recommended amendment of the definition of "decree" in section 2(2) by excluding therefrom "determination of any question under section 47" to make the final order under section 47 non-appealable in order to reduce delay in the execution of decree, but did not recommend any consequential amendment to delete this section; and Bill as such was passed by the Legislature. The result has been that, as there will be no appeal against final order under section 47, this section remains in the statute as *otiose* serving no useful function."

After taking into consideration the aforesaid circumstances, I am of the view that Section 99A does not entitle a party to file an appeal against an order under Section 47 of the said Code. Consequently, the finding of the learned District Judge that an appeal is maintainable against such an order is not correct and I reverse it.

(5) In view of the fact that the District Judge had no jurisdiction to entertain the appeal, the course open for him was to return the memorandum of appeal to the appellant.

(6) For the reasons recorded above, I accept the revision petition and set aside the order of the District Judge. In the circumstances of the case, I, however, make no order as to costs.

S. C. K.

Before S. S. Sandhawalia, C.J. and I. S. Tiwana, J.

JAI CHAND and others,—*Appellants.*

versus

STATE OF HARYANA —*Respondent.*

Criminal Appeal No. 534 *of* 1977.

29th July, 1979.

Haryana Children Act (14 *of* 1974)—*Sections* 21 *and* 23—*High Court Rules and Orders, Volume III, Chapter* 1-*G* (*Part G*) (*a*) & (*b*)—*Wide disparity between age given by an accused himself and visual assessment of the trial Judge—Assessment of Judge uncontroverted by the accused despite various opportunities—Duty of trial Court in such cases—Onus of proving age to secure benefit of the Act—Whether on the accused.*

Held, that a reading of Chapter 1-G (Part G) (a) and (b) of Volume III of the High Court Rules and Orders shows that it is incumbent on the Sessions Judge to record his estimate of the age when a wide disparity betwixt the age given and the age by appearance is manifest. The above noted Rules and Orders have laid a statutory obligation on the Presiding Officers to record their opinion about the age where it may become material. The rationale of the aforesaid Rules and Orders appears to be manifest. A mere clinical examination or even the radiological examination for applying the ossification test would still leave a margin of two or more years either way. Compliance of this rule cannot be easily thrown away more so when the margin varies from age to age in a younger person. Where the accused is aware that the Court is not accepting his *ipse dixit* regarding his age at the time of the trial and no attempt whatsoever is made on behalf of the accused to establish his claim that he was a child at the time of the commission of the offence, he cannot claim the benefit of sections 21 and 23 of the Haryana Children Act, 1974. On principle, it seems to be well settled that the onus of proof of a fact must necessarily lie on a party who claims the benefit thereof. But merely accepting the word of mouth of the accused on the point of age may therefore be placing undue premium on an interested *ipse dixit* with the patent object of taking undue advantage of the benefits of a criminal statute. Therefore the onus of establishing the age for the purpose of benefit under the Act must inevitably rest on the accused person and should be reasonably discharged.

(Paras 18 and 19)

Appeal from the order of Shri A. M. Aggarwal, Sessions Judge, Rohtak, dated the 18th April, 1977 convicting the Appellants.

U. D. Gaur, Advocate, *for the Appellants.*

V. K. Bali, Advocate, *for the State.*

N. C. Jain, Advocate with V. K. Jain, Advocate, *for the complainant.*

JUDGMENT

S. S. Sandhawalia, C.J.

1. Jai Chand convict, his three sons Badan Singh, Jagmal and Satbir and nephew Shamser were all brought to trial before the Court of Session at Rohtak on charges under sections 148 and 302 read with section 149 Indian Penal Code. All of them were held guilty on the charges aforesaid and sentenced to imprisonment for life on the murder charge and one year's rigorous imprisonment for the subsidiary offence. Both the sentences were directed to run concurrently.

2. The appellants and the deceased Kidara belong to village Ritoli and it is not in serious dispute that the land of the deceased and his brother Dhara P.W. adjoins that of the appellants and was irrigated by a common watercourse passing through the fields of Jai Chand appellant. About 15 days prior to the occurrence, Kidara deceased was cleaning the said watercourse when Jai Chand appellant obstructed him from doing so on the plea that he was putting earth in the watercourse which would tend to block the water therein. Kidara accused, however, persisted in his job whereupon Jai Chand appellant launched a tirade of abuse and an altercation followed but ultimately Kidara deceased desisted and returned home.

3. The actual occurrence took place at dawn on the 21st of December, 1975, at about 6.30 a.m. Kidara deceased along with his son Kalu and nephew Mohinder (both children) as also his brother Dhara P.W. had together gone to the fields to answer the call of nature near the Rajowali pond. After doing so, Kidara deceased was washing his hands at the aforesaid pond when all the five appellants out of whom Jai Chand and Satbir were armed with *lathis* and the others with *jailies* came there and Jai Chand appellant raised a challenge that he would now teach a lesson to Kidara for tampering with the watercourse. Forthwith Jai Chand appellant opened the attack with a *lathi* blow on the buttock of Kidara deceased and Satbir gave another *lathi* blow on the deceased whereafter all the other three appellants also showered *jaili* blows on Kidara indiscriminately. Jai Chand appellant repeated another *lathi* blow on the head of the deceased. Inevitably, the victim raised an alarm which attracted Dhara, his brother, and Mohinder and Kalu to the spot who witnessed the assault. The appellants then retreated from there along with their weapons.

4. Dhara P.W. secured a tempo and placing his badly injured brother Kidara therein took it to the Police Station, Kalanaur, at a distance of about 12 miles where they reached at 10.30 a.m. Sub-Inspector Mauji Ram recorded the statement Exhibit P.H. of Kidara deceased and on its basis the first information report was registered under sections 324, 325 read with sections 149 and 148, Indian Penal Code. The injury statement Exhibit P.C. was prepared and the injured Kidara along with his brother Dhara was sent to the Civil Dispensary, Kalanaur, along with Constable Bishamber Dayal for his medical examination. However, the doctor at the Civil Dispensary, Kalanaur, was not available and after securing an endorsement

Exhibit P.C./1 from the Pharmacist of the Dispensary, Kidara injured was carried towards the Medical College, Rohtak, on that very tempo along with Dhara P.W. However, on the way the victim succumbed to his injuries and Sub-Inspector Mauji Ram, who noticed the tempo standing on the road found on enquiry about the demise of Kidara and thereafter took steps to alter the offence to one under section 302 in the first information report. He also prepared the inquest report and forwarded the dead body for post-mortem examination. Reaching the spot he picked up bloodstained earth therefrom and later completed the other details of the investigation.

5. No serious contention has been raised on the basis of the medical testimony and it suffices to mention that the autopsy by Dr. D. R. Chugh, disclosed as many as 9 lacerated, incised and punctured wounds causing fractures on the body. The cause of death was haemorrhage and shock as a result of the injuries aforesaid all of which were ante-mortem and sufficient in the ordinary course of nature to cause death. The witness also opined that the time between the injuries and death was within 12 hours and between death and post-mortem to be within 24 hours. P.W. 2 Ashok Kumar Chhabra, Pharmacist of the Civil Dispensary, Kalanaur, merely deposed about the absence of the doctor therefrom and his endorsement on Exhibit P.C.

6. The ocular account is first that of P.W. Dhara, the brother of the deceased, who was subjected to a long and gruelling cross-examination which, however, elicited little or nothing in favour of the defence. P.W. 5 Kalu, the son of the deceased a mere boy of 13 years, is the other eye-witness who was found by the learned Sessions Judge to be a competent witness and he has also deposed in no uncertain terms in support of the prosecution story. P.W. 6 Mohinder, who is a mere child of 10 to 11 years, was tendered for cross-examination but was not challenged. The main Investigating Officer in the case is P.W. 13 Mauji Ram who deposed in categoric terms with regard to the recording of the dying declaration Exhibit P.H. and the original registration of the case on its basis under sections 324 and 325 read with sections 149 and 148, Indian Penal Code. The rest of the prosecution testimony is of a subsidiary and corroborative nature.

7. In his statement under section 313, Criminal Procedure Code, Jai Chand admitted the relation *inter se* of the appellants and

also the fact that the fields of the deceased and the appellants were adjoining but he attempted to deny the existence of any watercourse through his land. The rest of the prosecution allegations were denied and besides the bald plea of false implication it was alleged by this appellant that there had been a number of earlier hurt cases in which the parties had either assaulted or appeared as witnesses against each other. The rest of the appellants also took up an identical stand as taken by Jai Chand appellant. In Defence D.W. 1, Shri I. M. Malik, Senior Subordinate Judge-cum-Chief Judicial Magistrate, Narnaul, was put into the witness-box to prove the earlier cases and statements made in *State* v. *Kidara* under sections 326/34, Indian Penal Code. The testimony of D.W. 2 Ishwar was also adduced with regard to these earlier hurt cases and his statement and evidence therein.

8. The whole gravemen of the argument raised on behalf of the appellants by Mr. U. D. Gaur has centred round his stand that in fact the dying declaration Exhibit P.H. was not duly recorded, as deposed to by Sub-Inspector Mauji Ram, but in fact by the time Kidara was brought to the police station he was already dead. Counsel had vehemently contended that the deceased having been seriously injured it was more likely and prudent for P.W. 4 Dhara to carry him to Rohtak for better medical aid available at Medical College Hospital rather than carry him to Kalanaur which lies a few miles on the opposite side. The submission was that the main metalled road from village Ratauli to Kalanaur virtually touches the bye-pass of Rohtak and inevitably Kidara injured, if alive, would have been taken to Rohtak and not to Kalanaur. On these premises, Mr. Gaur had contended that in fact it was the dead body of Kidara which was taken to the Police Station at Kalanaur and not the mortally wounded deceased.

9. Though the argument was advanced with great persistence the hollowness of the same appears to be patent. There is first the categoric testimony of P.W. 4 Dhara, the brother of the deceased that when they reached Kalanaur, Kidara was yet alive and fully in senses to make the statement, Exhibit P.H. It has to be borne in mind that the village Ratauli falls within the jurisdiction of Police Station, Kalanaur, and it was, therefore, both natural and probable that the injured Kidara should be carried to the said place in the first instance. What, however, deserves highlighting in particular is the admitttd fact that there is the hospital located at Kalanaur and village Ratauli would fall within the areas and jurisdiction of

the said hospital, for medico-legal purposes. Therefore, also it was more likely that Kidara should be first taken to the Hospital at Kalanaur. As is already given in the resume of facts above, it was only when it was discovered that the doctor was not available that Kidara injured was carried towards Rohtak but he did not survive the journey. It has then to be noticed that apart from one injury on the parietal region, the rest of the serious injuries were on the arms and legs of the deceased which had been mercilessly fractured. There is then the categoric testimony of Sub-Inspector Mauji Ram P.W. 13 to the effect that Kidara was both alive and in a position to make a statement when he examined him. In fact he stated that to arrive at the truth he had asked P.W. Dhara and others to go away when he recorded the dying declaration. What is significant is that in view of the injuries noticed aforesaid the police officer recorded the offence in the first information as one under section 324/325. This would indicate that even the police officer and apparently the brother of the deceased had as yet thought the injuries to be relatively minor in nature. The case was not registered either under section 307 or 308, Indian Penal Code. There is nothing in the cross-examination of Mauji Ram P.W. 13, which could make one distrust his forthright statement that he had in ordinary course recorded the statement of the injured witness for the registration of a relatively simple case under sections 324 and 325, Indian Penal Code. Even otherwise the suggestion is rather incredulous that P.W. Mauji Ram would deliberately forge the thumb-impression of a dead man on the statement Exhibit P.H. and falsely frame up a dying declaration even though the victim was already dead. There is neither any reason for any particular interest suggested which could possibly motivate a public servant, like Sub-Inspector Mauji Ram, to indulge in a blatant forgery and fabrication of this kind.

10. Counsel for the appellants had then attempted to clutch at a straw by contending that the driver of the tempo who had carried the injured Kidara has not been put in the witness-box and his non-production was a material infirmity in the prosecution case. I am unable to agree. It appears to me a rather unusual argument that the driver of the vehicle in which an injured vitcim of crime may be carried is a material and necessary witness in the case. As has been noticed, the prosecution examined two eye-witnesses with regard to Kidara being injured and being alive at the spot and also brought on the record the evidence of P.W. 4 Dhara and Sub-Inspector Mauji Ram that the injured was alive when he was

brought to Police Station, Kalanaur. If the testimony of these witnesses is accepted the prosecution is under no obligation to bring any witnesses to prove that Kidara was alive at all the transit stages of the journey. The reliance by the Learned Counsel on *Keshav Ganga Ram Navge and another* v. *The State of Maharashtra*, (1), in this context seems to me misconceived. The observations in that judgment cannot be raised to the rule of law that drivers of transport carrying the injured are necessary or material witnesses in the subsequent prosecution case. The novel suggestion in this regard has only to be noticed and rejected.

11. Focussing himself primarily on the dying declaration, Mr. Gaur had virtually missed raising any argument against the direct ocular account of P.Ws. Dhara and Kalu which incorporate all particulars of the dying declaration Exhibit P.H. Indeed in a case of the present kind in which two unblemished eye-witnesses have remained wholly unsullied in cross-examination the total emphasis placed by the learned counsel for the appellants on the dying declaration appears to me rather lopsided. In the absence of any criticism and also on an independent appraisal it must be held that the ocular account given by the two witnesses aforesaid is wholly worthy of acceptance. The findings of the trial Court on the point are also affirmed.

12. In the present case the evidence of motive has not been seriously dislodged. The eye-witness account deserves ready acceptance as the same is totally in line and corroborative of the dying declaration made by the deceased soon after the occurrence which for the reasons mentioned above must be accepted. The medical testimony again matches the ocular account in every respect. The case of the prosecution has, therefore, been established to the hilt by the aforesaid circumstances.

13. Repelled on the main plank on merits Mr Gaur then fell back on what appears to us as a rather hyper technical plea. It was argued that Jagmal appellant, had chosen to give his age as 15 years (even though the learned Sessions Judge who had the opportunity to see him throughout the trial categorically noticed that by appearance he looked far older and was about 22 to 23 years of age) and, therefore, the provisions of the Haryana Children Act,

(1) A.I.R. 1971 S.C. 953.

1974 would be attracted. On these premises it was sought to be contended that Jagmal appellant, could neither have been tried nor convicted along with his other co-accused for the offence and further that the sentence of life imprisonment in any case could not be imposed upon him.

14. It calls for pointed notice that the very factual basis for the aforesaid contention appears to be utterly lacking on the present record. Even at the very initial stage of the trial, namely, the recording of the charge, the age of Jagmal appellant was clearly noticed by the Judge to be about 22 or 23 years by appearance. Section 23(1) of the Haryana Children Act, 1974 (hereinafter called the Act) is in the following terms :—

> "23(1) Notwithstanding anything contained in section 239 of the Code of Criminal Procedure, 1898 (Central Act 5 of 1898), or in any other law for the time being in force, no child shall be charged with or tried for, any offence together with a person who is not a child."

Now the provisions aforesaid are clear and forthright and even though the appellants were well represented and well defended by counsel, no objection thereunder was even hinted at far from being pressed with regard to this appellant being a child and consequently the existence of a legal bar for his trial along with his other co-accused.

15. The aforesaid position was very fairly conceded by Mr. Gaur but he took the stand that even the total absence of any objection at that stage and even later in the whole course of the trial would still make no difference to the legal position.

16. Yet again at the time of the recording of the statement under section 313, Criminal Procedure Code, Jagmal appellant again pretended to be 15 years of age and the learned Judge rejecting the claim again recorded that by appearance he was 21 or 23 years. It is significant to notice that even after the recording of the conviction the counsel for the appellant was heard apparently at length with regard to the imposition of sentence. No claim even at that stage was made that this appellant could not be sentenced to life imprisonment on the ground of being a child. The provisions of section 21(1) of the Haryana Children Act are as follows :

> "21(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent

child shall be sentenced to death or imprisonment, or committed to prison in default of payment of fine or in default of furnishing security.

Provided that where a child at the time of the commission of the offence was of the age of fourteen years or above and the children's court is satisfied that the offence committed is of no serious nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other children in a special school to send him to such special school and that none of the other measures provided under this Act is suitable or sufficient, the children's court may order the delinquent child to be kept in the observation home or with the parent, guardian or a fit person, on such conditions as may be imposed and shall report the case for the orders of the State Government."

Even in the context of the plain language of the provision admittedly not a hint of any claim on its basis that Jagmal appellant could not be sentenced to imprisonment was raised before the learned Sessions Judge. This has again not been disputed on behalf of the appellant before us.

17. It is manifest from the above that not once but twice the express recording of the age of the petitioner as 22 to 23 years by the learned Sessions Judge amounted to a clear notice to the appellant and his counsel that the *ipse dixit* of Jagmal with regard to his age was not being accepted and his version of being only 15 years of age at the time of trial was being treated as patently specious against his appearance which did not look marginally but substantially 7 or 8 years beyond the age claimed. Nevertheless, no attempt whatsoever was made on behalf of this appellant to establish his claim that he was a child at the time of the commission of the offence or even at the stage of the trial. No evidence with regard to his birth entry or any other documentary evidence like a School leaving Certificate etc. was even attempted to be adduced on the record on his behalf. This apart, even the oral evidence of the father or mother of the appellant on the point was not adduced despite opportunity to lead testimony in defence. It deserves highlighting that the father of Jagmal, namely, Jai Chand was himself a co-accused at the trial and did not come forward to say a word in this regard. Again, it calls for notice that no claim to have

himself clinically and medically examined for establishing his age was either made on behalf of this appellant. Therefore, there is on this record not a little of evidence to sustain the claim of Jagmal appellant that he was a child at the material time of the commission of the offence or even at the time of the trial.

18. On principle, it seems to be well-settled that the onus of the proof of a fact must necessarily lie on a party who claims the benefit thereof. Jagmal appellant had thus singularly failed to discharge this onus. Herein, apart from the onus placed by the statute the appellant had the clearest notice that his version of age had been categorically rejected by the trial Court. Nevertheless, he led no evidence on the point to rebut that finding. In *Dassapa* v. *The State of Mysore*, (2), it has been held that the onus for proving the age in order to secure the benefit of the Probation of offenders Act lies on the person claiming the benefit thereunder. We see no reason how the position can in any way be different under the Haryana Children Act.

19. In fairness to Mr. Gaur, reference must be made to *Raisul* v. *State of U.P.*, (3), on which he primarily relied for his contention that the recording of age by appearance by the Sessions Judge could not be acceptable. The way we read that short judgment, confined as it was only to the point of sentence, it does not appear to us that their Lordships were laying down any inflexible rule of law that in no case is the estimate of age by the Sessions Judge to be accepted or in the converse that the statement of age by an accused person is virtually conclusive. Their Lordships' observations made therein were perhaps made in the peculiar context of the facts of that case. What, however, calls for pointed notice in this context is that *Raisul's case* above was from Allahabad and the position appears to be radically different herein in view of the statutory provisions to which reference is made hereinafter. It was not disputed before us that the Rules and Orders of the High Court have the force of law within its jurisdiction. In Chapter 1-G (Part G) (a) and (b) of Volume III of the Rules and Orders of the Punjab and Haryana High Court it has been expressly provided as follows :—

> "(a) In criminal cases, in which the age of an accused person, complainant or witness, is material to the matter in issue,

(2) A.I.R. 1965 Mysore 224.

(3) A.I.R. 1977 S.C. 1822.

or is likely to affect the sentence, the Court should record a careful finding as to probable age of such accused person, complainant or witness, and should refer to, and comment on, any discrepancies which there may be in the evidence on the point. In cases of doubt, the opinion of a medical officer should be taken. The age of the accused as found or believed by the Court should be invariably stated in the judgment. A careful statement of the probable age of the accused is especially necessary in murder cases in which the person charged is a youth or is very advanced in years. But in every case in which a charge is framed the accused should, at the opening of his examination, be required to state his age; and in all cases in which the age of the accused appears to the Court to be under twenty or over fifty years, or to be material for any special reasons, the magistrate should add a note expressing his own opinion as to the probable age of the accused.

Note.—It has been brought to the notice of the High Court that owing to insufficient inquiry into the age of juvenile offenders youths of too advanced age are not infrequently sent to the Reformatory School. The Judges, therefore invite the attention of all magistrates to the necessity of exercising care in the preliminary inquiry into the age prescribed in section II of the Reformatory Schools Act of 1897 and to the propriety of taking medical advice in doubtful cases.

(b) Neither the complainant, nor a witness nor any accused person can be compelled to submit to medical examination for the purposes of evidence. A criminal Court has by law no power to order any person, whether male or female, to be subjected to medicas examination, though, where the consent of the person to be examined (or, in the case of a minor, or his or her lawful guardian) has been obtained, such examination may be authorised. The practice of ordering the medical examination of a woman who has complained of an offence against her virtue is illegal without her consent."

Now in view of the aforesaid statutory provisions it was incumbent on the learned Sessions Judge to record his estimate of the

age when such wide disparity betwixt the age given and the age by appearance was manifest. The provisions having statutory force, inevitably weight has to be attached to anything done in compliance therewith. Particular emphasis herein has to be placed on the fact that the appellant could not have been compelled to be medically examined against his will in order to rebut his *ipse dixit* that he was merely 15 years of age. On the other hand it bears repetition that at no stage did Jagmal appellant even offer to have himself clinically or radiologically examined for the purpose. It has also to be borne in mind that Dr. D. R. Chug had personally appeared to give evidence in the case, yet even at that stage no claim for medical examination was raised. In such a situation the learned Sessions Judge perhaps could do no better than comply with the strict statutory provisions laid out in the High Court Rules and Orders quoted above. The rationale of the aforesaid Rules and Orders again appears to be manifest. It is axiomatic in medico-legal jurisprudence that a mere clinical examination for the purpose of age cannot fix the same with any degree of precision. A wide ranging variation sometimes as much as 5 to 7 years can possibly result from an opinion rendered on a clinical examination alone. Not only this, even the radiological examination for applying the ossification test would still leave a margin of two or more years either way and this is the accepted medico-legal opinion in this regard. In persons beyond a certain age any radiological examination and the ossification test can be of little or no help. It is in this context that the Rules and Orders of the High Court have laid a statutory obligation on the presiding officers to record their opinion about the age where it may become material. Compliance of this rule cannot be easily thrown away, the more so when the margin varies from 8 to 10 years in younger persons. It is unlikely that a child of 14 would look 10 years above by appearance to a experienced Judicial Officer well versed daily in the trial of accused persons. Equally it has to be borne in mind that in view of the benefits which the law extends on the point of age the appellant and in fact all accused persons would necessarily be interested persons. Merely accepting the word of mouth of the accused on the point of age may, therefore, be placing an undue premium on an interested *ipse dixit* with the patent object of taking undue advantage of the benefits of criminal statute. Therefore it appears to us that the onus of establishing the age for the purpose of benefit under the Haryana Children Act must inevitably rest on the accused person and should be reasonably discharged.

20. It seems to follow inevitably from the aforesaid discussion that there is nothing on the present record to sustain the bald and the belated plea now sought to be raised on behalf of Jagmal appellant that he was at the material time a child within the meaning of the Act. We take the view that the appeal is wholly without merit and the same is hereby dismissed.

H.S.B.

Before P. C. Jain and D. S. Tewatia, JJ.

JAI BHARAT DAIRY FARM Delhi and another,—*Petitioners.*

versus

STATE OF HARYANA —*Respondent.*

Letters Patent Appeal No. 306 *of* 1978.

July 19, 1979

Haryana Milk and Milk Products Control Orders of 1978 *and* 1979 *—Clause* 3 *Second proviso sub-clauses (i) and (ii) of the* 1978 *Order and sub-clauses (i) & (iii) of the* 1979 *Order—Constitution of India* 1950*—Article* 14*—Exemption granted to certain Dairies from the provisions of clause* 3*—Whether discriminatory and* ultra vires *Article* 14.

Held, that from a bare reading of exceptions contained in Second proviso to clause 3 of the Haryana Milk and Milk Products Control Orders of 1978 and 1979, it is evident that export of milk is permitted by the two Dairies of Delhi in any quantity and by the vendor in the quantity of one quintal. In regard to the vendor carrying one quintal of milk, sub-clause (ii) of 1978 Order and sub-clause (iii) of 1979 Order are very vague as they no where define that the quantity of one quintal to be exported by one vendor to Delhi is the total quantity to be exported by him at one time of an hour or one time a day. If an individual vendor can take milk in a quantity upto one quintal in one turn to Delhi, then in a given case a clever vendor can multiply by his skill the turns to Delhi and earn profits by charging any rate on the milk which he would export. This being the effect of the two exceptions, permission to the two dairies to export milk in any quantity from Haryana to Delhi and also the