

ITEM NO.101 (PH) COURT NO.9 SECTION II

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CRIMINAL APPEAL NO(s). 1193 OF 2006

ABUZAR HOSSAIN @ GULAM HOSSAIN Appellant (s)

VERSUS

STATE OF WEST BENGAL Respondent(s)

(With appln(s) for permission to file additional documents)

WITH
CRIMINAL APPEAL NO. 1195 of 2006
(With office report)

Date: 10/11/2009 This Appeal was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE HARJIT SINGH BEDI
HON'BLE MR. JUSTICE J.M. PANCHAL

For Appellant(s) Mr. Pradip K. Ghosh, Sr. Adv.
In 1193/06 Mr. Ranjan Mukherjee, Adv.
Mr. Rauf Rahim, Adv.
Mr. Yadunandan Bansal, Adv.

In 1195/06 Mr. Fakhruddin, Sr. Adv.
Mr. Abhijat P. Medh, Adv.

For Respondent(s) Mr. Tara Chandra Sharma, Adv.
Ms. Neelam Sharma, Adv.

UPON hearing counsel the Court made the following
O R D E R

One of the issues raised by Mr. Pradip Ghosh, the
learned senior counsel for the appellant is that Abuzar
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Hossain @ Gulam Hossain was a juvenile on the date of the
incident and as such he could not have been tried in the
normal criminal court. He has submitted that as per his
statement recorded under Section 313 of the Code of
Criminal Procedure on 4th March, 2003 he was 19 years of age
and that the point of his juvenility had been raised even

in the grounds of appeal in the High Court as well as in the present petition as the incident had happened on 11th February, 2001. It is true, as contended by Mr. Ghosh, that this plea had been taken but we find from a perusal of the evidence as also the judgments of the trial court and the High Court that this matter does not appear to have been pressed at any stage and no evidence whatsoever had been led by the defence to prove the age of the appellant Abuzar Hossain.

Faced with this situation, Mr. Ghosh has relied upon Gopinath Ghosh v. State of West Bengal 1984 (Suppl.) SCC 228 to argue that notwithstanding the fact that the plea had not been raised, an obligation nevertheless lay on the Court to go into this matter and to determine the age of the appellant. Mr. Ghosh, in particular, had relied upon the observations made in para 10 of the judgment which reads as under:-

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"Unfortunately, in this case, appellant Gopinath Ghosh never questioned the jurisdiction of the Sessions court which tried him for the offence of murder. Even the appellant had given his age as 20 years when questioned by the learned Additional Sessions Judge. Neither the appellant nor his learned counsel appearing before the learned Additional Sessions Judge as well as at the hearing of his appeal in the High Court ever questioned the jurisdiction of the trial court to hold the trial of the appellant, nor was it ever contended that he was a juvenile delinquent within the meaning of the Act and therefore, the Court had no jurisdiction to try him, as well as the Court had no jurisdiction to sentence him to suffer imprisonment for life. It was for the first time that this contention was raised before this Court. However, in view of the underlying intent and beneficial provisions of the Act read with clause (f) of Article 39 of the Constitution which provides that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and

material abandonment, we consider it proper not to allow a technical contention that this contention is being raised in this Court for the first time to thwart the benefit of the provisions being extended to the appellant, if he was otherwise entitled to it."

He has also relied on the observations made by a Bench of this Court in Hari Ram v. State of Rajasthan 2009 (6) SCALE 695 to contend that after the amendment made in the year 2001 in Sections 2(k) and 2(l) of the Juvenile Justice (Care and Protection of Children) Act, 2000, a juvenile has been described as a person who had not yet

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completed 18 years of age and a proviso had also been added to Section 7A that the plea of juvenility could be raised before any Court at any stage even after the final disposal of the case and that the Court was bound to examine the matter.

Mr. Tara Chandra Sharma, the learned counsel appearing for the respondent-State, has however, relied upon certain observations made by another Bench of this Court in Akbar Sheikh & Ors. v. State of West Bengal (2009) 7 SCC 415 and in particular to the observations in para 45 at page 430 which read as under:

"We are also unable to accept the submission of Mr. Rauf Rahim that Kabir was a juvenile on the date of occurrence. No such question had ever been raised. Even where a similar question was raised by five other accused viz. Jahangir, Motahar, Mosi, Chosi and Habal, no such plea was raised even before the High court. Reliance inter alia has been placed on the statement of Kabir under Section 313 of the Code of Criminal Procedure wherein he stated his age to be 33 years in 2001. Such a statement, in our opinion, is not decisive. Reliance has also been placed on a voters' list. The said voters' list had been prepared long after the incident occurred. The same is again not decisive."

A comparative reading of the two paragraphs
above would reveal a very substantial discordance in the
approach of the matter and whereas Gopinath Ghosh's case
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quoted

(supra) lays an obligation lies on the Court to examine the
question of juvenility at any stage which stand is now
recognised even by the Act of 2000 and Hari Ram's Case,
Akbar Sheikh's case proceed on a contrary thesis.

We are, therefore, of the opinion that as this matter
would arise in a very large number of cases, the issue
requires to be referred to a larger Bench as the judgment
in both the cases [Akbar Sheikh's case and Gopinath Ghosh's
case] have been rendered by Co-ordinate Benches of this
Court.

The matter be put up for decision on merits after the
reference is answered.

Place the matter before the Hon'ble the Chief Justice
of India to seek appropriate directions to list the matter
before a larger Bench.

(KALYANI GUPTA)
SR. P.A.

(VINOD KULVI)
COURT MASTER