bhola

Bhagat (Supra) is that "" if the High Court had doubts about the correctness of the age as given by the appellant and also as estimated by the trial

court, it ought to have ordered an enquiry to determine their ages. It should not have brushed aside their plea without such an enquiry.

27. Significantly in Bhola Bhagat (Supra) Chandra Sen Prasad (appellant No. 2) had mentioned file age as 17 years, Mansen Prasad (appellant

No. 3) had given his age as 21 years and Bhola Bhagat (appellant No. 18) has given his age as 18 years. Thereafter the trial court had recorded its

estimation about the age of appellant No. 2 as 22 years, appellant No. 3 as 21 years and appellant No. 18 as 18 years. In spite of this estimation

of the ages given by the trial court, after comparing it with the age mentioned by the accused and raising of the plea of being juveniles, both in the

trial as well as in the High Court, the Courts had rejected the benefit of the plea of being juveniles which was disclosed on facts. This did not bear

scrutiny according to the decision in Bhola Bhagat.

28. However, it has been observed in Bhola Bhagat that ""the correctness of the estimate of age as given by the trial court was neither doubted nor

questioned by the State either in the High Court or in this Court."" This being the case, keeping in view the beneficial socially oriented legislation it

was observed in Bhola Bhagat that when such a plea was raised, the courts should not fold its hand regarding the plea.

29.Even in Babu Khan (Supra) we find that the High Court had not accepted the plea of age merely on the basis of the statement of the accused

u/s 313 Cr.P.C, but other circumstances have been mentioned in the Judgment that the appellant No. 2 Ramesh Kumar was granted bail by the

High Court on the ground that at the time of his initial arrest, for most of the part in view of his minority, he was confined in juvenile jail in Bareilly

and the juvenile jail authority transferred him to Central jail, Bareilly. Also the learned Sessions Judge whilst selecting the lesser punishment for

imprisonment of life, has accepted the age of the accused as 17 years which if calculated would take his age to be below 16 years on the date of

commission of the offence. At the stage when the case was pending enquiry, the committal Magistrate made a request to the Superintendent Jail,

Haldwani to produce the accused in court and it was reported in the return that the child accused was not in Haldwani Jail. It was further

mentioned that in the memo of arrest and charge sheet, in the age column, the. investigating officer failed to make any note regarding the age of the

accused.

30. In the totality of the aforesaid circumstances that this Court in Babu Khan (Supra) appears to have accepted the age mentioned by the accused

at the time of his 313 Cr.P.C. statement as the basis for calculating his age on the date of offence. In the present case, we find that neither was any

plea raised about the accused being a juvenile and even in bail application dated 16.4.1998, which was moved before the Chief Judicial

Magistrate, Mathura, copy of which is on record, no plea was taken that the appellant was a minor and he should be given the benefit of the

Juvenile Justice Act, 1986 nor was the appellant kept in juvenile jail even for a single day as was the position in Babu Khan''s case (supra), for

substantiating the plea of minority.

31. Shri R.K. Singh, learned Additional Government Advocate, has contended that very often when the accused mentions his age at the time of his

313 Cr.P.C. examination, the Sessions Judges do 1 not even pay attention to the age mentioned by the accused as they do not think that the

appellant would seriously be raising the plea of minority subsequently, especially when a number of years have elapsed since the date of incident

and the appellant has not claimed the benefit of Juvenile Justice Act at the time of his initial trial or in any bail or other application. This contention

of the learned A.G.A appears to be borne out in another case examined by us in Criminal Capital Appeal No. 5530 of 2004 (Naim and Anr. v.

State of UP.), decided on 18.8.2005 in which counsel for the appellants Naim and Rafiq had argued that they were 20 and 23 years in age on

7.8.2004, the date of recording of their statements u/s 313 Cr.P.C, as per their statements, which would make the appellant of that case, Nairn 14

years old and appellant Rafiq 17 years 2 months of age on the date of incident, (24.10.1998) and in support of his plea learned counsel for the

appellants had relied on Rule 50 of the General Rules (Criminal) for the proposition that if the court had entertained any doubt about the age as

mentioned by the accused, it was required to have made an endorsement to the contrary and in the absence of the same, the age as mentioned by

the accused in their 313 Cr.P.C, ought to have been accepted. In that case we have observed as under;

However, it is questionable whether these rules which have been framed by the High Court and not the legislature are actually observed or only

observed in their breach. We make take,notice of the fact that when trials are delayed, (in the present case itself the matter remained pending for

six years before the 313 Cr. P. C. statement was recorded and the trial concluded at that stage). It is quite probable that the concerned court may

not have attached any significance to the age mentioned by the accused, as the Court may not have anticipated that the accused might claim the

benefit of the Juvenile Justice Act, 1986, as the accused Nairn and Rafiq had never claimed to be a juvenile earlier. In fact in their earlier bail

application moved by the appellants Nairn and Rafiq before the Sessions Judge on 29.11.1999, which is on the record of this case, the appellants

had declared their ages to be 21 and 22 years. It is for this reason that this plea of age has also not very vehemently raised by the learned counsel

for the appellants. In Om Prakash @ Raja Vs. State of Uttaranchal, , the Apex Court has held that where an accused had given his age as 20

years on the date of his examination u/s 313 Cr. P. C. in order to take the benefit of being juvenile on the date of offence, but the evidence was

received in the court that he had opened an account in a Nationalized Bank where he had described himself as a major at the time of occurrence, it

is apparent that the age of the appellant mentioned u/s 313 Cr. P. C. was incorrect and the Apex Court agreed with the High Court and trial court

that the said claim of being below age could not be accepted and the appellant could not be treated as a juvenile on the date of offence.

32. It is true that U.P. General Rules (Criminal) have been held to be statutory in view of the Judgment of the Supreme Court in Bashira v. State of

U.P. : [1969]1SCR32 , and u/s 114(e) of the Indian Evidence Act, there is a presumption that judicial and official acts have been regularly

performed. But this presumption u/s 114 is only a directory presumption, which implies that the Court may presume the existence of any fact which

it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their

relation to the facts of the particular case. There is no obligatory presumption as described in Sections 79 to 85 of the Indian Evidence Act, which

relate to certain documents mentioned in those sections, where the court is mandated to presume their correctness.

33. In the light of events, public and private as they are now happening, we think it would not be proper for the Court to presume with any degree

of conclusiveness that when an accused mentions his age in his statement u/s 313 Cr.P.C, it should be accepted as his correct age if the trial court

fails to make any endorsement that it does not agree with the estimate of age given by the accused. As we have mentioned in Criminal Capital

Appeal No. 5530 of 2004 (Naim and Anr. v. State of U.P.) that this provision is observed more in the breach that it is actually observed as usually

a number of years have elapsed since the incident and if the accused has not claimed the benefit of being a juvenile at the stage of initiation of trial

or at the appellate stage, the courts are very often overlooking the importance of assessing the age of the accused and comparing it with the age as

given by the accused himself.

34. In Om Prakash @ Raja Vs. State of Uttaranchal, , the Apex Court the appellant''s plea of being a juvenile on the date of offence (15.11.94)

as he had given his age as 20 years at the time of his examination u/s 313 Cr.P.C, (7.3.01) was repelled because the appellant had not given any

proof regarding his age. The High Court had further noted that he admittedly opened a bank account in Punjab National Bank, Dehradun on

9.3.1994, which would have made him major on that date. In this connection paragraph 12 of the aforesaid law report may be ! usefully perused:

12. Regarding the age of the appellant, a contention has been raised that he was juvenile at the time of commission of crime on 15.11.1994

because he gave the age as 20 years in his statement recorded u/s 313 Cr.P.C. on 7.3.2001. Apart from the fact that on behalf of the appellant no

proof was adduced regarding his age, the High Court noted that he admittedly opened the bank account in Punjab National Bank at Dehradun on

9.3.1994. The passbook and the cheque book were exhibited in trial The High Court observed that the appellant would not have been in a

position to open the account unless he was a major and declared himself to be so. That was also the view taken by the trial court. The approach of

the trial court as well as the High Court on this aspect cannot be faulted.

35. In Jagtar Singh v. State of Punjab, 1994 Supp (I) SCC 65, the accused was described as 16 years of age on the basis of the 313 Cr.P.C.

statement school leaving certificate of the accused. But as the doctor who had examined the accused had mentioned his age as 18 to 20 years on

the date of incident and which statement of the doctor had gone without cross examination, hence the age as mentioned by the accused was not

accepted

36. In Suresh Vs. State of U.P., , the accused mentioned his age as 13 years in his committal proceedings. However the Apex Court held that the

age cannot be accepted as correct merely because the prosecution did not dispute the correctness of the assertion made by the appellant as there

was no assertion in regard to the appellant''s age and it was not even put in issue at any stage of the proceedings.

37. The Court further observed that ""it is not a matter of uncommon experience that the age of an accused is mentioned in the committal

proceedings without proper inquiry or scrutiny since, in most cases, nothing turns on it. In fact if the appellant was only 13 years of age at the time

of the offence, the Sessions Court would not have failed, to notice that fact and it would be amazing that the appellant''s advocates in the courts

below should not advert to it, though the minutest contentions were raised in arguments and subtle suggestions were made to prosecution witnesses

in their cross examinations.

38. Now we find that the provision for committal in the old Code of Criminal Procedure 1878 and Section 209 which gives an opportunity to the

accused when he is examined after the evidence referred to in Section 208(1)(3) have been taken and at that stage the accused may explain any

circumstance appearing in the evidence against him. Section 209(1) of the Code of Criminal Procedure 1898 may be usefully perused:

209(1) When the evidence referred to in Section 208, Sub-sections (1) and (3), has been taken and he has (if necessary) examined the accused

for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are

no sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such

person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

39. This provision is similar to Section 313 of the new Code of Criminal Procedure, 1973, which also gives an opportunity to the accused to

explain any circumstance appearing in the evidence against him. Section 313 of the Code of Criminal Procedure, 1973 is also being quoted

hereunder:

313. Power to examine the accused: (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances

appearing in the evidence against him, the Court- may at any stage, without previously warning the accused, put such questions to him as the Court

considers necessary; shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him

generally on the case. Provided that in a summons case, where the Court has dispensed with the personal attendance of the accused, it may also

dispense with his examination under Clause (b)

(2) No oath shall be administered to the accused when he is examined inder Sub-section (I)

(1)The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against him in any other

inquiry into, or trial for, any other offence, which such answers may tend to show he has committed.

40. It may be noted that neither Section 209 of the Old Code of Criminal Procedure, 1898 nor Section 313 of Code of Criminal Procedure, 1973

directly provide for mentioning of the age of the accused. However, in both situations, at the committal stage u/s 209 (Old Cr.P.C) and u/s 313

Cr.P.C, it is as a result of the General Rules (Criminal), which has been extracted hereinabove; that the accused are required to mention their ages

and if the court considered the age given by the witness or accused to be an underestimate or overestimate, it was required to form its own

estimate and mention it also in the record. The court could also order medical examination of the accused and for production of documentary

evidence if the court considered the age given by the accused as incorrect when the accused was charged with an offence punishable with death.

41. Suresh (supra) therefore, makes it abundantly clear that merely because the age mentioned by the accused in his statement in the committal

proceeding, is not disputed, the assertion of the age of the accused cannot be accepted ipso facto. The position of assertion of his age, in his

statement u/s 313 Cr.P.C, as we have pointed out hereinabove, is in para material

42. Therefore simply because the age mentioned by the accused at the time of his statement u/s 313 Cr.P.C. was not questioned by the trial court,

there can be no conclusive presumption that the age mentioned by the accused was correct, for reaching a conclusion that the accused was a

juvenile on the date of offence. However, it is made clear that in view of the mandate contained in Section 50 of the General Rules (Criminal) that

court must either mention its own estimate of age if it finds the age given by the accused is underestimate or overestimate or it should get an enquiry

conducted by asking for medical evidence or documentary evidence about the age of the accused.

43. We notice that many circulars have been issued by the High Court from time to time for getting the age, as mentioned by the accused, verified.

In this connection a High Court circular dated 13.8.1968 addressed to all the -District Judges and Civil and Sessions Judges by the Additional

Registrar, High Court Allahabad may be usefully cited:

It has been noticed in several criminal cases that the accused persons either exaggerate their ages or minimize the same in order to gain advantage.

It would, therefore, be proper that all the Sessions Judges and Magistrates should give their estimate of the ages of the accused persons when the

statements of the accused are recorded by them.

44. In view of what has been indicated hereinabove there are no sufficient grounds for holding the appellant to be a juvenile eligible for the benefits

of the Juvenile Justice Act 1986. However the conviction and sentence of the appellant is altered from one u/s 302 IPC to Section 304 part-2

IPC. As the appellant is in jail for over seven years and nine month since 1.12.1997 the date of his incarceration, we think it would be proper if the

sentence awarded to the appellant is reduced to the period already undergone by him. The appellant is in jail. He shall be released forthwith unless

he is wanted in any other case. The appeal is partly allowed as above.

45. Before parting with the case, we would like to observe that General Rules (Criminal) and circulars, which have been issued from time to time

by the High Court, directing the Sessions Judges to verify the ages of the accused when they mention their ages at the time of their examination u/s

313 Cr.P.C, have been rarely followed and have been observed more in the breach by the Sessions Judges and Magistrates. It would be useful to

close this case with the following observations from the case of Bhola Bhagat Vs. State of Bihar, :

18. Before parting with this judgment, we would like to re-emphasize that when a plea is raised on behalf of an accused that he was a ""child

within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the

age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and

seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard. Keeping in view the beneficial nature of the

socially-oriented legislation, it is an obligation of the court where such a plea is raised to examine that plea with care and it cannot fold its hands and

without returning a positive finding regarding that plea, deny the benefit of the provisions to an accused. The court must hold an enquiry and return

a finding regarding the age, one way or the other. We expect the High Courts and subordinate courts to deal with such cases with more sensitivity,

as otherwise the object of the Acts would be frustrated and the effort of the legislature to reform the delinquent child and reclaim him as a, useful

member of the society would be frustrated. The High Courts may issue administrative directions to the subordinate courts that whenever such a

plea is raised before them and they entertain any reasonable doubt about the correctness of the plea, they must as a rule, conduct an inquiry by

giving opportunity to the parties to establish their respective claims and return a finding regarding the age of the accused concerned and then deal

with the case in the manner provided by law.

46. We therefore deem it appropriate to direct all the Sessions Judges and Magistrates in the State of UP. to make a positive endorsement as to

their own estimate of the age of the accused when the accused mention their ages at the time of their examination u/s 313 Cr.P.C. This

endorsement must be made in each and every case, even if the Court concerned is in agreement with the age as mentioned by the accused This

direction has become necessary because we are finding that the requirement in Rule 50 of the General Rules (Criminal) that the court must note

down its own estimate of age in case it is not in agreement with the age mentioned by the accused are more often than not, being overlooked by

trial courts. Only if the Court is required to record a positive finding about the age of the accused in each trial after looking to the age mentioned by

the accused in his statement, other material on record, the court''s subjective impression of the age and in the event that the court deems it

appropriate by getting the medical examination of the accused conducted or by seeking further documentary or other evidence of age, that we can

ensure that the mandate of Rule 50 of the General Rules (Criminal) and directions of the apex Court are observed in letter and spirit. Only by this

exercise will a proper estimate of the age be available on record which is very necessary for deciding on questions of the appropriateness of the

procedure adopted for the trial of the case, i.e. whether the trial of the accused should have been conducted according, to the procedure

prescribed under the Juvenile Justice Act or otherwise, what should be the appropriate sentence, if the accused is of very young age, or he is very

old and in certain cases whether death or life sentence would be the appropriate sentence considering the age of the accused,

47. The Registrar General is directed to circulate copy of this judgment to all the District and Sessions Judges and Magistrates in the State for strict

compliance with the aforesaid directions.