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

Date of Decision: 1st August, 2014

\+ **DEATH SENTENCE REFERENCE No.5/2010**

STATE ..... Petitioner

Through Ms.Swati Goswami, Adv. for Mr.Dayan Krishnan, ASC with Inspector Rajveer Singh, PS S.P. Badli

Versus

JAGTAR & ORS. ..... Respondents

Through Mr. Sidharth Aggarwal, Adv. with Adit S. Pujari, Adv. & Mr.Rahul Kumar, Adv.

Crl.A. No.979/2008

AMAR BHADUR THAPAS S/O GYAN BHADUR THAPA .... Petitioner

Through Mr.Sumer K. Sethi, Adv.

Versus

STATE ..... Respondents

Through Ms.Ritu Gauba, APP
S.I. Amit Rathee, PS Model Town.

WITH

\+ **Crl.A. No.1087/2010**

RAVINDER ..... Petitioner
Through Mr.Sumer K. Sethi, Adv.

Versus

STATE (GOVT. OF NCT OF DELHI) ..... Respondent
Through Ms.Ritu Gauba, APP

AND

\+ **Crl.A. No.1301/2010**

NOOR JAHAN ALIAS HASEENA & ORS. ..... Petitioner
Through Mr.Vivek Sood & Mr.Vishwanath Pratap Singh, Advs.

Versus

STATE (GOVT. OF NCT OF DELHI) ..... Respondent
Through Ms.Ritu Gauba, APP
Insp. Rajveer Singh, PS S.P. Badli

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE J.R. MIDHA

GITA MITTAL, J

1. A question stands raised before this court that is, if a plea of juvenility of the convict, raised for the first time at the appellate stage in the High Court, is accepted, what happens to his appeal against the conviction? Consequently,

another issue follows. Does the Appellate Court have the power to order the removal of the disqualification attaching to the conviction? In other words, what is the fate of the conviction and the order on the sentence which stands imposed upon such a person?

2. This plea was raised by one or more of the appellants in the above appeals. We have therefore heard learned counsels in the appeals on these two issues.

I. Statutory Framework

3. So far as the issues at hand are concerned, it would be useful to first and foremost set out, in extenso, the provisions of Section 2(k), 2l, 6, 7, 19, 20 of the Juvenile Justice (Care & Protection of Children) Act, 2000 (hereinafter the 'JJ Act') as well as Rule 3(IX) and (XIV) of Chapter II of the Juvenile Justice (Care & Protection of Children) Rules of 2007 (hereinafter referred to as the 'Rules'). The same read as hereunder :-

> "2(k) "**juvenile**" or "child" means a person who has not completed eighteenth year of age;
>
> 2(l) "**juvenile in conflict with law**" means a juvenile who is alleged to have committed an offence;
>
> **6. Powers of Juvenile Justice Board.-** (1) Where a Board has been constituted for any district or a group of districts, such Board shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have power to

deal exclusively with all proceedings under this Act relating to juvenile in conflict with law. (2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise.

7. Procedure to be followed by a Magistrate not empowered under the Act.- Procedure to be followed by a Magistrate not empowered under the Act.-(1) When any Magistrate not empowered to exercise the powers of a Board under this Act is of the opinion that a person brought before him under any of the provisions of this Act (other than for the purpose of giving evidence), is a juvenile or the child, he shall without any delay record such opinion and forward the juvenile or the child and the record of the proceeding to the competent authority having jurisdiction over the proceeding.

(2) The competent authority to which the proceeding is forwarded under sub-section (1) shall hold the inquiry as if the juvenile or the child had originally been brought before it.

7A. Procedure to be followed when claim of juvenility is raised before any court. – (1) Whenever a 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, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a **claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act**.

(2) If the court finds a person to be juvenile on the date of commission of the offence under sub-section (1), it shall forward the

juvenile to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect."

4. How the Juvenile Justice Board is to proceed against the juvenile and what are the possible orders which may be passed on finding him guilty of commission of offences is prescribed under Section 15 of the Statute which reads as follows:-

> **"15. Order that may be passed regarding juvenile.-** (1) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it thinks so fit,-
>
> (a) allow the juvenile to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile;
>
> (b) direct the juvenile to participate in group counselling and similar activities;
>
> (c) order the juvenile to perform community service;
>
> (d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;
>
> (e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;
>
> (f) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;
>
> **(g) make an order directing the juvenile to be sent to a special home,- i. in the case of juvenile, over seventeen years but less than eighteen years**

of age for a period of not less than two years; ii. in case of any other juvenile for the period until he ceases to be a juvenile:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.

2. The Board shall obtain the social investigation report on juvenile either through a probation officer or a recognised voluntary organisation or otherwise, and shall take into consideration the findings of such report before passing an order.

3. Where an order under clause (d), clause (e) or clause (f) of sub-section (1) is made, the Board may, if it is of opinion that in the interests of the juvenile and of the public, it is expedient so to do, in addition **make an order that the juvenile in conflict with law shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years as may be specified therein,** and may in such supervision order impose such conditions as it deems necessary for the due supervision of the juvenile in conflict with law :

Provided that **if at any time afterwards it appears to the Board on receiving a report from the probation officer or otherwise, that the juvenile in conflict with law has not been of good behaviour during the period of supervision or that the fit institution** under whose care the juvenile was placed is no longer able or willing to ensure the good behaviour **and well-being of the juvenile it may, after making such inquiry as it deems fit, order the juvenile in conflict with law to be sent to a special home.**

4. The Board shall while making a supervision order under sub-section (3), explain to the juvenile and the parent, guardian or other fit person or fit institution, as the case may be, under whose care the juvenile has been placed, the terms and conditions of the order shall forthwith furnish one copy of the supervision order to the juvenile, the parent, guardian or other fit person or fit institution, as the case may be, the sureties, if any, and the probation officer."

5. Conviction for a criminal offence has widespread ramifications. It immediately impacts employability in public positions. To erase such consequences upon a juvenile, in recognition of social responsibility for his actions/omissions, the legislature has mandated removal of any disqualification in Section 19 which is as follows:-

> **"19. Removal of disqualification attaching to conviction.-** (1)Notwithstanding anything contained in any other law, a **juvenile who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.** (2) The Board shall make an order directing that the relevant records of such conviction shall be removed after the expiry of the period of appeal or a reasonable period as prescribed under the rules, as the case may be."

6. The legislation contains a special provision as to manner in which courts would proceed in cases pending on the date the statute came into force. Section 20 in this regard reads thus:-

> **"20. Special provision in respect of pending cases.-** Notwithstanding anything contained in this Act, **all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in** respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence."

7. It is also necessary to advert to some portions of Rule 3 of **the Juvenile Justice (Care and Protection of Children) Rules, 2007,** the relevant extract whereof reads as follows:

> **"Rule 3. Fundamental principles to be followed in administration of these rules.—**
>
> **xxx xxx xxx**
>
> **IX. Principle of non-waiver of rights:**
>
> (a) No waiver of rights of the child or juvenile in conflict with law, whether by himself or the competent authority or anyone acting or claiming to act on behalf of the juvenile or child, is either permissible or valid.
>
> (b) Non-exercise of a fundamental right does not amount to waiver.
>
> **xxx xxx xxx**
>
> **XI. Principle of right to privacy and confidentiality**
>
> The juvenile's or child's right to privacy and confidentiality shall be protected by all means and though all the stages of the proceedings and care and protection processes.
>
> **XIV. Principle of Fresh Start:**
>
> (a) The principle of fresh start promotes new beginning for the child or juvenile in conflict with law by ensuring erasure of his past records.
>
> (b) The State shall seek to promote measures for dealing with children alleged or recognized as having impinged the penal law, without resorting to judicial proceedings."

8. As per section 2(k) of the JJ Act, a juvenile is a person who has not completed the 18th year of age. Under Section 2l, 'a juvenile in conflict with law' is a person who has not completed the 18th year of age as on the date of commission of such offence and is alleged to have committed an offence.

9. A literal construction of section 2l suggests that a 'juvenile in conflict with law' includes persons who had not completed 18 years of age as on the date of commission of the offence but could be beyond such age on the date of consideration of the issues of conviction and sentencing.

10. As per section 6, the power of the Juvenile Justice Board 'JJB' or the Board, hereafter) is restricted to 'a juvenile in conflict with law'. Confinement in a special home under Section 15(1)(g) is also restricted to a juvenile who is over seventeen years of age and less than eighteen years of age.

11. The spirit, object and intendment of the JJ Act is obvious from a bare reading of the statutory provisions. Section 7(1) mandates that when any Magistrate (other than one empowered to exercise the power of the JJ Bord) is of the opinion that a person brought before him under any of the provisions of the JJ Act (other than as a witness), is a juvenile, he shall without any delay record such opinion and forward the juvenile and the record of the proceeding to the competent

authority having jurisdiction over the proceeding. Under Sub-Section (2) of Section 7, the competent authority to which the proceeding is forwarded is mandated to hold the inquiry as if the juvenile or the child had originally been brought before it.

12. Section 7A mandates that if the court finds a person to be a juvenile on the date of commission of the offence under sub-section 1, the juvenile shall be forwarded to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.

13. Section 7A is concerned with a claim of juvenility raised before any court. Upon the court being of the opinion that an accused person may have been a juvenile on the date of commission of the offence, the court is mandated to conduct an inquiry so as to determine the age of such person and to record a finding whether a person is a juvenile or not, stating his age as nearely as may be.

14. The proviso to Section 7A of the JJ Act states that a claim of juvenility as on the date of the offence may be made by a person at any stage of a proceeding, before any court, even after the final disposal of the case. If such a claim is made, the court is required to determine if the individual was a juvenile on the date of commission of the offence. It does not matter if the individual has ceased to be a

juvenile before the JJ Act of 2000 came into force. Further, Section 7A(2) states that if a court finds a person to be a juvenile on the date of commission of the offence, it shall forward the juvenile to the Juvenile Justice Board for passing appropriate orders. If a sentence has been imposed by a court, such sentence shall be deemed to have no effect. Sub-section 2 of Section 7A thus confined its scope to a person being a juvenile on the date the court accepts such plea.

15. Section 7A does not deal with the case wherein a person claims to have been a juvenile on the date of commission of the offence, but has ceased to be a juvenile either on the date on which such plea is taken in the court or it is taken in the appellate or revisional jurisdiction. It also does not deal with a situation where a person is not a juvenile, on the date when such plea is accepted by the court. This is the situation with which we are faced in these cases. We are also unable to find any judicial precedent which has considered this question. This issue would require to be thus tested keeping in view the spirit, intendment and purpose of the statute.

16. Another important aspect of the statutory scheme is the provision enacted with regard to removal of disqualifications attaching to a conviction contained in Section 19 of the statute. Section 19(1) states that if a person has been convicted for committing an offence and has been dealt with under the provisions of the JJ

Act, such person shall not suffer the consequences that attach because of such of a conviction. Section 19(2) states that the Juvenile Justice Board shall order the records of the conviction to be removed after the period of appeal has expired.

17. Section 19(1) thus provides a general statutory right for removal of disqualification but only where the juvenile has been dealt with and convicted under the `Act'. This right therefore is limited to proceedings before the Juvenile Justice Board and not to a conviction by the Magistrate or a court. Section 19(2) provides the procedure to be followed by the Board, in implementing an order for removal of disqualification. Thus, when an order is made for the removal of disqualification, it is the Board which implements the order in actuality, by removing the records and thus, cleaning the slate so that the juvenile can commence life afresh.

18. In this context, also of relevance is Rule 3 of the Rules, 2007, which lists the fundamental principles to be followed in administration of the rules. Rule 3(IX) unequivocally and absolutely prohibits waiver of the rights of the juvenile. As per Rule 3 (XIV) (a), one of these fundamental principles is the "Principle of Fresh Start," which is sought to be achieved by ensuring removal of past records. The

Board, exercising its power to direct the removal of the records under Section 19(2) of the JJ Act, facilitates the implementation of the "*principle of fresh start*."

19. The statutory scheme would show that this enactment confers exclusivity on the Juvenile Justice Board for dealing with all proceedings, which relate to juveniles.

20. We may briefly notice the factual matrix in these cases before examining the questions in hand. The same are considered appeal wise hereafter.

II. Crl.(A) No.979/2008 Amar Bahadur Thappa v. State

21. This appeal arises out of an incident which allegedly took place in the night intervening 22nd/23rd December, 2000 and resulted in the registration of FIR No.762/2000 implicating the appellant – Amar Bahadur Thappa and co-accused Raju Chakravarthy on the 23rd December, 2000 by the police station Model Town for the commission of offences under Sections 302, 392 read with 34 IPC. They jointly stood trial in Sessions Case No.26/2011 and were convicted for commission of offence under Sections 302/392 read with Section 34 of the IPC by the judgment dated 24th September, 2004 of the learned Additional Sessions Judge. By the order dated 27th September, 2004, the learned trial judge sentenced both the appellants to imprisonment for life along with a fine of Rs.10,000/- each in default one year

rigorous imprisonment under Section 302 read with 34 of the IPC. Additionally, for the offence under Section 392 read with 34 of the IPC, both the accused were sentenced to rigorous imprisonment for ten years along with a fine of Rs.5,000/- each in default six months rigorous imprisonment. It was further ordered that both the sentences imposed on the accused persons shall run concurrently.

22. Crl.(A)No.152/2005 was separately filed by Raju Chakravarthy impugning the order dated 24th September, 2004. This appeal was allowed by an order dated 4th November, 2011 passed by the Division Bench of this Court.

23. On 28th February, 2012 a plea was orally taken by learned counsel for the appellant in his appeal (Crl.(A)No.979/2008) that Amar Bahadur Thappa was a juvenile on the date of commission of offence. No documentation of Amar Bahadur Thapa's date of birth was available. A detailed inquiry was conducted by this court which included directions to the Investigating Officer to place a report with regard to the details of marriage of the appellant's parents; date of birth and ages of the siblings of the appellant; constitution of a medical board for the medical examination of the appellant, first by the Safdarjung Hospital, and then by the All India Institute of Medical Sciences. After consideration of the material

placed before the court, the plea of the appellant was accepted that he was juvenile on the date of commission of the offence by the order dated 28th May, 2012.

24. It is noteworthy that on 28th February, 2012, as per the nominal roll received from the Central Jail, Tihar, the appellant Amar Bahadur Thappa had undergone 11 years, 2 months and four days in jail. The appellant Amar Bahadur Thapa thus had undergone imprisonment which is not permissible under Section 15(1)(g) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (the JJ Act hereafter). The incarceration for a long period of 11 years is also way beyond the maximum period of three years which could be ordered to be spent by a juvenile in a special home as prescribed under the JJ Act.

25. As a result, by the order dated 28th May, 2012, it was directed that the appellant be released from jail forthwith. As on 28th May, 2012, Amar Bahadur Thapa would be between 25 – 29 years of age.

III. Crl.(A) No.1087/2010 Ravinder v. State

26. This appeal arises out of an alleged incident on 15th November, 2004 which resulted in registration of the FIR No.1035/2004 implicating the present appellant – Ravinder and co-accused Monu Thappa; Raj Kumar and Arjun Singh Rawat by the police station Kalkaji for the commission of offences under Sections 302, 397

read with 34 IPC. They jointly stood trial in Sessions Case No.21/2005. The trial court convicted the accused Ravinder and Arjun Singh Rawat for commission of offences under Sections 392/394/302 read with Section 34 of the IPC by the judgment dated 4th March, 2010. However the other two accused, namely Raj Kumar and Monu Thappa @ Nepali were given the benefit of doubt for the reason that no incriminating article had been recovered from them or at their instance and hence no role could be attributed to these two accused persons. As such they were acquitted by the trial court.

27. By the order dated 6th March, 2010, the learned trial judge sentenced both Ravinder and Arjun Singh Rawat to imprisonment for life along with a fine of Rs.2,000/- each and in default of payment of fine, further one year rigorous imprisonment for commission of the offence under Section 302 read with 34 of the IPC. Additionally, for commission of the offence under Section 392 read with 34 of the IPC, both the accused were sentenced to rigorous imprisonment for ten years along with a fine of Rs.2,000/- each in default of payment of fine one year rigorous imprisonment and for commission of the offence under Section 392 of the IPC, both the accused were awarded a sentence of three years rigorous imprisonment and a fine of Rs.2,000/- and in default of payment of the fine imposed, they were liable to undergo six months rigorous imprisonment. It was further ordered that the

substantive sentences under Section 392 and 394 imposed on the accused persons shall run concurrently with his life imprisonment.

28. Ravinder impugned his conviction as well as the order dated 4th March, 2004 by way of Crl.(A)No.1087/2010. On 13th September, 2010, Crl.M.B.No.1297/2010 was filed in Crl.A.No.1087/2010 seeking a clarification as to whether the co accused Arjun Singh who has been convicted by the learned Sessions judge has filed any appeal or not.

29. On 23rd September, 2011 a written plea to file documents on the basis of which the claims to be juvenile plea was taken by learned counsel for the appellant in Crl.M.A.No.11306/2011 filed in Crl.A.No.1087/2010 that Ravinder was a juvenile on the date of commission of offence. Again no documentation to support this plea was forthcoming. A detailed inquiry was conducted by this court which included directions to the Investigating Officer to place a report with regard to the details of marriage of the appellant's parents; date of birth and ages of the siblings of the appellant; constitution of a medical board for the medical examination of the appellant, first by Safdarjung Hospital. Directions were issued to the Joint Registrar to conduct an inquiry and record evidence and submit a report with regard to the juvenility claimed by the appellant. After consideration of the

material placed before the court, the plea of the appellant that he was juvenile on the date of commission of the offence was accepted by the order dated 17th July, 2012.

30. It is noteworthy that on 21st September, 2010, as per the nominal roll received from the Central Jail, Tihar, the appellant Ravinder had undergone 5 years, 9 months and 21 days in jail. It would therefore, appear that the appellant Ravinder – a juvenile on the date of commission of the offence, had undergone imprisonment which is completely impermissible under the JJ Act. The incarceration for the long period of 5 years is also way beyond the maximum period of three years to be spent in a special home by juvenile which would be prescribed under the JJ Act.

31. As a result, by the order dated 17th July, 2012, it was directed that the appellant shall be set at liberty forthwith. As on 17th July, 2012, Ravinder would be around 26 years of age.

IV. <u>Crl.(A) No.1301/2010 Noor Jahan @ Haseena & Ors. v. State –</u>

32. This appeal was jointly filed by Noor Jahan @Haseena, Abdul Waheed and Imran Khan assailing their conviction by the judgment dated 22nd September 2010 and the sentence imposed by the order dated 29th September 2010. The appeal

arises out of an alleged incident which took place on 8th October, 2008 resulting in the registration of FIR No.280/2008 implicating the appellants by the police station Gokul Puri for the commission of offences under Sections 302 and 506 IPC. They jointly stood trial in Sessions Case No.24/2009.

33. By the judgment dated 22nd September, 2010 of the learned Additional Sessions Judge, the appellants were held guilty for commission of the offences under Section 302 read with Section 34 IPC and convicted thereunder. Accused Imran Khan was additionally held guilty for commission of offence under Section 506 of the IPC. The learned trial judge by the order dated 29th September, 2010, sentenced the three convicted persons to imprisonment for life along with a fine of Rs.5,000/- each for offence punishable under Section 302 read with Section 34 of the IPC. In default of payment of fine, they would further undergo rigorous imprisonment for one year each. Convict Imran was also further sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.3,000/- for commission of the offence under Section 506 IPC. In default of payment of fine, he would further undergo rigorous imprisonment for six months.

34. Crl.(M). (Bail) No.468/2012 was filed by Imran Khan seeking suspension of sentence. On 16th July 2012, a plea that Imran Khan was a juvenile on the date of

commission of offence was orally taken by learned counsel for the appellant. No documentation with regard to his date of birth was available. A detailed inquiry was conducted by this court which included directions to be produced before the Medical Superintendent of Lok Nayak Jai Prakash Hospital for conducting the dental and ossification examination of the appellant. A report dated 1st July, 2012 was received from the medical experts opining that the appellant was 18 years 2 months 2 days on 8th of October, 2008, the date of the incident. As per Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2000, one year margin is given on the lower side of the age as opined on medical examination. The plea of juvenility as on the date of commission of the offence had to be accepted. As a result, by the order dated 16th August 2012, it was directed that the appellant be set at liberty by the jail authorities.

35. It is noteworthy that as per the nominal roll received from the Central Jail, Tihar on the 24th December, 2010, the appellant Imran Khan had undergone 2 years, 2 months and nine days in jail. By 16th August, 2012, Imran Khan would have undergone over 3 years 10 months of imprisonment, which is more than the permissible period for which a juvenile delinquent could be sent to a special home under the JJ Act. As on 16th August, 2012 Imran Khan could be over 27 years of age.

V. ***Death Reference 5/2010 - State v. Jagtar***

36. This reference under Section 366 Cr.P.C. is before this court for confirmation of the death sentence awarded to convicts namely, Jagtar, Sheela, Gian Chand and Ashok @ Ganja, arising out of an alleged incident which took place in the night intervening 6th/7th June, 2003 resulting in registration of FIR No.264/2003 dated 7th June, 2003 by the police station Samey Pur Badli. They jointly stood trial in Session Case No.123/2008. The accused Jagtar, Sheela, Gian Chand and Ashok @ Ganja have been convicted under Section 302 read with 34 IPC. The accused Jagtar further stands convicted under Section 25/27 of the Arms Act by the judgment dated 29th November, 2010 of the learned Additional Sessions Judge. By the order dated, 2nd December 2010, the appellants have been sentenced to death subject to confirmation of the sentence by the High Court of Delhi. Convict Jagtar was further sentenced to undergo rigorous imprisonment for a period of one year and fine of Rs.5,000/- in default of payment of which, he shall undergo simple imprisonment for a period of two months for committing offence under Section 25/27 of the Arms Act and in this regard, benefit under the provisions of Section 428 Cr.P.C. were also extended to the convict Jagtar.

37. In Death Reference 5/2010, Sheela and her brother Jagtar filed an application being Crl.App.No.14021/2011 contending that they were juvenile on the 7th of June, 2003 when the incident took place. On this application, the court called for a report to be filed by the State. On the 18th of August, 2011, it was observed that Sheela's claim with regard to date of birth had been verified and a report of the Sarpanch of the concerned village as well as office of the Additional District Registrar (Birth and Death) – cum District Health Officer, Panipat supported her claim. The court was of the view that a further inquiry under Section 7A of the JJ Act and Rule 12 and 98 of the JJ Rules 2007 be held by the trial court. Pending inquiry, on a prima facie view that she was juvenile on the date of the incident, she was granted interim suspension of sentence for a period of three months which was extended from time to time.

38. Jagtar and Sheela were subjected to medical examination and the inquiry with regard to their plea of juvenility was undertaken by the trial court in accordance with law. The report was considered by this court on 20th of April, 2012 when it was found that on the date of incident, i.e., 7th of June, 2003, Jagtar was approximately 16 years of age and that Sheela was older to him by one year only. As such Sheela would have been 17 years on the date of the incident. They were therefore, juveniles within the meaning of expression under the JJ Act, 2000.

39. In view thereof, both the Jagtar and Sheela were held to be juvenile on the date of the offence and by the order dated 21st September, 2011 directed to be released forthwith from custody.

40. As on 21st September, 2011, Jagtar would be over 24 years of age while Sheela would be above 25 years of age.

41. It is noteworthy that on 21st September, 2011, Sheela had undergone 8 years, 3 months and 14 days in jail as per the nominal roll received from Central Jail, Tihar which imprisonment is not permissible under JJ Act. The incarceration is also beyond the maximum period of three years which would be ordered to be spent in a special home by a juvenile delinquent as prescribed under JJ Act.

42. As on 21st April, 2012, Jagtar had undergone 8 years, 10 months and 9 days in jail as per the nominal roll received from Central Jail, Tihar. Jagtar has also undergone imprisonment which is not permissible under JJ Act. His incarceration of 8 years is also way beyond the maximum period of three years which could be ordered to be spent in a special home by a Juvenile delinquent as prescribed under JJ Act.

Ashok Kumar @ Ganja

43. Ashok @ Ganja was produced in this court on 13th of February, 2012. His physical appearance had suggested that he was still of young age and he was questioned briefly. The court was of the opinion that an inquiry with regard to his juvenility on the date of commission of offence was required to be made under Section 7(A) of the JJ Act, 2000. A direction was issued to the Inquiry Officer to submit a report with regard to full details of the family including the siblings of the respondent Ashok Kumar @ Ganja and file the same with documentary materials, details of marriage of the parents of the respondents, full details of the date of birth of the siblings as well as school and other records if any. The appellant was also directed to be produced in custody before the Medical Superintendent of the LNJP Hospital for a medical examination to obtain a report of his age. The Inquiry Officer was directed to ensure that a complete inquiry from the concerned authority and village as well was made and the consolidated report was directed to be placed before the trial court with a direction to conduct inquiry in terms of Section 7(A) of the JJ Act.

44. A report was received on 10th April, 2012 from the learned Additional Sessions Judge which records that the father of the convict Ashok Kumar @ Ganja

had not submitted any record regarding the birth of his son. The date of birth recorded in the admission register was based on an affidavit submitted by the father. As it was unsafe to place reliance on this record, the trial court relied on the report of the Medical Board according to which he is estimated to be 24 years as on 1st March, 2012. Computed on this basis, as on 7th June, 2003, Ashok Kumar would have been around 15 years of age and hence would fall under the definition of juvenile as on the date of the offence.

45. By the order dated 20th April, 2012, it was also directed that Ashok Kumar @ Ganja be released from custody.

46. It is noteworthy that on 21st April, 2012, Ashok Kumar @ Ganja had undergone 8 years, 10 months and 11 days in jail as per the nominal roll received from Central Jail, Tihar. Ashok Kumar @ Ganja also has thus undergone imprisonment which is not permissible under JJ Act. The incarceration is also beyond the maximum period of three years which a juvenile delinquent could be ordered to spend in a special home under JJ Act.

47. Other than in Crl.Appeal.No.979/2008, the offences in the above cases were post 1st April, 2000 when the Juvenile Justice (Care and Protection of Children) Act, 2000 had come into force.

48. So far as Crl.A.No.979/2008 is concerned, the same arises out of incident which took place in the night intervening 22nd/23rd December, 2000. Therefore Section 20 of the JJ Act would come apply.

VI. Issues arising for consideration

49. The legislature has anticipated the situation where a criminal case may be pending when the JJ Act came into force, against a person who was juvenile on the date of commission of the offence. A perusal of Section 20 of the JJ Act would shows that it postulates that the court would record findings and forward such juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the statutory provisions as if it had been satisfied on inquiry under the JJ Act that the juvenile has committed the offence. The question which has been raised in these appeals is regarding persons who after facing a full-fledged trial before courts, have been convicted and are found by an appellate court to be a juvenile on the date of commission of the offence. How is such person to be treated? The further question to be answered is as to how the person, a juvenile on the date of the crime, but has ceased to be so on the date of the finding of his juvenility, is to be treated.

50. What happens to the finding of guilt by the trial court as well as the sentence which has been awarded to the person? Can such a person who is an adult on the date of the adjudication of the juvenility plea, be forwarded to the Board for fresh trial or passing of orders on the sentence (as in section 20 of the JJ Act?) A further question which arises is as to whether the High Court (or the appellate/revisional court) itself can order removal of the disqualification attached to the conviction by the trial court, without referring the matter to the Board?

VII. Plea of juvenility on date of offence accepted at appellate stage – status of appeal against conviction

51. We are here concerned with the course of action to be adopted by the court when a plea of juvenility on the date of commission of the offence is taken before an appellate court after the appellant ceased to remain a juvenile or when the finding of juvenility came to be returned by the appellate court before which the plea was raised in proceedings pending on the date of the Juvenile Justice Act coming into force.

52. In the judgment reported at ***(2009) 13 SCC 211 Hari Ram v. State of Rajasthan & Anr.***, the court has extensively considered the provisions of the Juvenile Justice (Care & Protection of Children) Act, 2000 especially the provisions of Sections 2(k), 2(l), 7A (Explanation), and 49 (as amended by the Act

of 2006). The question which was raised before the Supreme Court was as to whether a person who was below 18 years of age on the date of commission of the offence, prior to the commencement of the 2000 Act, was entitled to the benefit under the Act of 2000. The court held that though such person was not a "juvenile" under a literal application of Section 2(h) of the Juvenile Justice Act, 1986 nor a "juvenile in conflict with law" under Section 2(l), however in all cases pending in any court on the date the Act came into force, the determination of juvenility shall be in terms of clause (l) of Section 2 by virtue of the explanation to Section 20 of the Act of 2000. Therefore, a claim of juvenility was tenable even after the accused had crossed the age of 18 years on or before the commencement of the JJ Act 2000 or was undergoing a sentence after conviction.

The permissibility of raising the plea for determination of juvenility for the first time at the appellate stage is, therefore, no more *res integra*.

53. Taking note of previous decisions on this point in ***(2011) 2 SCC 251 Lakhan Lal v. State of Bihar***, the Supreme Court has allowed such plea raised before the Court for the first time and has observed thus:

> "21. The fact remains that the issue as to whether the appellants were juvenile did not come up for consideration for whatever reason, before the courts below. The question is whether the same could be considered

by this Court at this stage of the proceedings. A somewhat similar situation had arisen in *Umesh Singh* v. *State of Bihar* [(2000) 6 SCC 89 : 2000 SCC (Cri) 1026] wherein this Court relying upon the earlier decisions in *Bhola Bhagat* v. *State of Bihar* [(1997) 8 SCC 720 : 1998 SCC (Cri) 125], *Gopinath Ghosh* v. *State of W.B.* [1984 Supp SCC 228 : 1984 SCC (Cri) 478] and *Bhoop Ram* v. *State of U.P.* [(1989) 3 SCC 1 : 1989 SCC (Cri) 486] while sustaining the conviction of the appellant therein under all the charges, held that the sentences awarded to them need to be set aside. It was also a case where the appellant therein was aged below 18 years and was a child for the purposes of the Bihar Children Act, 1970 on the date of the occurrence. The relevant paragraph reads as under (*Umesh Singh case* [(2000) 6 SCC 89 : 2000 SCC (Cri) 1026] , SCC pp. 93-94, para 6):

> "6. So far as Arvind Singh, appellant in Criminal Appeal No. 659 of 1999 is concerned, his case stands on a different footing. On the evidence on record, the learned counsel for the appellant was not in a position to point out any infirmity in the conviction recorded by the trial court as affirmed by the appellate court. The only contention put forward before the court is that the appellant is born on 1-1-1967 while the date of the incident is 14-12-1980 and on that date he was hardly 13 years old. We called for a report of experts being placed before the court as to the age of the appellant, Arvind Singh. The report made to the court clearly indicates that on the date of the incident he may be 13 years old. This fact is also supported by the school certificate as well as the matriculation certificate produced before this Court which indicate that his date of birth is 1-1-1967. On this basis, the contention put forward before the court is that although the appellant is aged below 18 years and is a child for the purpose of the Bihar Children Act, 1970 on the date of the occurrence, his trial having been conducted along with the other accused who are not children is not in accordance with law. However, this contention had not been raised either before the trial court or before the High Court. In such circumstances, ***this Court in Bhola Bhagat v. State of Bihar [(1997) 8 SCC 720 : 1998***

> ***SCC (Cri) 125] following the earlier decisions in Gopinath Ghosh v. State of W.B. [1984 Supp SCC 228 : 1984 SCC (Cri) 478] and Bhoop Ram v. State of U.P. [(1989) 3 SCC 1 : 1989 SCC (Cri) 486] and Pradeep Kumar v. State of U.P. [1995 Supp (4) SCC 419 : 1995 SCC (Cri) 395] while sustaining the conviction of the appellant under all the charges, held that the sentences awarded to them need to be set aside. In view of the exhaustive discussion of the law on the matter in Bhola Bhagat case [(1997) 8 SCC 720 : 1998 SCC (Cri) 125] , we are obviated of the duty to examine the same but following the same, with respect, we pass similar orders in the present case***. Conviction of the appellant Arvind Singh is confirmed but the sentence imposed upon him stands set aside. He is, therefore, set at liberty, if not required in any other case.'"

54. Relying on the above pronouncements in several appeals against convictions and sentences awarded by session's court pending in this court, the convicts, as appellants, have raised a plea of juvenility which if supported by the inquiry in this regard, has been accepted by the court.

55. The issue as to the procedure to be adopted by the court on such a plea, gets vexed when it comes to dealing with a case where the person stands convicted and sentenced by the trial court and has ceased to be juvenile on the date that a plea of juvenility of the offender as on the date of commission of the offence, is set up before an appellate court.

56. The investigating officer as well as the court before whom the challan was filed, remained oblivious of the juvenility of the accused on the date of commission of the offence. Such person as well as his counsel also failed to take such plea in the proceedings before the criminal court. The trial proceedings culminated in a conviction and a sentence of imprisonment stands imposed upon the accused person. The plea of juvenility was raised in the appellate proceedings long after the person ceased to be a juvenile. We attempt to examine the questions noted hereinabove by the present consideration.

57. We have been ably assisted in the present consideration by Mr. Dayan Krishnan, Additional Standing Counsel (Criminal), Mr. Siddharth Agarwal, Mr. Sumer Sethi, Mr. Vivek Sood, learned amicus on behalf of the appellants.

58. Appearing on behalf of the State, Mr. Dayan Krishnan has taken us carefully through the applicable statutory provisions and judicial precedents and drawn our attention to similar provisions in statutes regarding juveniles in different countries including Bangladesh, South Africa, Canada, Nepal, United Kingdom. Mr. Krishnan has also placed several international instruments including the United Nations Convention on the Rights of the Child which was adopted and opened for ratification and accession by the General Assembly Resolution No. 44/25 of 20th

November, 1989 and entered into force on 2nd September, 1990; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice dated 29th November, 1985 and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty dated 14th November, 1990.

Position in other jurisdictions

59. Mr. Dayan Krishnan, learned Additional Standing Counsel (Criminal) has submitted that some guidance on the issue can be taken from the position in other countries. Our attention has been drawn to the provisions of the Children Act, 1974 of the Republic of Bangladesh and the Children Rules, 1976 framed thereunder. As a matter of illustration of legislative prohibitions, Sections 6, 8, 70, 71 and 76 of this Act deserve to be considered in extenso and read as follows :-

> "6. No Joint trial of child and adult - (1) Notwithstanding anything contained in section 239 of the Code or any other law for the time being in force, no child shall be charged with, or tried for, any offence together with an adult.
>
> (2) If a child is accused of an offence for which under section 239 of the Code or any other law for the time being in force such child but for the provisions of sub-section (1) could have been tried together with an adult, the Court taking cognizance of the offence shall direct separate trials of the child and the adult.
>
> 8. Adult to be committed to sessions in a case to be committed to sessions-- (1) When a child is accused along with an adult of having committed an offence and it appears to the Court taking cognizance of the offence that the case is a fit one for committal to the Court of Session, such Court shall, after

separating the case in respect of the child from that in respect of the adult, direct that the adult alone be committed to the Court of Session for trial.

(2) The case in respect of the child shall then be transferred to a Juvenile Court if there is one or to a Court empowered under section 4, if there is no Juvenile Court for the local area, and the Court taking cognizance of the offence is not so empowered:

Provided that the case in respect of the child shall be transferred to the Court of Session under section 5 (3) if it is exclusively triable by the Court of Session in accordance with the Second Schedule of the Code.

xxx

70. **When a child is found to have committed any offence, the fact that he has been so found shall not have any effect under section 75 of the Penal Code (XLV of 1860), or section 565 of the Code or operate as a disqualification for any office, employment or election under any law.**

71. Save as provided in this Act, the words ‘conviction' and ‘sentenced' shall cease to be used in relation to children or youthful offenders dealt with under this Act, and any reference in any enactment to a person convicted, a conviction or a sentence shall, in the case of a child or youthful offender be construed as a reference to a person found guilty of an offence, a finding of guilty or an order made upon such a finding, as the case may be.

xxxx

76. (1) Notwithstanding anything contained in the Code, an appeal from an order made by a Court under the provisions of this Act shall lie-

(a) if the order passed by a Juvenile Court or a Magistrate empowered under section 4, to the Court of Session; and

(b) if, the order is passed by a Court of Session or Court of an Additional Sessions Judge or of an Assistant Sessions Judge, to the High Court Division.

(2) Nothing in this Act shall affect the powers of the High Court Division to revise any order passed by a Court under this Act.”

To try a child for commission of offences, in the ordinary course is, therefore, statutorily prohibited under the Children Act, 1974.

60. An issue similar to the one with which we are concerned herein had arisen before the Supreme Court of Bangladesh and High Court division in ***W.P.(C) No.1341/2000*** in the matter of ***Bangladesh Legal Aid and Services Trust and Anr. V. Bangladesh & Ors***. The judgment of the Division Bench was delivered on 6th November, 2001.

61. In this case, the petitioner no. 2 stood convicted and sentenced by a judgment dated 1st December, 1998 passed by Mr. Iktedar Ahmed, Bicharak (District and Sessions Judge), Nari-O-Shishu Nirjatan Daman Bishesh Adalat, Comilla, in Nari-O-Shishu Case No.4 of 1998. The petitioner no. 2 stood convicted for offences under Sections 5 (kha) and 5 (gha) of the Nari-O- Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 and was sentenced to suffer imprisonment for life as well as the fine and in default to undergo other punishments of lesser duration on other counts. In this case, the Special Tribunal itself found that the petitioner no. 2 was 14-15 years of age at the time of occurrence. A challenge was laid to this conviction and sentence on the grounds that the same was violative of the aforenoticed statute as well as of the repeated directions of the High Court

Division; was unconstitutional; was without jurisdiction and of no legal effect. The Bangladesh court had referred to the pronouncement of the Supreme Court of India reported at *AIR 1986 SC 1777 Sheela Barse & Ors. vs. UOI & Ors*. while referring to the issue as to whether an accused, if found to be a child, could be lodged in prison. It was further observed that the Children Act, 1974 provided different processes and modes of arrest, detention and trial of the juvenile offenders being below 16 years of age. Consequently, the court found that the trial of the petitioner no. 2 held by the Special Tribunal was "without jurisdiction" and without lawful authority; and that as such the impugned judgment and order of conviction was void ab initio. The court referred to other precedents wherein also it had been so ruled as far as conviction of persons who were below the age of 16 years at the time of trial was concerned. The court also found that there was no evidence to support the order of conviction and sentence as the charge against the petitioner no. 4 had not been proved by even a single witness and that the order of conviction had been passed on the basis of his uncorroborated confessional statement which was made when the convict was a minor and hence, did not have the required competency to make it. The court found that the child had no maturity to understand the consequences of such statement and that he had, in a written statement, categorically stated that the statement was procured through coercion,

threat and false promises to release him on giving the statement, before the magistrate as tutored by the police.

62. The principle reiterated by the court was that the very trial of the person was in violation of the statute and therefore completely without jurisdiction. This case however, does not deal with a issue of plea of juvenility being taken post conviction in proceedings in the appellate court. It also does not envisage the conditions anticipated by the Indian legislature and the prescription in Section 20 of the JJ Act, 2000. The Indian legislature has empowered the court to complete the pending proceedings, record findings and thereafter to forward the juvenile and the proceedings to the JJB for passing the sentence.

63. In this regard, Mr. Dayan Krishnan, learned Additional Standing Counsel has also referred to us the consideration by the Supreme Court of the United States of America in the judgment reported at ***383 U.S. 541 : 16 L.Ed.2d 84*** in the case titled ***Morris A. Kent, Jr. v. United States***. In this case, the petitioner was prosecuted for house breaking, robbery and rape. The United States District Court for the District of Columbia entered a judgment of conviction on counts of housebreaking and robbery. The defendant appealed to the United States Courts of Law for the District of Columbia Circuit which affirmed the judgment of the trial

court and granted certiorari. The Supreme Court held that the District of Columbia Juvenile Court Act allowed the Juvenile Court to waive jurisdiction over the juvenile after full investigation. As a condition to a valid waiver order, the juvenile was entitled to a hearing including access by his counsel to the social records and probation or similar reports, which presumably were considered by the court. It was also observed that the same included a statement of reasons for the decision of the juvenile court. In this case, the juvenile court waived jurisdiction and the petitioner was indicted by a grand jury of the United States District Court for the District of Columbia on eight counts. The petitioner moved the District Court to dismiss the indictment on the ground that the waiver was invalid and also moved the District Court to constitute itself a Juvenile Court in accordance with law. The District Court denied the motion to dismiss the indictment and ruled that it would not 'go behind' the Juvenile Court judge's recital that his order was entered 'after full investigation'. The District Court held that the petitioner was guilty and sentenced to imprisonment. The challenge to the findings was laid before the Supreme Court inter alia on the ground that his detention and interrogation were unlawful and that the police failed to follow the procedure prescribed by the Juvenile Court and also that they failed to notify the parents of the juvenile. The petitioner attacked the waiver of jurisdiction on the ground that

no hearing was held; that no findings and no reasons were given by the Juvenile Court for the waiver and because counsel was denied access to the social service file.

64. The Supreme Court ruled that full investigation was required before waiver of jurisdiction and that the same could not be granted as a matter of routine. The procedural regularity required satisfaction of the basic requirements of due process and fairness as well as compliance of the statutory requirement of a 'full investigation'. Though the statute conferred substantial degree of discretion on the juvenile court, it did not confer upon it a license for arbitrary procedure and did not permit the juvenile court to determine in isolation and without the participation or any representation of the child, of the 'critically important' question whether a child would be deprived of the special protection and provisions of the Juvenile Court Act. The Supreme Court concluded that the petitioner was by statute entitled to certain procedures and benefit as a consequence of his statutory right to be tried by the exclusive jurisdiction of the juvenile court and as a condition to a valid waiver order, the petitioner was entitled to a hearing, including access by his counsel to the social records and probation and similar reports which were presumably considered by the court and to a statement of reasons.

65. This pronouncement was relied upon by the US Supreme Court in the later decision reported at ***387 U.S. 1 (1967) In Re Gault*** wherein observations of the court on the history underlying the development of the juvenile court movement shed valuable light on the ethos and background behind similar provisions in other jurisdictions which observations read as follows :-

> "3. In such proceedings the child and his parents must be advised of their right to be represented by counsel and, if they are unable to afford counsel, that counsel will be appointed to represent the child. Mrs. Gault's statement at the habeas corpus hearing that she had known she could employ counsel, is not "an `intentional relinquishment or abandonment' of a fully known right."
> 4. The constitutional privilege against self-incrimination is applicable in such proceedings: "an admission by the juvenile may [not] be used against him in the absence of clear and unequivocal evidence that the admission was made with knowledge that he was not obliged to speak and would not be penalized for remaining silent." "[T]he availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. . . . [J]uvenile proceedings to determine `delinquency,' which may lead to commitment to a state institution, must be regarded as `criminal' for purposes of the privilege against self-incrimination." Furthermore, experience has shown that "admissions and confessions by juveniles require special caution" as to their reliability and voluntariness, and "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children." "[S]pecial problems may arise with respect to waiver of the privilege by or on behalf of children, and . . . there may well be some differences in technique but not in principle depending upon the age of the child and the presence and competence of parents. . . . If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary. . . ." Gerald's admissions did not [387 U.S. 1,

3] measure up to these standards, and could not properly be used as a basis for the judgment against him."

66. The jurisprudence from Bangladesh as well as judgments by the Supreme Court of the United States of America manifest the concern of the courts and authorities with the rights of the child, specially those in conflict with law. Strict compliance with the letter and spirit of legislation stipulating special procedures and courts for trials of juvenile offenders has been mandated in all jurisdictions. Failure to do so has rendered the trial court proceedings and judgments as violative of law and held to be without jurisdiction.

67. These very concerns are manifested in the statutory provisions in India as well as the jurisprudence which has developed here as would be evident from the following discussion. As is evident from Principle IX of Rule 3 of the JJ Rules reproduced above, there can be no waiver of the rights of the juvenile in India.

VIII. Judicial precedents

68. There is scanty jurisprudence with regard to the pleas of juvenility being raised in criminal appeals against conviction by the convicts before the High Courts, though several instances of such plea being pressed before the Supreme Court are available. It would be useful to examine such jurisprudence to answer

the question as to whether this court can order removal of the disqualification of conviction for criminal offences or is it essential for this Court to refer the matter to the Juvenile Justice Board upon arriving at a conclusion that the appellant/convict was a juvenile on the date of commission of the offence.

69. Prior to the JJ Act, 2000 coming into force, these issues were dealt under the Children's Act as applied and were in vogue in the different states.

70. The examination of the jurisprudence on the subject would show that the Supreme Court has followed three approaches in dealing with the issue of juvenility when it has been raised before it for the first time. We have available a set of cases whereby the Supreme Court upheld the conviction of the individual while quashing/suspending the sentence without making any reference to the removal of the disqualification which is attached to the conviction and/or the sentence.

71. In the second set of cases we find that the Supreme Court has referred the cases to the Juvenile Justice Board for appropriate action. It is obvious therefrom that, in such cases, the Juvenile Justice Board while passing the requisite order under Section 15 of the JJ Act, would also pass an order under Section 19(2) for removal of any disqualification attached to the conviction.

72. The third approach followed by the Supreme Court in some cases is to itself direct that any disqualification incurred shall be removed.

73. We would firstly discuss the approaches adopted by the Supreme Court before adverting to the few instances where the such issue has arisen before the High Courts.

Conviction sustained, sentence set aside.

74. The judgment of the Supreme court reported at ***(1981) 4 SCC 149 Jayendra & Anr. V. State of U.P.*** has been placed before us. In this case a question arose in the context of a plea of juvenility by the appellant Jayendra that he was about 15 years on the date of the offence and sought benefit under the Uttar Pradesh Children Act, 1951. Section 29 of this Act was similar to the provisions of Section 7A of the JJ Act. Section 29 provided that if the child is found to have committed an offence punishable with imprisonment, the court may order him to be sent to an approved school for a period of stay as will not exceed his attaining the age of 18 years. Jayendra was 23 years of age on the date of the report of his juvenility plea and therefore, in view of the provision of Section 29 of the Uttar Pradesh Children Act, 1951 could not be sent to an approved school. For this reason, the Supreme

Court upheld the conviction of the appellant of Jayendra and quashed the sentence imposed upon him and directed that he shall be released forthwith.

75. In ***(1989) 3 SCC 9 Bhoop Ram v. State of U.P.*** the appellant stood convicted with five others for commission of offences under Section 148, 302, 323, 324 read with Section 149 of the IPC and sentenced to life imprisonment besides concurrent sentences for lesser terms of imprisonment. Placing reliance on a school certificate showing his date of birth, the appellant had claimed that he should have been treated as a child within the meaning of Section 2(4) of the U.P. Children Act, 1951. The learned Sessions Judge did not go into the question as to whether the appellant was below 16 years of age on the date of offence and proceeded to award the lesser sentence of imprisonment of life instead of the extreme penalty of death sentence. In the face of this plea, at the stage of admission of the Special Leave Petition, the Supreme Court was of the view that the Sessions Judge, Bareilly be called upon to enquire into the age of the appellant and submit a report with the option to have the appellant examined by the Chief Medical Officer of the State. Liberty was given to the parties to adduce evidence on this aspect. In this case, the Chief Medical Officer, Bareilly gave a certificate that the appellant appeared to be 30 years of age as on 30th April, 1987. The appellant had placed only his school certificate before the Sessions Judge to prove

that he had not completed 16 years on 3rd October, 1975, the date of commission of the offence. This certificate was rejected by the learned Sessions Judge on the ground that it was not unusual that in schools, ages are understated by one or two years for future benefits.

76. The Supreme Court rejected the finding of the learned Sessions Judge and opined that the appellant could not have completed 16 years of age on 3rd October, 1975 and ought to have been treated as a child within the meaning of Section 2(4) of the U.P. Children Act and dealt with u/s 29 of the Act because of the following three factors :-

> "i) The first is that the appellant has produced a school certificate which carries the date 24-6-1960 against the column 'date of birth'. There is no material before us to hold that the school certificate does not relate to the appellant or that the entries therein are not correct in their particulars."
>
> (ii) The second factor is that the Sessions Judge has failed to bear in mind that even the Trial Judge had thought it fit to award the lesser sentence of imprisonment for life to the appellant instead of capital punishment when he delivered judgment on 12-9-1977 on the ground the appellant was a boy of 17 years of age. The observation of the trail judge would lend credence to the appellant's case that he was less than 10 years of age on 3-10-1975 when the offences were committed.
>
> (iii) The third factor is that though the doctor has certified that the appellant appeared to be 30 years of age as on 30-4-1987, his opinion is based only on an estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out. As regards the opinion of the Sessions Judge, it is mainly based upon the report of the Chief

> Medical Officer and not on any independent material. On account of all these factors, we are of the view that the appellant would not have completed 16 years of age on the date the offences were committed. It therefore follows that the appellant should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment when he was convicted by the Sessions Judge under various counts."
>
> (Underlining by us)

77. It is noteworthy that in ***Bhoop Ram v. State of U.P***. (Supra), the Supreme Court followed the reasoning of ***Jayendra & Another v. State of U.P.*** (Supra). On the date of consideration of the appeal by the Supreme Court, the appellant Bhoop Ram was aged more than 28 years of age and there was no question of his being sent to an approved school in accordance with the provisions of U.P. Children Act, 1951 and for being detained there. The appellant had crossed the maximum age of detention at the time of consideration of the issue.

78. Therefore, so far as the manner in which the appellant ***Bhoop Ram*** was to be treated as he was more than 28 years of age at the time of consideration of the case by the Supreme Court is concerned, the court adopted the course followed in ***Jayendra v. State of U.P.****(*supra*)* and observed that the course which was to be followed is to *sustain the conviction but however, quash the sentence imposed on the accused*. The court accordingly sustained the conviction of the appellant under

all the charges framed against him but quashed the sentence awarded to him and directed his release forthwith. In this regard, the court had observed as follows:-

> "8. Since the appellant is now aged more than 28 years of age, there is no question of the appellant now being sent to an approved school under the U.P. Children Act for being detained there. In a somewhat similar situation, this Court held in *Jayendra v. State of U.P. (1981) 4 SCC 149 : 1982 Cri LJ 1000* that where an accused had been wrongly sentenced to imprisonment instead of being treated as a "child" under Section 2(4) of the U.P. Children Act and sent to an approved school and the accused had crossed the maximum age of detention in an approved school viz. 18 years, the course to be followed is to sustain the conviction but however quash the sentence imposed on the accused and direct his release forthwith. Accordingly, in this case also, we sustain the conviction of the appellant under all the charges framed against him but however quash the sentence awarded to him and direct his release forthwith. The appeal is therefore partly allowed in so far as the sentence imposed upon the appellant are quashed."
>
> (Underlining by us)

79. At this stage, we may notice another pronouncement of the Supreme Court. An issue of juvenility was raised for the first time before the Supreme Court of India by the appellant in the judgment reported at ***(2005) 12 SCC 615 Gurpreet Singh vs. State of Punjab*** and the connected appeal. In this regard, the court laid down the procedure which was required to be followed under the following terms:-

> "18. ……It appears that this point was not raised either before the trial court or the High Court. But it is

> **well settled that in such an eventuality, this Court** should ***first consider the legality or otherwise of conviction of the accused and in case the conviction is upheld, a report should be called for from the trial court on the point as to whether the accused was juvenile on the date of occurrence*** *and upon receipt of the report, if it is* found that the accused was juvenile on such date and continues to be so, he shall be sent to juvenile home. But ***in case it finds that on the date of the occurrence, he was juvenile but on the date this Court is passing final order upon the report received from the trial court, he no longer continues to be juvenile, the sentence imposed against him would be liable to be set aside."***
>
> (Emphasis by us)

80. It is noteworthy that the dicta in ***Bhoop Ram*** (Surpa) is cited as an authority for suspension of sentence while upholding the conviction in cases involving the Juvenile Justice Act, 1986 as well.

81. The Supreme Court had observed that it is well settled that in such an eventuality, the court should first consider the legality, or otherwise, of the conviction of the accused. In case the conviction is upheld, a report should be called for from the trial court on the point as to whether the accused was juvenile on the date of occurrence and upon receipt of the report, if it is found that the accused was juvenile on such date and continues to be so, he shall be sent to juvenile home. In case the court finds that on the date of the occurrence, he was juvenile but on the date the Court is passing the final order upon the report

received from the trial court, he no longer continues to be juvenile, the sentence imposed against him would be liable to be set aside.

82. In ***(2010) 5 SCC 344 Dharambir v. State (NCT of Delhi) & Anr.***, the court reiterated the well settled principles that a claim of juvenility would be maintainable and can be raised before any court or forum and has to be recognised at any stage even after disposal of the case. In this case, by the impugned judgment, the High Court had upheld the conviction of the appellant for commission of the offences under Sections 302 and 307 read with Section 34 of the Indian Penal Code, 1860. The appellant had been sentenced to imprisonment for life under sections 302/34 IPC as well as fine. Additionally, for commission of offence under Section 307/34 IPC, he stood sentenced to undergo rigorous imprisonment for a term of seven years and fine. The Supreme Court noted that at the time of pronouncement, the appellant had undergone an actual period of sentence of 2 years, 4 months and 4 days and was now aged about 35 years. The court was of the view that keeping in mind the age of the appellant, it may not be conducive to the environment in the Special Home and to the interest of other juveniles housed in the Special Home, to refer him to the Board for passing orders for sending the appellant to Special Home or for keeping him at some other place of safety for the remaining period of less than eight months, the maximum period

for which he can now be kept in either of the two places in accordance with the provisions of the Juvenile Justice Act, 1986. For these reasons, while sustaining the conviction of the appellant for the aforestated offences, the sentence imposed upon him was quashed and he was directed to be released forthwith.

83. We find that this issue arose in yet another pronouncement reported at ***(2012) 8 SCC 800 Babla @ Dinesh v. State of Uttrakhand*** before the Supreme Court of India. The plea of juvenility had been raised by the appellant before the High Court which stood rejected by the High Court on the ground that it was not raised before the trial court and no evidence has been adduced in defence and no suggestion had been made to the witnesses. The High Court had also relied on the statement made by the appellant with regard to his age being 20 years at the time of recording of his statement under Section 313 of the Code of Criminal Procedure. The High Court had examined the appeal on merits in great detail. The appellant had challenged the rejection of the juvenility plea by the High Court. The Supreme Court directed an inquiry to be conducted with regard to the age of the appellant on the date of commission of offence and to submit a report as envisaged under Rule 12 of the JJ Act. The Supreme Court accepted the inquiry report dated 3rd December, 2011 wherein it was concluded that the appellant was aged between 10 to 15 years on the date of commission of offence and therefore, held that on the

date of the offence the appellant was juvenile. The court noted that the appellant had undergone actual period of sentence of more than three years out of the maximum period prescribed under Section 15 of the Juvenile Justice Act. In these circumstances, while sustaining the conviction of the appellant, the sentence awarded to him by the trial court (which stood confirmed by the High Court) was set aside.

84. Again in an judgment reported at ***(2012) 8 SCC 763 Vijay Singh v. State of Delhi*** the issue of juvenility was raised for the first time only before the Supreme Court. In this case as well, in para 7 of the pronouncement, the Supreme Court noted that there was overwhelming evidence led before the trial court which on being convinced of proof of guilt against the appellant, had convicted him for the offence under Section 307 of the IPC and had imposed a sentence of five years rigorous imprisonment with fine. The Supreme Court also noted that on a detailed analysis of the evidence available on record and the injuries sustained by the victim, supported by medical evidence, the High Court had dismissed the appeal. In these circumstances, the Supreme Court noted that it did not find any scope to interfere with the order of conviction imposed on the appellant. After returning this finding, the court proceeded to examine the impact of the plea of juvenility raised by the appellant for the first time before it.

In paras 14 and 15 of the pronouncement, the court considered the juvenility plea of the appellant and concluded that he was below 18 years on the date of commission of offence and therefore, the provisions of the JJ Act, 2000 would apply in full force in his case. Having so concluded in para 16, the court held the following: -

> "16. Having regard to the above conclusion, in the normal course we would have remitted the matter to the Juvenile Justice Court, Itawa for disposal in accordance with law. However, since the offence was alleged to have been committed more than 10 years ago and having regard to the course adopted by this Court in certain other cases reported in *Jayendra* v. *State of U.P.* [(1981) 4 SCC 149 : 1981 SCC (Cri) 809] , *Bhoop Ram* v.*State of U.P.* [(1989) 3 SCC 1 : 1989 SCC (Cri) 486] which were subsequently followed in *Bhola Bhagat* v.*State of Bihar* [(1997) 8 SCC 720 : 1998 SCC (Cri) 125] , *Pradeep Kumar* v. *State of U.P.* [1995 Supp (4) SCC 419 : 1995 SCC (Cri) 395] , *Upendra Kumar* v. *State of Bihar* [(2005) 3 SCC 592 : 2005 SCC (Cri) 778] and *Vaneet Kumar Gupta* v. *State of Punjab* [(2009) 17 SCC 587 : (2011) 1 SCC (Cri) 1092] , we are of the view that at this stage when the appellant would have now crossed the age of 30 years, there is no point in remitting the matter back to the Juvenile Justice Court. Instead, following the abovereferred decisions, appropriate orders can be passed by this Court itself."

85. The precedents noted in para 16 of ***Vijay Singh*** (supra) above were considered at length. In each of these cases, the evidence before the trial court and the conviction by court stood considered and upheld by the High Court. The conviction was therefore, sustained by the Supreme Court. However, the sentence awarded to them had been quashed. Consequently, in para 27 of [***Vijay Singh***

(Supra)] also while upholding the conviction of the appellant, the Supreme Court set aside the sentence imposed upon him and directed that he be released forthwith, if not required in other cases.

86. It is important to note that so far as the judgments of the Supreme Court in ***Jayendra; Vijay Singh; Bhoop Ram; Dharambir; Babla @ Dinesh*** as well as ***Gurpreet Singh*** (Supra) are concerned, the issue of juvenility was being considered by the Supreme Court. In all these judicial precedents, the convictions by the trial courts had been challenged before the High Courts in appeals. The evidence recorded before the trial courts stood tested and considered in the appeals by the High Courts. The findings of guilt of the appellants were found justified by the High Courts which had considered the evidence and rejected the appeals of these persons. It was in these circumstances, while confirming the conviction, the Supreme Court had set aside the sentence imposed upon the appellants.

Conviction set aside

87. We may now consider the second approach which has been followed in some cases by the Supreme Court. In some cases, the court not only accepted the plea of juvenility but also set aside the conviction. In this regard we may usefully

refer to the judgment reported at ***1984 (Supp.) SCC 228 Gopinath Ghosh v. State of West Bengal*** which arose in the context of the West Bengal Children Act.

In this case, the entire trial was conducted before the Additional Sessions Judge, Nadia who found that the appellant had caused the fatal injury to the deceased in furtherance of the common intention of the three accused and convicted all of them for commission of an offence under Section 302 read with Section 34 of the Indian Penal Code and sentenced each of them to suffer imprisonment for life. The High Court rejected the appeal filed by the appellant who thus moved the Supreme Court. At this stage, a plea was urged on his behalf that as on 19th August, 1974, the date of the offence, the appellant was aged below 18 years and was therefore a child entitled to the benefit of the benevolent provisions of the West Bengal Children Act, 1959.

88. The Supreme Court remitted the issue for decision on the age of the appellant after recording evidence to the Sessions Judge, Nadia. Section 24 of the West Bengal Act contained a non-obstante clause and took away the jurisdiction of the court to impose the sentence of death on a juvenile delinquent as well as the power to impose a sentence of imprisonment or commitment to prison in default of payment of fine or in default of furnishing security of a juvenile delinquent. As

per the proviso to sub-clause 2 of Section 24, the court was empowered to impose a sentence of imprisonment on the juvenile delinquent if the conditions prescribed therein are satisfied. An application to the court to report the case to the State Government and direct the juvenile delinquent to such custody as it may deem fit was made.

89. Section 4 conferred power on the State Government to establish juvenile courts by a notification in this behalf. It was held that, from a reading of the statute, that a juvenile delinquent ordinarily has to be released on bail irrespective of the nature of the offence alleged to have been committed, unless it is shown that there appears reasonable grounds for believing that the release was likely to bring him under the influence of any criminal or expose him to moral danger or defeat the ends of justice. Section 25 forbade any trial of a juvenile delinquent and only an inquiry could be held in accordance with the provisions of the Code of Criminal Procedure ('Cr.P.C.') for the trial of a summons case. The court called for a report of the Additional Sessions Judge, which, on unassailable evidence, established that, on the date of offence, the appellant was a juvenile delinquent. The Supreme Court held that the learned Magistrate therefore, could not have committed his case to the court of sessions in view of the statutory provisions and thus the entire trial of the appellant was without jurisdiction and vitiated. The Supreme Court

therefore set aside as unsustainable the conviction of the appellant for having committed an offence under Section 302 IPC and the consequential sentence for imprisonment for life imposed by the learned Additional Sessions Judge as well as confirmed by the High Court.

As to what should follow, in para 12 of the judgment, the court directed thus:-

> "12. The next question is what should be the sequel to our decision ? The appellant has been in prison for some years. But neither his antecedents nor the background of his family are before us. It is difficult for us to gauge how the juvenile court would have dealt with him. Therefore, we direct that the appellant be released on bail forthwith by the learned Additional Sessions Judge, Nadia. The case is remitted to the learned Magistrate for proceeding further in accordance with law keeping in view the provisions of the Act."
>
> (Underlining by us)

90. A similar view was taken in the pronouncement of the Karnataka High Court reported at ***ILR 2005 KAR 1572 State of Karnataka v. Harshad.*** The High Court reiterated the legislative mandate that Juvenile Justice Board having been constituted, it therefore alone would have the exclusive power of dealing with the issue of juvenility and to that extent the jurisdiction of any court including that of the Sessions Court or Fast Track Court is barred.

91. In ***(1981) 4 SCC 210 Raghbir v. State of Haryana,*** a question was raised as to whether a person under 16 years of age and accused of offence under Section 302 of the Penal Code can get the benefit of the Haryana Children Act, 1974. The High Court sustained the conviction and the sentence. The discussion by the Supreme Court in para 19 of the pronouncement sheds valuable light on the issue under consideration and reads as follows:-

> "19. Mr Bhagat in support of his contention has relied on a Full Bench decision of the Madhya Pradesh High Court in *Devi Singh* v. *State of M.P* [1978 Cri LJ 585] . The Full Bench of three judges considered the jurisdiction of the Madhya Pradesh Bal Adhiniyam, 1970 (15 of 1970) to try a juvenile offender for offences punishable with death or imprisonment for life. There was a difference of opinion.
>
> The view of the majority was that the juvenile courts constituted under the Madhya Pradesh Bal Adhiniymn have exclusive jurisdiction to try a delinquent child (a person under sixteen years of age) for all offences *except* those punishable with death or imprisonment for life even after the commencement of the Code of Criminal Procedure, 1973 (Act 2 of 1974), while the minority view of Verma, J. was to the contrary. With respect, the majority view is erroneous. Verma, J. has observed as follow:
>
> "...Such a conclusion is supported also by the fact that the Bal Adhiniyam is a special local Act while the new Code is a general enactment applicable throughout the country on account of which the special local Act would apply within this State in preference to the general law on the subject. It is in this light that the question has to be examined with a view to determine whether there is any such

irreconcilable conflict so as to attract Article 254 of the Constitution. This is the real question for decision."

He has held:

"Applying the tests indicated by the settled principles, I have no hesitation in holding that there is no real conflict between the provisions of the new Code, particularly Section 27 thereof, and the provisions of the Bal Adhiniyam. In short, the provisions of the new Code clearly save any special or local law like the Bal Adhiniyam and Section 27 of the new Code is merely an enabling provision which does not express any contrary intention to undo the saving provided in Section 5 of the new Code. There being thus no conflict or repugnancy, the question of Article 254 of the Constitution being attracted does not arise."

With respect, Verma, J. has expressed the correct opinion."

Matter referred to the Juvenile Justice Board

92. We may now examine the third approach, which is to refer the matter to the Juvenile Justice Board.

93. Section 7(A) of the Juvenile Justice (Care and Protection of Children) Act, 2006 permits the claim of juvenility to be made by a person at any stage of proceedings and before any court, even after the disposal of the case.

94. In the judgment reported at ***(2009) 17 SCC 574 Rambir Singh & Ors. v. State of Uttar Pradesh***, upon the plea of juvenility being raised before it, the court

sustained the conviction. Instead of suspending the sentence, the matter was referred to the Juvenile Justice Board for the purposes of sentencing. The case of the appellant no.4 who had taken the plea of juvenility was transmitted to the Juvenile Justice Board for passing appropriate orders in terms of Section 15 of the Act read with Rule 98 of the Juvenile Justice (Care and Protection of Children) and Rules framed thereunder.

95. Thus the Juvenile Justice Board had to take action under Section 15 of the Juvenile Justice Act read with Rule 98 of the Rules framed thereunder. This procedure requires to be followed upon plea of juvenility being raised before the court.

IX. <u>Procedure to be followed when the plea is raised in an appeal before the High Court and matter of removal of disqualification.</u>

96. The Supreme Court has also made observations on the manner in which the High Court would proceed where the plea of juvenility is raised for the first time before it in an appeal against the conviction and order of sentence by the trial court. In the case reported at ***(2012) 8 SCC 34 Kalu @ Amit v. State of Haryana***, the court noted that on 7th April, 1999 when the offence in question took place, Kalu @ Amit was a juvenile. He was convicted by the trial court on 7th September,

2000. The Juvenile Justice Act came into force on 1st April, 2001. The appeal of Kalu @ Amit was decided by the High Court on 11th July, 2006.

97. We have set out Section 20 of the JJ Act in extenso hereinabove, which provides the manner in which the trial in court of a person, who is juvenile on the date of which the Juvenile Act came into force, is to proceed. In ***Kalu @ Amit v. State of Haryana (Supra)***, the Supreme Court had considered the provisions of Section 20 thus:-

> "21. Section 20 makes a special provision in respect of pending cases. It states that notwithstanding anything contained in the Juvenile Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Juvenile Act comes into force in that area shall be continued in that court as if the Juvenile Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Juvenile Act as if it had been satisfied on inquiry under the Juvenile Act that the juvenile has committed the offence. The Explanation to Section 20 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1-4-2001, when the Juvenile Act came into force, and the provisions of the Juvenile Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed.

22. As regards the Explanation to Section 20 of the Juvenile Act, it would be appropriate to quote observations of this Court in *Hari Ram v. State of Rajasthan [(2009) 13 SCC 211 : (2010) 1 SCC (Cri) 987]* . The observations read thus: (SCC p. 223, para 39)

> "39. The Explanation which was added in 2006, makes it very clear that in all pending cases, which would include not only trials but ***even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1-4-2001,*** when the Juvenile Justice Act, 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. In fact, ***Section 20 enables the court to consider and determine the juvenility of a person even after conviction by the regular court and also empowers the court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Juvenile Justice Act, 2000."***

23. It is clear, therefore, that the Juvenile Act is intended to protect the juvenile from the rigours of a trial by a criminal court. It prohibits sentencing of a juvenile and committing him to prison. As its Preamble suggests it seeks to adopt a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation."

(Emphasis supplied)

98. After noting the above principles, so far as the facts of ***Kalu @ Amit*** (Supra) are concerned**,** the Supreme Court observed as follows:-

"24. The instant offence took place on 7/4/1999. As we have already noted Kalu @ Amit was a juvenile on that date. He was convicted by the trial court on 7/9/2000. The Juvenile Act came into force on 1/4/2001. The appeal of Kalu @ Amit was decided by the High Court on 11/7/2006. Had the defence of juvenility been raised before the High Court and the fact that Kalu @ Amit was a juvenile at the time of commission of offence had come to light the ***High Court would have had to record its finding that Kalu @ Amit was guilty, confirm his conviction, set aside the sentence and forward the case to the Board and the Board would have passed any appropriate order permissible under Section 15 of the Juvenile Act (See Hari Ram)***.

25. As noted above, the Board could have sent Kalu alias Amit to a special home for a maximum period of three years and under Section 19, it would have made an order directing that the relevant record of conviction be removed. Since on the date of offence, Kalu alias Amit was about 17 years, 5 months and 23 days of age, he could have been directed to be kept in protective custody for 3 years under the proviso to Section 16 as the offence is serious and he was above 16 years of age when the offence was committed. But he certainly could not have been sent to jail. Since the plea of juvenility was not raised before the High Court, the High Court confirmed the sentence which it could not have done. None of the above courses can be adopted by us, at this stage, because Kalu alias Amit has already undergone more than 9 years of imprisonment. In the peculiar facts and circumstances of the case, therefore, we quash the order of the High Court to the extent it sentences accused Kalu alias Amit to suffer life imprisonment for the offences under Section 302 read with Section 34 IPC. After receipt of report from the Additional Sessions Judge, Rewari, vide order dated 14-12-2009, we had ordered that Kalu alias Amit be released on bail. If he has availed of the bail order, his bail bond shall stand discharged. If he has not availed of the bail order, the prison authorities are directed to release him forthwith, unless he is required in some other case. Accused Kalu alias Amit shall not incur any disqualification because of this order. Criminal Appeal No. 1467 of 2007 filed by the accused Kalu alias Amit is allowed to the above extent."

(Emphasis by us)

Even in ***Kalu @ Amit*** (Surpa), the Court did not quash the conviction. Kalu @ Amit had the benefit of consideration of his appeal against the conviction by the High Court.

99. Section 20 mandates the criminal court to continue with the trial as if the JJ Act "***had not been passed;*** if the criminal court finds that the juvenile has committed an offence, "***it shall record such finding;*** thereafter "***instead of passing any sentence in respect of the juvenile;*** forward the juvenile to the Juvenile Justice Board which shall pass an order in respect of that juvenile. So far as manner in which the Board would consider the matter is concerned, Section 20 mandates that the Juvenile Justice Board shall pass an order in respect of that juvenile in accordance with the provision of the JJ Act "***as if it had been satisfied on an inquiry"*** under the Act that a juvenile had committed an offence.

100. In ***Kalu @ Amit v. State of Haryana (supra),*** the Supreme Court had mandated that if the plea of juvenility is raised at the appellate stage before the High Court, it would have to record its findings on merits and decide on the guilt or innocence of the appellant. However, upon confirming the conviction, the sentence has to be set aside and the case has to be forwarded to the Juvenile Justice Board for passing an order permissible under Section 15 of the JJ Act.

X. Discussion in the present Case

101. From the above narration, it is evident that the prohibition upon the court trying a juvenile for commission of an offence is absolute. There is no option but to deal with the juvenile in accordance with the provisions of the Juvenile Justice Act. Failure to do so would be contrary to specific statutory provisions and result in violation of statutory provision and denial of legal protections to the juvenile.

102. In the instant case, the trial judges proceeded with the trial oblivious of the fact that juveniles were arraigned before them and that they were not authorized to conduct such trials. The JJ Act on the other hand had taken away the jurisdiction of the court to conduct the trials.

103. The right to appeal against the findings and sentence of the criminal court are provided by Section 374 of the Code of Criminal Procedure. No statutory provision has been pointed out whereby such a right has been taken away.

This court is seized of such statutory appeals filed by the appellants assailing their convictions by the criminal courts.

104. Given the judicial pronouncements and the statutory provisions, the appellants have been set at liberty. Three options are available - would it be proper

to hold that the appellants are to be denied their statutory right to challenge the judgments convicting them on merits or is the trial to be held to be without jurisdiction or can we test the appeal on merits?

105. In the cases before the Supreme Court wherein the conviction was sustained, challenges were laid to the judgments of the High Courts in appeals against convictions. Thus, orders of conviction by the trial court had been challenged before the High Court which convictions by the trial courts stood tested and sustained by the High Courts.

106. It is also necessary to bear in mind that under Rule 3(IX), the legislature has mandated that it is not open to a 'juvenile in conflict with law' by himself or by the competent authority, or anyone acting or claiming on his or her behalf to waive any of the rights conferred under the statute. At this stage, reference can usefully be made to some of the judicial pronouncements placed before us.

107. We may at this stage also refer to Section 20 of the JJ Act which has been set out hereinabove. This provision is restricted in its applicability to proceedings in respect of a juvenile pending in any court, in any area, on the date on which this Act comes into force in that area. The legislature has mandated that such proceedings would continue in that court as if the Act had not been passed and if

the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of the juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under the Act that *'a juvenile' has committed the offence'*. By virtue of Section 20, in cases against juveniles pending before criminal courts on the date the enactment came into force, the legislature itself permits completion of the juveniles' trial before the regular court. The principle as statutorily prescribed, say by the Bangladesh Statute noticed above, that in view of the JJ Act, the trial would be rendered as being without jurisdiction, is therefore not applicable in absolute terms.

108. Keeping in view the scheme of the statute, as well as the spirit, intendment and purpose of the legislation, the trial of the juvenile in these circumstance before the criminal court cannot be faulted.

109. From the above discussion, it is quite clear that once a plea of juvenility is raised in an appeal against conviction before the High Court, the course to be followed by the High Court is clear. The High Court is required to cause the inquiry in terms of Section 7(A) of the JJ Act to give a finding upon the correctness of the plea of juvenility to be conducted. The High Court also has to

examine the legality and validity of the conviction of the juvenile. In case the High Court concludes that the juvenile is innocent and accepts the appeal, the order on sentence is automatically quashed. However in case the High Court maintains the conviction, the sentence is required to be suspended and the matter sent to the Juvenile Justice Board for passing an order on sentence as well as the order under Section 19 of the JJ Act.

110. However, this might not be feasible in all cases. There is an important circumstance which needs bearing in mind. How is the High Court to proceed if at the stage when the plea is raised or when the appellate court is passing the order, the appellant has undergone sentence beyond the maximum prescribed under the Juvenile Justice Act, 2000? In such eventuality is it still necessary to send the matter to the Juvenile Justice Board for consideration of sentence and passing order under Section 15 of the Juvenile Justice Act?

111. In this regard it is also necessary to refer to Sub Section 2 of Section 6 which empowers the High Court and the Court of Session to exercise all powers conferred on the Juvenile Justice Board when examining an appeal revision of otherwise. The courts thus stand empowered to pass such orders qua the person asserting a plea of juvenility on the date of the offence, prescribed under Section

15 of the JJ Act, of course bearing in mind the age of the person and sentence already undergone by him.

112. Therefore if the conviction is maintained, then the Appellate Court would also examine the facts and circumstances of the case, and if deemed appropriate refer the juvenile appellant to the Juvenile Justice Board for consideration of the sentence. However, if the appellant has ceased to be a juvenile on the date of consideration of the sentence, that is, he has crossed 18 years - the maximum age for which he/she could be lodged in the special home or if the appellant has already undergone a sentence equal to or more than that prescribed under the Juvenile Justice Act, then the court while setting aside the sentence would be required to mould relief appropriately.

113. The first question framed for consideration by us in the opening part of this judgment is answered thus.

XI. Removal of disqualification attached to the conviction- power of appellate court?

114. We now turn to the consequential question arising from the above. The Juvenile Justice Act provides removal of disqualification attached to the conviction upon a juvenile as a statutory right under Section 19 of the JJ Act. The JJB is

mandatorily required to make an order directing that the relevant records of the conviction shall be removed after expiry of the period of appeal or such reasonable period as may be prescribed under the rules.

115. The above narration would also show that in ***Kalu @ Amit v. State of Haryana (supra)*** the Supreme Court was of the view that given the fact that Kalu @ Amit had already undergone more than 9 years of imprisonment, it would not be appropriate to send the matter back to the Juvenile Justice Board. The Supreme Court upheld the conviction (which had been sustained by the High Court) and quashed the order of the High Court to the extent it sentenced Kalu @ Amit to suffer life imprisonment. In these circumstances, the Supreme Court also directed that the juvenile shall not incur disqualification as a consequence of the conviction.

116. Our attention is also drawn on the two High Court cases of relevance in relation to removal of disqualification. In both these cases, the High Courts themselves passed order Section 19, instead of referring the matter to the relevant Juvenile Justice Board. In a case reported at ***(2012) Cri.L.J. 759 Ranjeet Kumar Jha v. State of Bihar,*** the Patna High Court found the appellant to be a juvenile. It upheld the conviction, and set aside the sentence. It also ordered that the juvenile

shall not suffer disqualification, if any, attached to the conviction. This was in accordance with Section 19 of the Juvenile Justice Act.

117. While considering this issue in Criminal Appeal No.365/2010, decided on 22nd November, 2012 ***H C Sharma d/o Chand Pasha v. State of Karnataka,*** the Karnataka High Court was faced with a situation where a prayer was made before it to erase the disqualification that would arise because of conviction. The appellant in that case had been convicted of offences under the Indian Penal Code, as well as the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Court upheld the conviction, and suspended the sentence. The court took note of Section 19 of the Juvenile Justice Act and ruled that the conviction shall not result in any disqualification.

118. The statutory provision does not state that the responsibility to enforce this statutory right is only upon the Board. As per Section 19(2), the Board only ensures the implementation of the statutory right by ordering removal of records. The High Court is as much under an obligation to uphold the right, as is the Board. On contrary Section 6(2) specifically reiterates the jurisdiction of the High Courts as well as Sessions Courts to pass all orders which the JJB stands statutorily empowered to do so. The High Court therefore also empowered to pass orders for

removal of disqualification attaching as a result of the conviction as well as destruction of records which the JJB is statutorily mandated to do under Section 19 of the JJ Act.

119. We may note that this situation could arise not only in appeals against conviction by the criminal courts in serious offences which are placed before the Division Bench of the High Court as in the present case, but could very well arise in any appeal against the convictions as well as criminal revision before the learned Single Judge. Given the enunciation of law in ***Hari Ram v. State of Rajasthan & Anr.(Supra),*** the plea can be raised in revisions and appeals before the Sessions Courts as well . The dicta laid down by the Supreme Court and the statutory position crystallized by us hereinabove would apply to all appeals and revisions before the learned Single Judge of the High Court as well as in all proceedings before the Sessions Courts as well.

The second question, which was noticed by us in the opening part of this judgment, also stands answered thus.

XII. <u>Duty of the Trial Court</u>

120. We find in several of these cases that the plea of juvenility is raised in appeals before us after the person concerned may have undergone a long period of

incarceration which would have had an irreversible impact on his/her life as well as personality.

121. What is the primary duty of the trial court then? In this regard, the observations of the Supreme Court in para 13 of the judgment reported at ***1984 (Supp) SCC 226 Gopinath Ghosh v. State of West Bengal*** made as back as in the year 1984 deserve to be noticed in extenso and read thus :-

> "13. …….. Ordinarily this Court would be reluctant to entertain a contention based on factual averments raised for the first time before it. However, the Court is equally reluctant to ignore, overlook or nullify the beneficial provisions of a very socially progressive statute by taking shield behind the technicality of the contention being raised for the first time in this Court. A way has therefore, to be found from this situation not conducive to speedy disposal of cases and yet giving effect to the letter and the spirit of such socially beneficial legislation. We are of the opinion that ***whenever a case is brought before the Magistrate and the accused appears to be aged 21 years as below, before proceeding with the trial or undertaking an inquiry, an inquiry must be made about the age of the accused on the date of the occurrence. This ought to be more so where special acts dealing with juvenile delinquent are in force. If necessary, the Magistrate may refer the accused to the Medical Board or the Civil Surgeon, as the case may be, for obtaining credit worthy evidence about age. The Magistrate may as well call upon accused also to lead evidence about his age. Thereafter, the learned Magistrate may proceed in accordance with law. This procedure, if properly followed, would avoid a journey upto the Apex Court and the; return journey to the grass-root court***. If necessary and found expedient, ***the High Court may on its administrative side issue necessary instructions to cope with the situation herein indicated.***"
>
> (Emphasis by us)

122. In the judgment reported at ***1995 Supp.(4) SCC 419 Pradeep Kumar v. State of U.P.*** and connected appeals, the observations of the court in para 18 so far as the mandatory requirement of holding an inquiry especially by the High Courts and subordinate courts also deserve to be considered in extenso and read as follows :-

> "18. Before parting with this judgment, we would like to reemphasis 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 of 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 concerned accused and then deal with the case in the manner provided by law***. "

(Emphasis supplied)

Thus, the Supreme Court has held that if a plea of juvenility is raised before the court, it is the obligation of the court to mandatorily hold an inquiry and return a finding regarding the age in one way or the other. The court has also reiterated its earlier directions to the High Court issuing administrative directions to the subordinate courts with regard to such pleas.

123. It is, therefore, well settled that it is the duty of the Magistrate to conduct an inquiry about the age of an accused whenever a case is brought before the Magistrate. The Supreme Court has held that the trial court is not required to await an application taking the plea that the accused is juvenile from the accused or the State. On the contrary, the inquiry is required to be undertaken as soon as it appears to the court from the physical appearance of the accused when he is produced before it that he may be a juvenile.

This duty also enjoins the Sessions Courts conducting trials as well as appeals, revisions to conduct such inquiry when cases are brought before it.

124. We find that this directive of the Supreme Court is being unfortunately completely ignored. We have not come across a single case where the trial court has undertaken a *suo motu* inquiry. There are instances when convicts were produced before us even at the appellate stage, after several years in the court

system, their physical appearance still suggested that they were juveniles on the date of the offence. Our impression were confirmed upon the *suo motu* inquiry directed by us. By then the appellants, juveniles at the time of offence have undergone long year's incarceration. Irreversible damage may have resulted to the juveniles.

125. Ashok Kumar @ Ganja (one of the respondents in Death Reference No.5/2010) is one such person. Our doubt from his physical appearance that he may have been as juvenile on the date of the offence was confirmed in the medical examination.

126. The directions by the Supreme Court bind every court. The mandate of the law too requires strict compliance. This is more so in the context of social welfare legislation as the erstwhile Children Act of different states, and now, the Juvenile Justice Act. Apart from the resultant prejudice to the welfare of a juvenile who is subjected to a criminal trial in violation of the law, there is an unnecessary drain on scarce judicial resources. Valuable judicial time is expended on proceedings which are without jurisdiction at not only the trial court level but at the appellate stage as well. These apprehensions find articulation by the Supreme Court in the judgment rendered in ***Gopinath Ghosh*** (Supra).

127. We therefore, emphasize the duty of the trial courts to ensure that an inquiry in accordance with the provisions of the JJ Act, 2000 is undertaken at the earliest when an accused brought before it appears to be of 18 years or below.

128. In ***Hari Ram v. State of Rajasthan (supra)*** certain observations of the Supreme Court, with regard to questions which were fundamental to the understanding and implementation of the object with which the JJ Act, 2000 was enacted, deserve to be considered in extenso and reads thus:-

> "2. The said law which was enacted to deal with offences committed by juveniles, in a manner which was meant to be different from the law applicable to adults, is yet to be fully appreciated by those who have been entrusted with the responsibility of enforcing the same, possibly on account of their inability to adapt to a system which, while having the trappings of the general criminal law, is, however, different therefrom.
>
> 3. The very scheme of the aforesaid Act is rehabilitatory in nature and not adversarial which the courts are generally used to. The implementation of the said law, therefore, requires a complete change in the mindset of those who are vested with the authority of enforcing the same, without which it will be almost impossible to achieve the objects of the Juvenile Justice Act, 2000."

129. The Statement of Object and reasons of the JJ Act, 2000 records the legislature's concerns with the much greater attention that is required to be given to children in conflict with law as well as those in need of care and protection. The justice system as available for adults is not considered suitable for being applied to

a juvenile or the child or any one on their behalf, including the police, voluntary organizations, social workers, or parents and guardians, throughout the country.

130. Article 40 of the United Nations "*Convention on the Rights of the Child*" enjoins on state parties to take certain actions with regard to children against whom there may be allegations of infringing penal laws. The relevant extract of Article 40 in this regard reads as follows:-

> "Article 40
>
> 1. States parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
>
> 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
>
> (a) No child shall be alleged as, be accused of, or recognised as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
>
> xxxx
>
> 3 States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular:

> (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law…;"

Children's legislations are the result of the State's concern about these issues.

131. The Constitution of India places the primary responsibility on the State of ensuring that all needs of the children are met with and their basic human rights are fully protected. As a result, the Juvenile Justice Act of 1986 was enacted to provide neglected or delinquent juveniles the due care, protection, treatment, development and rehabilitation for adjudication of certain matters relating to and disposition of delinquent juveniles. In order to confirm to the set of standards for securing the best interest of the child, the Government of India re-enacted the existing statutes to give effect to the aforenoticed international instruments and enacted the Juvenile Justice (Care & Protection of Children) Act of 2000.

132. The importance of a prompt determination of juvenility is not only in the interest of the juveniles but has a deep impact on society inasmuch as efforts of reform are made. Public employment require disclosure of implications in cases, arrest, conviction, sentence etc. at the time of recruitment. Section 19 refers to

removal of disqualification attaching to conviction of offence enabling juveniles who may have been in conflict with law, to thus seek public employment.

133. In this background, in failing to abide by the statutory mandate and the directions of the Supreme Court, the trial courts are failing to discharge constitutional duties as well as responsibility in public law of ensuring the best interest of a child in conflict with law. The District Judges concerned shall ensure that the directions of the Supreme Court as well as the observations made by us which are extracted by us (in para 118 to 131) are complied with.

XIII. Result

134. In the cases before us, such pleas have been taken in appeals against award of life sentences and even death sentences as detailed above. We *suo moto* caused inquiry in respect of two persons who stood sentenced to death. We have found them to be juveniles on the date of offences after conducting the inquiries in respect of their ages.

135. It is noteworthy that so far as Amar Bhadur Thapa, Ravinder, Sheela, Jagtar and Ashok@ Ganja are concerned, they have undergone imprisonment much beyond the maximum period of permissible detention of three years under the

Juvenile Justice (Care and Protection) Act, 2000. It would therefore, be impermissible to deprive such persons of their liberty, after having undergone confinement beyond the three years permitted by the J.J. Act. In any case, all the persons with whom we are concerned in these cases are over 18 years of age now and cannot be lodged in the special homes.

136. We find that Imran Khan has undergone imprisonment of only 2 years, 2 months and 9 days as on 24th December, 2010. The JJ Act prohibits sentence of imprisonment absolutely. The maximum that can be ordered under Section 15 of the JJ Act against a juvenile is a direction that the juvenile be sent to special home for completing the period of three years of detention. So far as Imran Khan is concerned, such a course may be available. However, as on 24th December, 2010, when his case of juvenility was considered , Imran Khan had completed 24 years of age. Therefore, it would not be permissible to send him to a special home where only juveniles are kept.

137. It is noteworthy that Sheela, Jagtar and Ashok @ Ganja (respondents in Death Sentence Reference No.5/2010) have not filed appeals assailing their conviction by the judgment dated 29th November, 2010 in Sessions Case

No.123/2008. This court has accepted the plea in the reference of their having been juveniles on the date of the occurrence.

138. In this background, keeping in view the above discussion and our answer to the questions under consideration, it is directed that the appeals of the appellants are required to be considered on merits. In case this court upholds the judgment of the trial court whereby the appellants have been found guilty of commission of offence, appropriate orders with regard to the sentence as well as removal of disqualification in accordance with Section 19 of the JJ Act would require to be passed.

139. In view of the above discussion, Sheela, Jagtar and Ashok @ Ganja (respondents in Death Sentence Reference No.5/2010) are entitled to an opportunity to file appeals against their conviction for which purpose they would require to be informed of the directions of this court.

140. We make it clear that by this judgment, we do not preclude any of the appellants from withdrawing the appeal or challenge to the judgment whereby they have been convicted by the trial court. A considered submission in this regard would be made by the appellants before the court hearing the appeal which would then pass appropriate orders permitting the withdrawal of the appeal.

141. Given the nature of the question considered and the anguish expressed by the Supreme Court on the failure of trial courts to suo moto take action with regard to determination of juvenility of accused persons, we direct the Registrar General to send copies of the judgment to all District and Sessions Judges for circulation to all judges for information and compliance. The trial courts shall ensure strict compliance with the observations and directions of the Supreme Court and this court noted by us from paras 118 to 131 above.

(GITA MITTAL)
JUDGE

(J.R. MIDHA)
JUDGE

AUGUST 1st, 2014
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