

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

+ CRL.Rev.P. No.571/2011

% Judgment reserved on: 15.03.2012
Judgment delivered on:02.07.2012

RAMYASH@ LALLU @ Ramesh Petitioner
Through: Ms.Anu Narula, Adv.

Versus

STATE Respondent
Through: Mr. Navin Sharma, APP

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide the instant petition, the petitioner has challenged the order dated 03.11.2011 passed by learned Additional Sessions Judge, who came to the conclusion that the age of the petitioner was about 18 years 8 months as on the date of commission of the offence in the present case and the application filed on behalf of the petitioner was disposed of by observing that the petitioner was not juvenile at the time of commission of the crime.

2. It is pertinent to mention here that the petitioner is facing trial vide FIR No.16/2006 registered at PS New Friends Colony for the offences punishable under sections 302/201/394/397/34/411 of the Indian Penal Code. The prosecution has examined all the witnesses.

The statement of petitioner/accused has already been recorded under section 313 of the Code of Criminal Procedure from which it emerged that the petitioner/accused is 21 years old. Therefore, the petitioner/accused moved an application for determination of his age.

3. While considering the claim of the petitioner, the copy of the application was sent to Jail Superintendent directing him to get the ossification test of the accused done for determination of his age. The report was also called from his last attended school. On 07.07.2011 the copy of the report from jail was received in which the age of the petitioner was opined by the doctor 'more than 25 years but less than 30 years as on 08.0.2011'.

4. At the request of the Id. counsel for the petitioner, the concerned doctor(CW1 Dr. Sameer Dhari, Sr. Resident) was also summoned and examined who stated that he was the member of the board for determination of age. After clinical dental examination, he submitted his report to Chairman for opinion. At the time of clinical dental examination, he found that the appellant was having 32 permanent teeth in oral cavity and 3rd molar in all the quadrants. The report of the medical examination of dental is Ex.CW1/A.

5. In cross-examination, he has stated that his clinical examination is based on eruption of 3rd molar. He could not give the maximum age of the person even after eruption of 3rd molar but he can give the lower age from the eruption of 3rd molar, i.e., not less than 17 years of age but it is in the rarest of rare cases. He has further replied the questions

as under:-

“Q: I put it you that the estimation of the age from the teeth with X Rays can be done by noting the number and position of teeth erupted?

A: I cannot clarify this in the answer yes or no but the numbers are important but position of teeth is not. Volunteered - I have done clinical dental examination only.

Q: I put it to you that even the number and position of the teeth can only give the estimation and not the meticulous certainty?

A: It is correct.

Q: I put it to you that even this estimation is closest between the age of 17 to 20 years?

A: It is correct.

Q: I put it to you that beyond the age of 17 to 20 years the guess work keeps becoming more and more remote/rough?

A: Only the Radiologist can answer this and I cannot.

Q: Is it correct that your report does not mention about any decay, malposition, overlapping, malrotation, filling gaps? (The witness is shown the report)?

A: My report is based on tooth eruption only, so I did not mention the above noted features in my report.”

6. He has further stated in cross-examination that these features are highly relevant in identification and assessment of age. The permanent teeth began to appear at the age of 7 years but it continue to come till

the age of 21 years not till the age of 27 years.

7. Further questions were put to the said witness and recorded as under:-

“Q. Is it correct that there can be instances when the third molar teeth can be erupted at the of 14,15 and 16 years also?

A: It is rare and infrequent.

Q: Is it correct that the first molar erupts at the age of 6/7 years; second molar erupts at the age of 12 to 14 years and third molar erupts at the age of 17 to 25 years?

A: It is correct that the first molar erupts at the age of 6/7 years generally; second molar erupts at the age of 12 to 14 years generally but the third molar erupts at the age of 17 to 21 years but not 25 years generally.

Q: I put it to you that as per Modi Medical Jurisprudence and toxicology the third molar can also erupt between 12 to 25 years?

A: It is very rare exception. Volunteered – and the chart given by Modi shows 17 to 25 years.

Q: I put it to you that your opinion that the subject is between 25 to 30 years is exclusively based on your dental examination or you have been influenced by the other examination also?

A: I have already stated in my report that the subject is not less than 17. However, upper age limit can not be given by any dentist.

Q: I am confronting you with the dental examination of one Nate Kumar Sonkar, S/o Lal Chand and put it

you that as per its examination and features it is identical with the report of subject Ramyash, the photocopy of the report is mark DX-A(objected to by the Id. APP being irrelevant and can not be confronted)?

A: I cannot comment on this report but in both the reports the accused not less than 17 years by dental clinical examination.

Q: Please clarify whether on the day of examination the subject is more than 17 or more than 25?

A: According to clinical Dental examination he is more than 17 years.”

8. CW2 Dr. Vikas Yadav, Radiologist, Deen Dayal Upadhyay Hospital has deposed that on 24.05.2011, he examined the X-ray plate, i.e., wrist joint, pelvic, medial clavical, sacrum and thereafter he came to the conclusion that the age of the petitioner is more than 25 years and less than 30 years. Though, in cross-examination he has stated that he did not recollect the exact number of the X-rays done in this case for determination of bone age. Volunteered –but in this case the five parts of the body X-rays were done, i.e., shoulder, wrist joint, pelvic, medial end of clavical and sacrum. Again said he also got the elbow joints X-ray. He has further answered the question as under:-

“Q. For the assessment and evaluation of the age of the subject, details and description like – ‘distal end of radius; lateral epicondyle, bilateral iliac crest; ischial tuberosity fusion, etc. with respective appearances like one year; 10 to 11 years; 14 to 16 years etc. along with the respective fusion year results like 16-17 years; 14-18 years etc. etc. should be mentioned for the determination of the best possible result and report?

Ans. We don't mention the years though the rest of the details are required to be mentioned in our report.

Q; Can you furnish any good reason for not mentioning any results of the shoulder X-rays and elbow x-rays?

Ans. They were not required."

9. This witness has further stated in his cross-examination that from the age of 18 to 20 years the extent of fusion of pelvic joints (iliac crest, ischial tuberosity) are completely fused; in wrist joints (the distal end of radius and distal end of ulna) are completely fused; shoulder (head) are completely fused; elbow (olecranon process of ulna and head of radius) are completely fused; sacrum gets completely fused in 25 years. For every bone there is a different age of complete fusion. It is correct that the complete fusion for every bone is different. The fusion of the various bone starts as under:- shoulder at 14 years, pelvic 15 to 16 years, elbow 13 to 15 years, wrist 15 to 16 years and sacrum around 22 years.

10. PW 3 Dr. Sunil Kakkar, MD, Radio-diagnosis, HOD, Radiologist, DDU Hospital, Govt. of NCT of Delhi has deposed that on 24.05.2011, the petitioner was examined for bone age at the DDU Hospital. He was the Chairman of the board and the report was prepared in consultation to each other. They reached at the final opinion regarding age determination of the petitioner as more than 25 years and less than 30 years.

11. In cross-examination he has stated that he has not examined the petitioner personally but he examined his x-ray plate of his different parts of the body, i.e., shoulders and elbow.

12. He further stated that it is not his field, so he did not examine the patient for sexual secondary character. However, he said with authority that the range of examination and results both dental and radiological are certain/definite in nature. However, again said, he cannot say about dental because same is not his field. It is correct that with the advancement in age the range of certainty increases thereby to say the assessment of the exact age becomes more difficult. He replied to certain questions as under:-

“Q. I put it to you that even in very young age the assessment of exact age is not the forte of any expert, be it a Radiological or a dental expert?

Ans. It is correct about the exact age but not the bone age.

Q. For the assessment and evaluation of the age of the subject, details and description like – “distal end of radius; lateral epicondyle, bilateral iliac crest; ischial tuberosity fusion, etc. with respective appearances like one year; 10 to 11 years; 14 to 16 years etc. along with the respective fusion year results like 16-17 years; 14-18 years etc. etc. should be mentioned for the determination of the best possible result and report?

Ans. All these should be ascertained but it is not essential to write or mention in the report.”

13. He has further submitted in cross-examination that he had

personally ascertained all the features in the present case. He denied the suggestion that the shoulder and the elbow X-ray in this case were not got done although they were recommended to be done. In the report Ex.CW1/A the number of X-ray films as 6 in number have been mentioned. Volunteered –it includes shoulder and elbow which is done in all the cases for bone age determination.

14. He admitted the suggestion of ld. defence counsel that for the purpose of bone age assessment the reports of shoulder and elbow x-rays are relevant. Volunteered – these were done and examined in this case. He sent complete report with x-ray plates to the Jail Superintendent.

15. During the course of arguments before the ld. trial Judge, the ld. defence counsel has drawn the attention of the court to the ossification test report of the petitioner Ex.CW1/A and one more ossification test report of Nate Kumar Sonkar in another case and stated that in both the reports dental examination report is same but the opinion regarding age determination is different. She argued that CW1 has stated that the age to be 17 years on the basis of dental examination and the same age should be considered for deciding as to whether the accused is juvenile or not.

16. Ld. Defence counsel had relied upon the judgment titled as **Ajeem (Mohd.) vs. State of NT of Delhi**, 2010 VII AD(Delhi) 161 and **Vikas Chaudhary vs. State**, 143 (2007)) DLT 6031 and stated that one year margin has to be given and lower age of the accused

should be considered for determination of his age on the basis of ossification test.

17. Ms. Anu Narula, Id. Counsel for the petitioner, submitted that Dr. Sameer Dhari, Sr. Resident from the Department of Dental Surgery has answered to the question as under:-

“Q. I put it to you that beyond the age of 17 to 20 years the guess work keeps becoming more and more remote/rough?

A: Only the Radiologist can answer this and I cannot.”

18. She further submitted that cross-examination of CW2 Dr. Vikas Yadav, Radiologist and CW3 Dr. Sunil Kakkar, HOD Radiology, revealed that they could not comment on the report of Nate Kumar Sonkar but in both the reports the accused are not less than 17 years by dental clinical examination. She has relied on the book written by ‘Moitra and Kaushal’ on Age Determination which is at page 373 as under:-

“2.Means of determining age. – The principal means which enable an expert to form a fairly accurate opinion about the age of a individual, especially in early years are teeth, height and weight, classification of bones and minor sings.

(i) *Teeth*: The estimation of age from the teeth with X-rays with some amount of certainty by noting the number and position of teeth erupted is only possible upto 17 to 20 years of age, beyond that it is merely guess work. A careful detailed record of the teeth and the presence of any peculiarities, like decay, malposition, overlapping or malrotation, filling, gaps

or dentures will often help in identification.”

(ii).....

(iii) *Ossification Test.* – An X-ray ossification test may provide a surer basis for determining the age of an individual with the opinion of a medical expert, but it can by no means be so infallible and accurate a test as to indicate the correct number of years and days he has lived. Hence the opinion of a medical expert based on such test cannot be regarded to be conclusive, particularly when the difference in the approximate age stated by him and the penal provisions is not wide.

It must be remembered that too much reliance should not be placed on the table given at page 30 of showing the age in years of the appearance and fusion of some epiphysis as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of development and that owing to the variation in climatic, dietetic, hereditary and other factors affecting the people of different provinces of India it cannot be reasonably expected to formulate a uniform standard for the determination of the age of union of epiphyses for the whole of India.”

19. Ld. Counsel has also relied upon the book written by Loins on ‘**Age Estimation in the Living**’ as under:

“Assessment of age in India by forensic imaging: A few factors must be borne in mind before seeking to assess the age of a person in India. These include the following:-

- Demographic details including the state of origin, sex and racial background of a person. The differences

noted in the above mentioned studies justifies such an approach.

- Any assessment should be conditional to the place of actual origin not just the place of residence of a person and due consideration must be given to environmental and socio-economic factors which might have an effect on the growth and development of children.
- Any assessment made can at best be only approximate. Objectivity and truthfulness must be scrupulously followed in proceeding with a case. Based on experience, every centre should evolve its own protocol for age estimation. Due circumspection must be exercised before committing an opinion on the age of a person, without considering the findings of clinical and odontological examination.”

20. Ld. Counsel has referred to the statement of CW1 Dr. Sameer Dhari, wherein he replied to the questions put by Id. Counsel for the petitioner as under:-

“Q: I put it to you that even this estimation is closest between the age of 17 to 20 years?

A: It is correct.”

Q: I put it to you that in your opinion that the subject is between 25 to 30 years is exclusively based on your dental examination or you have been influence by the other examination also?

A: I have already stated in my report that the subject is not less than 17. However, upper age limit can not be given by any dentist.

Q: Please clarify whether on the day of examination the subject is more than 17 or more than 25?

A: According to clinical Dental examination he is more than 17 years.”

21. Ld. Counsel has also referred to the question put by Dr. Vikas Yadav, Radiologist, as under:-

“Q: For the assessment and evaluation of the age of the subject, details and description like – “distal end of radius; lateral epicondyle, bilateral iliac creast; ischial tuberosity fusion, etc. with respective appearances like one year; 10 to 11 years; 14 to 16 years etc. alongwith the respective fusion year results like 16-17 years; 14-18 years etc. etc. should be mentioned for the determination of the best possible result and report?

Ans: We don't to mention the years though the rest of the details are required to be mentioned in our report.

.....

For every bone there is a different age of complete fusion. It is further correct that the complete fusion for every bone is different. The fusion of the various bone starts as under: shoulder at 14 years, pelvic 15 to 16 years, elbow 13 to 15 years, wrist 15 to 16 years and sacrum around 22 years.”

22. He has also referred to the question put in cross-examination to Dr. Sunil Kakkar, MD, Radio-diagnosis, HOD, Radiologist, DDU Hospital:

“It is correct that with the advancement in age the range of certainty increases thereby to say the assessment of the exact age becomes more difficult.”

“Q. For the assessment and evaluation of the age of the subject, details and description like – “distal end of radius; lateral epicondyle, bilateral iliac creast; ischial tuberosity fusion, etc. with respective appearances like one year; 10 to 11 years; 14 to 16 years etc. along with the respective fusion year results like 16-17 years; 14-18 years etc. etc. should be mentioned for the determination of the best possible result and report?

Ans. All these should be ascertained but it is not essential to write or mention in the report.”

23. Ms. Anu Narula, Id. Counsel for the petitioner, submitted that the trial judge erred in not appreciating that as per the settled law the age of the subject has to be calculated from the lower margin and has grossly erred in ignoring the candid, categorical and critic testimony of the CW1 Dr. Sameer Dhari, Dental Surgeon, who admitted in his cross-examination that as on date of examination, i.e., 24.05.2011, the petitioner was more than 17 years, but his upper age could not be given.

24. She further submitted that in the medical report is stated that as on 24.05.2011 he as more than 25 years but less than 30 years. Whereas in his cross-examination he admitted that the petitioner was more than 17 years on the date of examination.

25. She argued that the learned trial Court has erred in not

appreciating that the radiological and ossification tests can never give an accurate result, therefore, the extent of margin of 2 years plus and minus is given.

26. Ld. Counsel for the petitioner has relied upon the decision of the Supreme Court in the case of 2002(1) JCC 268 wherein it was held that a hyper technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile. If two views are possible, the Court should lean in favour of holding that accused to be juvenile in border line case.

27. While referring to the Book written by ‘Moitra and Kaushal’ , she submitted that the estimation of age from the teeth with X-rays with some amount of certainty by noting the number and position of teeth erupted is only possible upto 17 to 20 years of age, beyond that it is merely guess work. On ossification test, she has argued that an X-ray ossification test may provide a surer basis for determining the age of an individual with the opinion of a medical expert, but it can by no means be so infallible and accurate a test as to indicate the correct number of years and days he has lived. Hence the opinion of a medical expert based on such test cannot be regarded to be conclusive, particularly when the difference in the approximate age stated by him and the penal provisions is not wide.

28. She further submitted that it must be remembered that too much reliance should not be placed on the table given at page 30 of showing

the age in years of the appearance and fusion of some epiphysis as it merely indicates an average and is likely to vary in individual cases even in the same province owing to the eccentricities of development and that owing to the variation in climatic, dietetic, hereditary and other factors affecting the people of different provinces of India it cannot be reasonably expected to formulate a uniform standard for the determination of the age of union of epiphyses for the whole of India.

29. On the other hand, Id. APP for the State has submitted that the Medical Board has opined the age of petitioner between 25 years and less than 30 years. The learned trial judge, after considering the submission made by the counsel for the petitioner, has observed that Rule 22(5) of the Juvenile Act prescribes the following documents to be taken into consideration for the purpose of determination of age:

“(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.”

30. He has further submitted that in the present case there was no proof (certificate issued by school), M.C.D. and Panchayat etc. showing the age of the petitioner. Upon filing of an application, directions were issued to the Jail Superintendent to get the ossification test of the petitioner done for determination of his age and SHO concerned was also directed to depute any police officer with the direction to go to village Khirya, Post Office Majgawa, PS Wazirganj, District Gonda UP in the last attending school, i.e., Government Prathmik Vidyalaya and get the record of the petitioner. The photocopy of the report received from SHO duly signed and stamped by Headmaster of the aforesaid school, which reveals that the name of the petitioner was not found mentioned in the Register. The ossification test report was also received by the trial Court in which the Medical Board has opined the age of the petitioner more than 25 years and less than 30 years. The doctors of the medical board were called for cross-

examination by the defence counsel. They appeared before the Court and were cross-examined in length. However, the counsel for the petitioner could not get any material in his favour.

31. Ld. APP referred to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 which contemplated the procedure to be followed in determination of age and its relevant sub-clause (iii) (b) which reads as under:-

“(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.”

32. It is submitted that the learned trial court after considering the evidence on record as well as the provisions of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 came to the conclusion that after considering the age on the lower side, i.e., 25 years and after giving the benefit of one year the age of the accused as on 24.05.2011(the date of examination) comes to 24 years.

33. He also referred to the method of age assessment by forensic odontology from the book written by ‘Loins’ on Age Estimation in the Living which provides as under:

“The average boy or girl on reaching the age of puberty is already in possession of all the permanent teeth except the wisdom teeth. As far as the permanent twenty-eight teeth are concerned, there are few exceptions. The time of eruption of the wisdom teeth is much more uncertain though various authorities state that their eruption occurs between the ages of eighteen and twenty-five. Wisdom teeth have been found present in boys of about fifteen years of age and absent in men of sixty and seventy. Therefore, the mere fact that wisdom teeth have not erupted is not of great importance except in relation to other evidence.”

34. To sum up his arguments, Id. APP has submitted that from all angles the age of the petitioner was more than 18 years as on the date of commission of the crime in the present case. Therefore, the instant petition deserves to be dismissed.

35. I have heard the learned counsels for the parties. Vide the instant petition, the petitioner is seeking revision of the order dated 03.11.2011 passed by the learned trial judge. I am conscious, the powers in revision are limited.

36. On an application being moved by the petitioner, the learned trial judge directed the Superintendent Jail to get the ossification test done on the petitioner. Accordingly, a report was submitted wherein the age of the petitioner was affirmed to be between 25 to 30 years. At the request of Id. Counsel for the petitioner, the learned trial judge summoned all the doctors of the medical board who opined the age of

the petitioner. They were cross-examined by the counsel for the petitioner in length. The learned trial judge considered each and every fact and held that the petitioner was having the age more than 18 years as on the date of commission of the crime.

37. The Courts are not super doctors and the petitioner could not point out any lapse in the procedure adopted by the doctors while determining the age of the petitioner. No infirmity in the order passed by the learned trial judge has been established. Therefore, I am of the considered view that there is no discrepancy in the order passed by the learned trial judge.

38. I find no merit in this petition. Accordingly, the same is dismissed.

39. No order as to costs.

SURESH KAIT, J

JULY 02, 2012

RS