

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRR No.2905 of 2015 (O&M).
Decided on:-October 13, 2015.

Ashu.

.....Petitioner.

Versus

State of Punjab.

.....Respondent.

CORAM: HON'BLE MR. JUSTICE HARI PAL VERMA.

1. Whether reporters of local newspapers may be allowed to see judgment? Yes
2. To be referred to reporters or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

Argued by:- Mr. Gaurav Chopra, Advocate
for the petitioner.

Mr. Sultan Singh Gill, DAG, Punjab.

HARI PAL VERMA, J.

Petitioner Ashu son of Mithan Lal, resident of Radha Swami Colony, Gali No.5, Fazilka, Tehsil and District Fazilka has filed the present revision petition under Section 401 Cr.PC challenging order dated 22.7.2015 passed by learned Additional Sessions Judge, Fazilka whereby the appeal filed by the petitioner against the judgment dated 18.1.2014 passed by learned Judicial Magistrate 1st Class, Fazilka, was dismissed.

The petitioner claims that he is juvenile in FIR No.53 dated

13.5.2011 under Sections 376, 452 and 506 IPC registered at Police Station City Fazilka. In support of his plea, the petitioner has placed reliance upon the document Ex.AW1/A, a certificate of 5th standard dated 31.3.2004, which has been annexed as Annexure P-1 with the present petition, to contend that his date of birth is 14.6.1994. The petitioner has also relied upon Annexure P-2, which is a certificate of Middle Standard Examination issued by the Punjab School Education Board regarding the examination held in March, 2007. The said certificate was issued on 25.5.2007 wherein also date of birth of the petitioner is mentioned as 14.6.1994.

Learned Magistrate has disbelieved the aforesaid two documents i.e. Annexures P-1 and P-2 with the observations that nothing has been brought in evidence by the petitioner that from where the entry of date of birth was verified and recorded in these documents. Therefore, the same is not reliable. The claim put forward by the petitioner for juvenile was declined by learned Magistrate on the ground that the petitioner has failed to produce any other certificate or documentary evidence in support of his date of birth as 14.6.1994. The certificate Annexure P-1 produced by the petitioner is not proved on record whereas the prosecution has brought satisfactory evidence to show that at the time of occurrence, the petitioner-accused was major and more than 18 years of age.

Under the Juvenile Justice (Care & Protection of Children) Rules, 2007 (hereinafter mentioned as 2007 Rules), the claim of a person as

juvenile is required to be governed by Rule 12, which 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 appearance 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 7A, 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.”

Learned counsel for the petitioner has contended that document Annexure P-1 i.e. the Certificate of 5th Standard Examination issued by the Education Department, Punjab on 31.3.2004 reflects date of birth of the petitioner as 14.6.1994. He has further contended that though the petitioner has failed in Middle Standard Examination held in March, 2007, but the Certificate issued by the Punjab School Education Board on 25.5.2007 in this regard also shows date of birth of the petitioner as 14.6.1994.

Learned counsel for the petitioner has argued that the Courts below have committed error while placing reliance on the application form submitted by the petitioner with the Punjab School Education Board (Open School), SAS Nagar, Mohali as well as record regarding declaration of result on the file, wherein the date of birth of the petitioner is mentioned as 14.1.1989. He argued that the alleged incident had occurred on 4.5.2011 and the FIR was registered on 13.5.2011 and on that day, the petitioner was less than 18 years of age, entitling him to face trial as 'juvenile'. He submitted that earlier the petitioner had approached this Court by way of CRM-M-18019 of 2011 for the grant of anticipatory bail under Section 438 Cr.PC. This Court while disposing of the said petition on 3.6.2011 had given liberty to the petitioner to surrender before the Juvenile Justice Board on 10.6.2011 with

the liberty to move an appropriate application to establish his claim as juvenile and the Board was required to pass necessary orders in accordance with law. He submitted that the petitioner has appeared before the Juvenile Justice Board and instituted an application seeking declaration that the petitioner is juvenile on the strength of certificate dated 31.3.2004 issued by the Education Department, Punjab for the 5th Standard Examination, 2004 as well as Annexure P-2 i.e. the result card issued by the Punjab School Education Board for Middle Standard Examination held in March, 2007 for which certificate was issued on 25.5.2007. Both these documents reflect the date of birth of the petitioner as 14.6.1994. The learned Magistrate vide order dated 18.1.2014 has erroneously ignored the certificate issued by the Punjab School Education Board and rather, relied upon gazette of result for the matriculation examination issued by the Punjab School Education Board (Open School), SAS Nagar, Mohali. He further submitted that the date of birth as mentioned in the Open School Certificate was on the basis of entry made by the petitioner and, therefore, even if it is mentioned as 14.1.1989, the same is contrary to Rule 12(3) of 2007 Rules.

Learned counsel for the petitioner has placed reliance upon ***Ashwani Kumar Saxena Versus State of M.P. 2012(4) RCR (Criminal) 391 (Supreme Court)*** to contend that for determination of question whether accused was juvenile or not, the Court is to make an enquiry as per the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter

mentioned as the Act) and rules framed thereunder and not the investigation or criminal trial under the Criminal Procedure Code to assess the age of the accused. He has further submitted that in **Ashwani Kumar Saxena's case (supra)**, the inquiry means every enquiry other than a trial, conducted under the Criminal Procedure Code by a Magistrate or Court. He has referred to para Nos.27 and 28 of the judgment which read as under:

“27. Section 7A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the J.J. Act. Criminal Courts, JJ Board, Committees etc., we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. Statute requires the Court or the Board only to make an ‘inquiry’ and in what manner that inquiry has to be conducted is provided in JJ Rules. Few of the expressions used in Section 7A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7A has used the expression “court shall make an inquiry”, “take such evidence as may be necessary” and “but not an affidavit”. The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates etc. as evidence need not be oral evidence.

28. Rule 12 which has to be read along with Section 7A has also used certain expressions which are also be borne in mind. Rule 12(2) uses the expression “prima facie” and “on the basis of physical appearance” or “documents, if available”. Rule

12(3) uses the expression “by seeking evidence by obtaining”. These expressions in our view re-emphasize the fact that what is contemplated in Section 7A and Rule 12 is only an inquiry. Further, the age determination inquiry has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The word ‘inquiry’ has not been defined under the J.J. Act, but Section 2(y) of the J.J. Act says that all words and expressions used and not defined in the J.J. Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

In Section 2(g) of the Criminal Procedure Code, the term inquiry has been defined wherein inquiry means every inquiry other than a trial conducted under this Code by a Magistrate or Court. Thus, the word 'inquiry' is not defined under the Code of Criminal Procedure which is an act of asking for information and also consideration of some evidence, may be documentary.

As per Section 2 of the Criminal Procedure Code, the words, 'inquiry', 'investigation' and 'trial' are defined as under:

“Inquiry” means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.

The word “enquiry” is not defined under the Code of Criminal Procedure which is an act of asking for information and also consideration of some evidence, may be documentary.

“Investigation” as defined in section 2(h), Cr.P.C. reads as follows:

“Investigation includes all the proceedings under this code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

The expressions “trial” has not been defined in the Code of Criminal Procedure but must be understood in the light of the expressions “inquiry” or “investigation” as contained in sections 2(g) and 2(h) of the Code of Criminal Procedure.”

Learned counsel for the petitioner has also placed reliance upon ***Basant Sharma Versus State of Bihar 2015(2) RCR (Criminal) 902 (Supreme Court)*** whereby the accused was convicted for commission of offence under Section 376 IPC and was sentenced. The accused had approached the Hon'ble Supreme Court and while considering the plea of the accused regarding juvenility for the first time, the Hon'ble Supreme Court on the basis of School Education Board held that the accused was juvenile on the date of occurrence and remanded the matter to the Juvenile Justice Board for consideration of the punishment that the accused/appellant will have to suffer under provisions of the Act. In that case, an objection was raised by the State on the admission card issued by the Board and the State has submitted that admit card is not one of the documents mentioned in the Bihar Juvenile Justice (Care and Protection of Children) Rules, 2003 for the

purpose of determining the question as to whether the accused/appellant is juvenile. In that case, the Apex Court has observed as under:

“7. We have considered the matter including the objections raised on behalf of the State and it is our considered view that the admit card having been duly verified and authenticated by the Board itself the same can be acted upon as a safe and reasonable basis for arriving at the conclusion that the date of birth of the accused appellant is 20th November, 1981 and that he was a juvenile on the date of the occurrence i.e. 6th March, 1999.

8. In view of our above conclusion on the sole issue raised in the case and following the ratio laid down in **Jitendra Singh alias Babboo Singh and another versus State of Uttar Pradesh [(2013) 11 SCC 193]**, the conviction of accused appellant under Section 376 of the Indian Penal Code, 1860 is upheld. In this regard we would like to make it clear that while holding the accused-appellant to be guilty of the offence in question we have considered the evidence of the prosecutrix as well as the medical evidence on record, despite the sole contention raised before us being in respect of the age of the accused.

9. The matter will now have to be remanded to the Juvenile Justice Board for consideration of the punishment that the accused appellant will have to suffer under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000. The Juvenile Justice Board will take an appropriate decision in the matter within a period of two months from the date of receipt of a copy of this order. Until the Board decides the

matter as directed in terms of the present order, the accused appellant shall remain in custody.”

Learned counsel for the petitioner has further placed reliance upon ***Babloo Pasi Versus State of Jharkhand and another 2008(4) RCR (Criminal) 756 (Supreme Court)*** to contend that in a trial of an accused in a criminal offence, plea of the accused that he was juvenile was not accepted by the Juvenile Justice Board and the Court found that the accused was not juvenile, the Apex Court has held that when no authentic evidence is available with regard to age and if two opinions are possible on the basis of material on record, the Court should lean in favour of accused in borderline cases. The Apex Court has further held that while determining the age of the juvenile, if the birth certificate is not available, the medical evidence is an opinion and not conclusive proof of age. In that case, the Apex Court has held as under:

“12. We may now take up the pivotal point, viz., whether or not the Board had applied the correct parameters for determining the age of the accused, who is claiming to be a juvenile on the date of occurrence. Determination of age of a delinquent, particularly in borderline cases, is rather a complex exercise. The Act as such does not lay down any fixed norms, which could be applied for determining the age of a person. Sub- Section (1) of the Act provides for presumption and determination of age and reads thus:

“49. Presumption and determination of age.-(1) Where it appears to a competent authority that person brought

before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

(2) xxx xxx xxx"

13. *From a bare reading of the provision, it is clear that it merely provides that when it appears to the competent authority viz., the Board, that the person brought before it is a juvenile, The Board is obliged to make an enquiry as to the age of that person; for that purpose it shall take evidence as may be necessary and then record a finding whether the person in question is a juvenile or not. Explaining the scope and purpose of Section 32 of the Juvenile Justice Act, 1986 which is almost pari materia with Section 49 of the Act in **Bhola Bhagat Vs. State of Bihar 1998(1) RCR (Criminal) 21**, this Court had observed as under:-*

“.....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 to an accused. The court must hold an enquiry and return a finding regarding the age, one way or the other."

x x x x

22. *Insofar as the Board is concerned, it is evident that it has mechanically accepted the entry in Voters List as conclusive without appreciating its probative value in terms of the provisions of Section 35 of the Indian Evidence Act, 1872. Section 35 of the said Act lays down that an entry in any public or other official book, register, record, stating a fact in issue or relevant fact made by a public servant in the discharge of his official duty especially enjoined by the law of the country is itself a relevant fact. It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not*

*much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. (See: **Birad Mal Singhvi Vs. Anand Purohit, 1988 (Supp) SCC 604**)*

23. *Therefore, on facts at hand, in the absence of evidence to show on what material the entry in the Voters List in the name of the accused was made, a mere production of a copy of the Voters List, though a public document, in terms of Section 35, was not sufficient to prove the age of the accused. Similarly, though a reference to the report of the Medical Board, showing the age of the accused as 17-18 years, has been made but there is no indication in the order whether the Board had summoned any of the members of the Medical Board and recorded their statement. It also appears that the physical appearance of the accused, has weighed with the Board in coming to the afore-noted conclusion, which again may not be a decisive factor to determine the age of a delinquent. Insofar as the High Court is concerned, there is no indication in its order as to in what manner Rule 22(5)(iv) has been ignored by the Board. The learned Judge seems also to have accepted the opinion of the Medical Board in terms of the said Rule as conclusive. Therefore, the afore-stated ground on which the High Court has set aside the opinion of the Board and holding the accused to be a juvenile, cannot be sustained.”*

Learned counsel for the petitioner has also argued that for the purpose of consideration even the certificate of Middle School Education, Haryana was held to be an equivalent certificate to that of matriculation and the Middle School Certificate can be taken into consideration while deciding

the issue of juvenility. In this regard, he has placed reliance upon ***Sushil Kumar Versus State of Haryana 2013(2) RCR (Criminal) 932 (P&H)***. In that case, this Court has held as under:

“4. The only contention raised by learned Counsel for the petitioner is that the petitioner is a juvenile; his date of birth is 21.12.1992 as described in Annexure P-1, the certificate of Middle Stand Examination issued by the Board of School education, Haryana. In view of this, learned Counsel for the petitioner contended that as per Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (in short the Rules), the certificate issued by the school or specifically when it is issued by a Education Board with regard to matriculation examination is admissible as per Rule 12(3)(a)(i). Rule 12(3)(a)(i) stipulates that the matriculation or equivalent certificate, 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, shall be taken into consideration in every case concerning a child or juvenile in conflict with law, the age inquiry shall be conducted by the court or the Board or the committee by seeking evidence and obtaining the same. In the case of a juvenile, the Principal Magistrate is required to make an inquiry and submit report regarding that. In this case, however, no inquiry was conducted by the Juvenile Justice Board, rather the Chief Judicial Magistrate declined the application by appreciating the evidence on its own record.

5. *Keeping in view the fact that the petitioner has been issued middle standard certificate by the Education Board wherein his date of birth is recorded as 21.12.1992, at that time the petitioner was studying in DAV Senior Secondary School, Sewah (Panipat), this certificate can be taken into consideration in view of Rule 12(3)(a)(i) and (ii). Learned Counsel for the State failed to rebut the same.”*

On the other hand, learned counsel for the State has submitted that it is the petitioner who while submitting application for Punjab Open School Matriculation Course Annual Exam, 2008 has submitted his date of birth as 14.1.1989. The said application was submitted on 29.8.2007. Similarly, the father of the petitioner, namely, Mithan Lal has furnished an affidavit wherein date of birth of the petitioner is shown as 14.1.1989. He submitted that even in the voter card, the age of the petitioner does not entitle him to claim juvenility. He further submitted that the form submitted by the petitioner before Punjab Open School Matriculation Course Annual Exam, 2008 and the affidavit furnished by the father of the petitioner are sufficient to establish that the date of birth of the petitioner is 14.1.1989 and, therefore, he was major on the relevant date i.e. the date of alleged offence committed by him.

I have heard learned counsel for the parties.

To appreciate the rival contentions of learned counsel for the parties, it would be appropriate to refer to the relevant statutory provision,

namely, Section 7A of the Act, which is as under:

“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 recognised 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 a juvenile on the date of commission of the offence under sub- section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect.”

Adverting to the facts of the present case and in the light of Section 7A of the Act and Rule 12 of 2007 Rules, it is obligatory on the part of the trial Court to seek 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.

Admittedly, in the present case, there is no matriculation certificate with the petitioner as he has not qualified the said schooling. The next consideration comes to the equivalent certificate as held by this Court in *Sushil Kumar's case (supra)*.

This Court in *Sushil Kumar's case (supra)* has considered the middle standard certificate issued by the Education Board and has held that middle standard certificate issued by the school can be taken into consideration as equivalent certificate in view of Rule 12(3)(a) of 2007 Rules. But that certificate was considered as equivalent because the State failed to rebut the same. Since the material as produced by the petitioner is not sufficient to establish juvenility, though efforts have been made to persuade this Court to treat the petitioner as juvenile on the strength of the certificates of 5th standard and 8th standard. These certificates have been controverted by the respondent-State on the strength of application form submitted by the petitioner before Punjab Open School Matriculation Course Annual Exam, 2008 and the affidavit furnished by the father of the petitioner. Therefore, this Court is of the considered view that in order to

arrive at the juvenility, the petitioner is required to undergo the ossification test. The courts below while considering the plea of the petitioner regarding juvenility have not followed procedure as mandated under Section 7A of the Act and Rule 12 of 2007 Rules.

The certificate of 5th Standard Examination, 2004 (Annexure P-1) issued by the Education Department, Punjab does indicate the date of birth of the petitioner as 14.6.1994. Similarly, the certificate issued by the Punjab School Education Board, Middle Standard Examination, 2007 (Annexure P-2) indicates the date of birth of the petitioner as 14.6.1994. But at the same time, in the application form submitted by the petitioner for Punjab Open School Matriculation Course, Annual Examination, 2008, the petitioner has mentioned date of birth as 14.1.1989 as well as the affidavit dated 25.9.2007 submitted by the father of the petitioner does indicate the date of birth of the petitioner as 14.1.1989. In this manner, the date of birth as mentioned in all these documents have been furnished by the petitioner himself or his father and, therefore, the same are not covered under Rule 12(3) (a) (i), (ii) and (iii) of 2007 Rules.

Rule 12(3)(b) of 2007 Rules deals with such like situation i.e. in the absence of any evidence as provided under Rule 12(3) (a) (i), (ii) and (iii) of 2007 Rules, the medical opinion is required to be sought from a duly constituted Medical Board and such Medical Board will declare the age of juvenile or child.

Accordingly, the present petition is allowed and the impugned orders are set aside. The matter is remanded back to the trial Court for decision afresh on the application filed by the petitioner regarding his juvenility by getting his ossification test conducted as required under Rule 12(3)(b) of 2007 Rules.

October 13, 2015
Yag Dutt

(HARI PAL VERMA)
JUDGE