

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

+ **CRL.REV.P. 390/2011**

% Reserved on: 20<sup>th</sup> October, 2011

Decided on: 8<sup>th</sup> November, 2011

DILBAHAR @ BABU

..... Petitioner

Through: Mr. R.S. Soni, Advocate.

versus

GNCT OF DELHI

..... Respondent

Through: Mr. Manoj Ohri, APP with Inspector  
Amar Singh, PS Old Delhi Railway  
Station.

**Coram:**

**HON'BLE MS. JUSTICE MUKTA GUPTA**

- |                                                                              |               |
|------------------------------------------------------------------------------|---------------|
| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Not Necessary |
| 2. To be referred to Reporter or not?                                        | Yes           |
| 3. Whether the judgment should be reported in the Digest?                    | Yes           |

**MUKTA GUPTA, J.**

1. By this petition the Petitioner challenges the orders dated 30<sup>th</sup> March, 2011 and 1<sup>st</sup> August, 2011 whereby he has been held to be above 18 years of age on the date of the commission of the offence on the basis of ossification test report dated 16<sup>th</sup> March, 2010 and seeks a declaration that the Petitioner is

under 18 years of age on the date of commission of offence and in the alternative to get a second ossification test conducted.

2. Learned counsel for the Petitioner contends that the plea of juvenility of the Petitioner was rejected by the impugned order without taking into consideration the report of the dentist. According to the dental report the third molar had not erupted. Learned counsel for the Petitioner states that the third molar erupts after the age of 17 years and in view of this the age of the Petitioner was less than 18 years on the date of examination. Thus, the Petitioner was a juvenile on the date of the incident. He states that the average of the three reports that the Radiological, dental and physical examination should be taken as the final opinion. The statement of the mother CW7 has not been considered who has stated that at the time of demolition of Babri Masjid, his son was 1½ month and thus in view of the evidence which is quite cogent, the Petitioner was a juvenile at the time of commission of offence. Against the order dated 30<sup>th</sup> March, 2011 the Petitioner had filed a review petition also but the same was also dismissed vide order dated 1<sup>st</sup> August, 2011.

3. It is further contended that the doctors have not stated that the Petitioner was examined in their presence nor the doctors who have appeared in the

witness box have shown the constitution of the board nor even placed the same on the trial court record and thus the same cannot be relied upon.

4. Learned APP for the State on the other hand contends that the x-ray reports are signed by the Radiologist and as per the opinion of the Radiologist the age of the Petitioner was more than 20 years and less than 22 years on the date of examination. Further the final opinion has been given with the concurrence of all the three, that is, the Radiologist, the doctor who has physically examined the Petitioner and the dentist. The witnesses have been examined and cross-examined at length and if there was something in the Modi's Medical Jurisprudence, it was for the Petitioner to put the same to the witnesses.

5. I have heard learned counsel for the parties.

6. Briefly the prosecution case is that on the intervening night of 4<sup>th</sup> & 5<sup>th</sup> November, 2009, dacoity with murder took place resulting in registration of FIR No. 156/2009 under Sections 302/307/394/397/412/34 IPC at PS Old Delhi Railway Station. In the said case the Petitioner was arrested on 20<sup>th</sup> November, 2009 and since then he is in custody. The Petitioner and one more boy R took the plea of juvenility before the learned Trial Court. Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (in short

`the Rules’), lays down the procedure to be followed for determination of age.

Rule 12 reads as under:-

“12. Procedure to be followed in determination of Age.-

(1) In every case concerning a child or a juvenile in conflict with law, the Court or the Board, or as the case may be, the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or, as the case may be, the Committee shall decide the juvenility or otherwise of the juvenile or the child or, as the case may be, the juvenile in conflict with law, *prima facie* on the basis of physical appearances or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining - (a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat; (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the

conclusive proof specified in sub-rule (3), the Court or the Board or, as the case may be, the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, *inter alia*, in terms of section 7-A, section 64 of the Act and these rules, no further inquiry shall be conducted by the Court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

7. In view of Rule 12 the learned Trial Court constituted a medical board for ascertaining the age of the Petitioner and the co-accused which opined the age of the Petitioner to be more than 20 years and less than 22 on the date of examination. After examination of the witnesses during enquiry on the plea of juvenility the learned Trial Court came to the conclusion that the other boy ‘R’ was a juvenile and referred his case to the Juvenile Justice Board, however, as regards the Petitioner it concluded that the petitioner was not a juvenile and thus was required to face trial before the learned Additional Sessions Judge. For examining the Petitioner a board was constituted under the Chairmanship of Dr. Sunil Kakkar, Sr. Consultant (Radiologist) DDU Hospital, Dr. Sudhinder, Senior Radiologist, DDU Hospital, Dr. Urvashi

Pruthi, Dentist and Dr. Dhananjay Kumar, Physician. Dr. Sudhinder, who was a Senior Resident was examined as CW1. According to the radiological opinion as regard the Petitioner on the date of examination, that is, 16<sup>th</sup> March, 2010 the x-ray of the clavicle, elbow, shoulder, radius and scrum were conducted which showed that the head of the radius had fused so age was more than 16 years, the head of humerus had fused so the age was more than 18 years, medial end of clavicle was not fused so age was less than 22 years, Iliac crest had fused so the age was more than 20 years and sacral vertebrae had not fused so the age was less than 22 years. Thus according to the radiological opinion bone age was more than 20 years but less than 22 years.

8. Further the physical examination was also conducted which revealed male husky voice and all sexual character etc. well developed. As per the dental examination there were 28 teeth, space was found behind the second molar and the third molar had not erupted. As according to the dentist the molars had not erupted, the Petitioner contends that he is less than seventeen years of age. Further Dr. Urvashi Pruthi, the dentist appeared as CW6 who was cross-examined at length on behalf of the petitioner. This question was specifically put to her in the cross-examination as what is the meaning of the words “status of third molar not yet erupted in any of the quadrants”? The witness replied that the said opinion was given after examining Dil Bahar in

whose case the third molar has not yet erupted. Usually, the third molar erupts above 17 years of age, but variations can be there from person to person. In reply to the next question posed to the doctor it was stated that the witness had gone through the medical jurisprudence of Dr. N.J. Modi and Dr. Reddy. According to the doctor, the findings were according to above stated medical jurisprudence. It may be noted that no specific suggestion has been put to this witness to discredit the opinion. Eruption of third molar would be after the age of 17 years but it is not essential that it will take at the age of 17 years and variations are possible. In view of this fact the PW6 has concurred with the opinion of the Radiologist and the board came to the conclusion that the age was above 20 years and less than 22 years and thus the Petitioner was more than 18 years on the date of the incident.

9. Sub-rule 3(b) of Rule 12 uses the words, "...may, if considered necessary,..." In other words, it is within the discretion of the court to grant or refuse the margin of error while ascertaining the age of a party and, does not enjoin the Court to necessarily give the benefit to a child or a juvenile by considering his/her age on the lower side, within the margin of one year. The facts of each case have to be examined in its own backdrop for considering grant of age relaxation.

10. It may also be noted that the opinion of the dentist that second and the third molar had not yet erupted does not show that the petitioner was of 17 years of age as there is no limitation or a fixed age when the molars would erupt. The eruption of the same is specific to every individual. The doctor has admitted that the eruption of third molar would be after the age of 17 but it is not essential that it will take place at the age of 17 years specifically. The doctor has been cross-examined by the counsel for the Petitioners and no specific suggestion has been put.

11. Thus, in view of the evidence on record, I do not find any infirmity much less any illegality in the impugned orders.

Petition is dismissed.

**(MUKTA GUPTA)**  
**JUDGE**

**NOVEMBER 08, 2011**  
**vn**