

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.REV.P.362/2012**

Date of Reserve: 07.09.2015

Date of Decision: 17.09.2015

BHARAT RATTAN SHAH Petitioner
Through: Mr.J.P. Sengh, Sr. Advocate with
 Ms.Sana Ansari and Ms.Vanessa
 Singh, Advocates.

versus

STATE & ANR Respondents
Through: Ms. Alpana Pandey, APP for State.
 Mr. Siddharth Aggarwal &
 Mr.Utkarsha Saxena, Advocate for the
 Respondent No.2.

CORAM:
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J.

1. The petitioner, who is the son of the deceased Bimla Shah who was killed by respondent No.2 and his associate, has preferred this revision petition against the order dated 4.7.2012 passed by the Additional Sessions Judge, Saket Courts, New Delhi whereby the order passed by the Juvenile Justice Board on 11.5.2012, declaring the respondent No.2 to be a juvenile was upheld. It has further been prayed on behalf of the petitioner to direct the Juvenile Justice Board to conduct re-inquiry regarding the age of respondent No.2 and allow him to participate in the aforesaid inquiry.

2. The factual matrix of the case is as follows.
3. On 31.10.2011 a PCR call was received at Jangpura regarding theft in a house at Jangpura Extension. On such information, local police reached the spot and found the main entry gate of the house open. The household articles were found scattered all over and it was deciphered that the house had recently been ransacked. In the process, the dead body of the mother of the petitioner was spotted. Smt.Bimla Shah, aged about 80 years was found to be inside the bathroom of her house with her hands and mouth tied. Blood was oozing out of her mouth. Thus a case vide FIR No.317/2011 (P.S.Hazrat Nizamuddin) dated 31.10.2011 was instituted for the offence under Section 302 of the IPC.
4. During the course of investigation, the police, on coming to know that the deceased was staying with a Nepali servant who was found missing, made a search for him as he was suspected of having committed the offence. On a tip off, on 25.12.2011, the Nepali servant (respondent No.2) was apprehended along with his associate and they confessed about their having committed the murder of Smt.Bimla Shah. Respondent No.2 was sent to judicial custody.
5. While in judicial custody, the respondent No.2 preferred an application seeking a declaration of his juvenility at the time of occurrence. Acting on such an application, the learned Additional Sessions Judge, by order dated 28.4.2012, directed the IO of the case to produce respondent No.2 before the Juvenile Justice Board-II, Delhi Gate.

6. The Juvenile Justice Board directed for conducting medical test/ossification bone test of respondent No.2 in order to find out his actual age. Pursuant to such a direction, the bone ossification test was conducted at Safdarjung Hospital and a report dated 3.5.2012 was given which opined the age of the respondent No.2 between 18 to 19 years.

7. By order dated 11.5.2012 the Juvenile Justice Board, found the respondent No.2 to be a juvenile and returned the finding that respondent No.2 was less than 18 years of age on the date of occurrence. By the same order the respondent No.2 was directed to be shifted to a place of safety.

8. It would be relevant here to state that the police submitted chargesheet under Section 173 of the Cr.P.C against the respondent No.2 for offences punishable under Sections 302/394/411 and 34 of the IPC. On the respondent No.2 being declared a juvenile, he was tried by the Juvenile Justice Board and convicted under the aforesaid sections. Respondent No.2 had pleaded guilty and, therefore, he was sentenced for the period which he had remained in custody i.e six months. By order dated 7.7.2012 the Juvenile Justice Board directed that respondent No.2 be deported to Nepal.

9. The petitioner challenged the order dated 11.5.2012 passed by the Juvenile Justice Board whereby the respondent No.2 was declared a juvenile and was directed to be shifted to the place of safety. Though Section 52 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the 'Act') provides for filing of an appeal against the order passed by the Juvenile Justice Board, the

petitioner chose to file a revision before the Sessions Judge and which revision petition was entertained as well. The learned Sessions Judge vide order dated 4.7.2012 dismissed the prayer of the petitioner.

10. The petitioner took the plea that the Juvenile Justice Board did not act in accordance with the provisions of Section 7A of the Act which mandates the Juvenile Justice Board to proceed in a specific manner while dealing with an inquiry regarding to the age of a juvenile. Without asking for any other documents namely the birth certificate or any document regarding school first attended, the Juvenile Justice Board, straightway, asked for a medical information and directed for the ossification test. The petitioner has also raised objection with respect to the ossification test report which, in the estimation of the petitioner is incomplete as it does not contain the report of teeth X-ray and further that the report is based on AP View only and not lateral view. The challenge of the petitioner was overruled and the petition was dismissed vide order dated 4.7.2012.

11. A prayer was made by the petitioner for obtaining certified copy of the order dated 7.7.2012 whereby the respondent No.2 was convicted and sentenced for the period which he had undergone in custody and also additionally made a prayer for inspecting the file of the case. Both the prayers were refused by the Juvenile Justice Board vide order dated 10.7.2012. A reference has been made to the aforesaid orders in the petition though no specific prayer has been made to set aside the said order.

12. Adverting first to the orders passed by the Juvenile Justice Board whereby request for the certified copy of the order has been

refused and inspection of the record of the case also has not been permitted, it is necessary to examine the provisions of Section 51 of Sections 52 and 53 of the Juvenile Justice (Care and Protection of Children) Act, 2000.

13. Section 52 of the Act provides that any person aggrieved by an order made by the competent authority under the Act may prefer an appeal to the Court of Sessions. Section 53 of the Act confers on the High Court the revisional jurisdiction to satisfy itself as to the legality or propriety of any order passed by the competent authority or Court of Sessions. The sections reads as under:-

52. Appeals.—

(1) Subject to the provisions of this section, any person aggrieved by an order made by a competent authority under this Act may, within thirty days from the date of such order, prefer an appeal to the Court of Session: Provided that the Court of Session may entertain the appeal after the expiry of the said period of thirty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) No appeal shall lie from—

(a) any order of acquittal made by the Board in respect of a juvenile alleged to have committed an offence; or

(b) any order made by a Committee in respect of a finding that a person is not a neglected juvenile.

(3) No second appeal shall lie from any order of the Court of Session passed in appeal under this section.

53. Revision.—The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality

or propriety of any such order and may pass such order in relation thereto as it thinks fit:

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard.”

14. From the bare reading of proviso to Section 53 it becomes obvious that in exercise of its revisional jurisdiction, the High Court cannot pass any order which is prejudicial to any person without affording him a reasonable opportunity of being heard. A reference also is required to be made to the provisions of Section 54 of the Act which prescribes the procedure to be followed while dealing with inquiries, appeals and revisions under the Act. Section 54 of the Act reads as hereunder:-

“54. Procedure in inquiries, appeals and revision proceedings.—

(1) Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trials in summons cases.

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).”

15. Sub Section (2) of Section 401 of the Cr.P.C contemplates that no order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

16. Section 7A of the Act reads 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 orders and the sentence, if any, passed by a court shall be deemed to have no effect.”

17. From a reading of Section 7A what becomes very obvious is that whenever a claim of juvenility is raised, an inquiry has to be made and such inquiry would take place by receiving evidence which would be necessary but not an affidavit so as to determine the age of such person. The receiving of evidence presupposes that the statement given in evidence would be subject to cross examination. The person who would be aggrieved if an accused is declared to be a juvenile,

would cross examine such evidence in an inquiry for determination of age. In that event also, non supply of records of the case or the certified copy of the order whereby a person is declared juvenile would make the provisions of appeal and revision otiose and meaningless.

18. Reference is also required to be made to Chapter II of the Juvenile Justice (Care and Protection of Children) Rules, 2007, more particularly to Rule 3(1) and Principles II, IV, XI, XII, XIII & XIV enumerated in Rule 3(2). The said provisions and principles are extracted herein below:-

3. Fundamental principles to be followed in administration of these rules,

(1) The State Government, the Juvenile Justice Board, the Child Welfare Committee or other competent authorities or agencies, as the case may be, while

(2) The following principles shall, inter alia, be fundamental to the application, interpretation and implementation of the Act and the rules made hereunder

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II. Principle of dignity and worth

(a) Treatment that is consistent with the Child's sense of dignity and worth is a fundamental principle of juvenile justice. This principle reflects the fundamental human right enshrined in Article I of the Universal Declaration of Human Rights that all human beings are born free and equal in dignity and rights. Respect of dignity includes not being humiliated, personal identity boundaries and space being respected, not being labeled and stigmatized, being

offered information and choices and not being blamed for their acts.

(b) The juvenile's or Child's right to dignity and worth has to be respected and protected throughout the entire process of dealing with the child from the first contact with law enforcement agencies to the implementing of all measures for dealing with the child.

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III. Principle of Right to be heard.

Every child's right to express his views freely in all matters affecting his interest shall be fully respected through every stage in the process of juvenile justice. Children's right to be heard shall include creation of developmentally appropriate tools and processes of interacting with the child, promoting Children's active involvement in decisions regarding their own lives and providing opportunities for discussion and debate.

IV. Principle of Best Interest:

(a) In all decisions taken within the context of administration of juvenile justice, the principle of best interest of the juvenile or the juvenile in conflict with law or child shall be the primary consideration.

(b) The principle of best interest of the juvenile or juvenile in conflict with law or child shall mean for instance that the traditional objectives of criminal justice, retribution and repression, must give way to rehabilitative and restorative objectives of juvenile justice.

(c) This principle seeks to ensure physical, emotional, intellectual, social and moral development of a juvenile in conflict with law or child so as to ensure the safety, well

being and permanence for each child and thus enable each child to survive and reach his or her full potential.

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XI Principle of right to privacy and confidentiality

The juvenile's or Child's right to privacy and confidentiality shall be protected by all means and through all the stages of the proceedings ad care and protection processes.

XII. Principle of last resort

Institutionalization of a child or juvenile in conflict with law shall be a step of the last resort after reasonable inquiry and that too for the minimum possible duration.

XIII. Principle of repatriation and restoration

(a) Every juvenile or child in conflict with law has the right to be re-united with his family and restored back to the same socio-economic cultural status that such juvenile or child enjoyed before coming within the purview of the Act or becoming vulnerable to any form of neglect, abuse or exploitation.

(b) Any juvenile or child, who has lost contact with his family, shall be eligible for protection under the Act and shall be repatriated and restored, at the earliest, to his family, unless such repatriation and restoration is likely to be against the best interest of the juvenile or the child.

XIV. Principle of Fresh Start.

(a) The principle of fresh start promotes new beginning for the child or juvenile in conflict with law by ensuring erasure of his part records.

(b) The State shall seek to promote measures for dealing with children alleged or recognized as having impinged the penal law, without resorting to juridical proceedings

b. It is submitted that Section 51 of the Act provides that the report of a probation officer or a social worker shall be confidential. It is further submitted that Rule 18 provides for a procedure to be followed in respect of violation of Section 21.

19. Besides the International Convention and the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 it may be noted that the Constitutional guarantee for the protection of the child is enshrined in Article 39. Article 39 reads as under:

39. Certain principles of policy to be followed by the State.

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

20. Article 39 of the Constitution of India, the International Convention and the provisions of the Act thus clearly provide that maintaining confidentiality of the proceedings in matters involving juveniles in conflict with law has an overriding public interest. However, it may be noted that while providing for utmost

confidentiality and privacy and minimizing the judicial intervention, the Conventions and the Juvenile Justice (Care and Protection of Children) Act, 2000 did not take away the right of appeal/revision permitted to an aggrieved person under the Juvenile Justice (Care and Protection of Children) Act, 2000.”

21. Apart from the above provisions, there can be no cavil on the proposition that except under exceptional circumstances the principle of affording hearing to the concerned party has to be applied in all circumstances. It is a part of rules of natural justice and it is in consonance with the basic dicta of fair play in action which demands that before any prejudicial or adverse order is passed or action is taken against a person, he must be given an opportunity to be heard.

22. This presupposes that any party which is aggrieved by any order passed by the Juvenile Justice Board, would be competent to maintain an appeal or revision as the case may be. Such remedies would become meaningless if the concerned person is not afforded and provided with certified copies of the orders passed by the competent authority or by the appellate or revisional Courts. Even if the Juvenile Justice (Care and Protection of Children) Act, 2000 is a beneficial legislation, meant only for the purposes of providing safety and taking care of the juveniles in conflict with law but a copy of the order cannot be refused to a person who seeks to challenge the declaration of juvenility of a particular person.

23. Thus the Juvenile Justice Board was in clear error in not providing the certified copy of its order on the ground that the records with respect to juveniles are required to be kept in strict confidence

and in safe place so as not to be easily accessible. The Juvenile Justice Board completely misdirected itself in saying that there was a possibility of the records being used against a juvenile and that would be in breach of the confidentiality and right to privacy of the juvenile. The prayer of the petitioner was refused on additional ground that the juvenile has already been released in the present matter.

24. Thus the aforesaid orders of the Juvenile Justice Board cannot be sustained and are set aside.

25. Now to the basic issue regarding the finding of juvenility by the Juvenile Justice Board.

26. Rule 12 of the Juvenile Justice (Care and Protection of Children) Rule, 2007 provides for the procedure to be followed in determination of the age. It reads as hereunder:-

“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 subrule(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.”

27. Sub clause (3) of the aforesaid rule clearly mandates that while conducting an inquiry about the juvenility of an accused, the board would seek evidence by obtaining the matriculation or equivalent certificates and in the absence whereof the date of birth certificate from the school first attended and in absence whereof the birth certificate given by a Corporation or a Municipal authority or a Panchayat. It is made clear by sub clause (b) that only in the absence of the aforesaid three documents, medical information would be sought from a duly constituted medical board which will declare the age of the juvenile or child. Thus it is only in the absence of the aforesaid documents that the Juvenile Board could have asked for medical information/ossification test.

28. From the records it would appear that no sooner the respondent was produced before the Juvenile Justice Board, an ossification test was directed. By order dated 11.5.2012, the Juvenile Justice Board, on analysing the medical report/ossification test returned the finding of the respondent being a juvenile. As has been stated earlier the aforesaid order was put to challenge though by invoking a wrong forum under the Act i.e. by filing a revision and not an appeal before a Sessions Judge. The reasoning given by the Sessions Judge is

absolutely incorrect. The Sessions Judge has not applied its mind to the provisions of Rule 12 quoted above and decisions of the Apex Court in that regard.

29. Even with respect to analysing the ossification test the Juvenile Board lost sight of the fact that the opinion per se is not conclusive proof of age as the ossification report is no more than an opinion. It is a matter of common knowledge that owing to variations in climatic, dietic, hereditary and other factors, the structure of the body of persons show different results. It would be rather unsafe to formulate a uniform standard for the determination of age. The radiological examination in the ossification test could be a useful guiding factor but it does not remain incontrovertible.

30. The Juvenile Justice Board has taken such report to be absolutely infallible and has assumed it to be an accurate test to indicate the exact date of birth.

31. Since it is neither feasible nor desirable to lay down any abstract formulae to determine the age of person, the legislature in its wisdom has formulated the rules which are to be followed by the competent authority in determining the age. The date of birth is required to be taken on the basis of materials on record and on appreciation of evidence adduced by the parties. The medical evidence is the last in the category of receivable material and that ought not to have been treated as the only conclusive material regarding the age of the accused.

32. In *Court on Its Own Motion vs. Department of Women and Child Development and Ors*, 2013(3) RCR (Criminal) 362, a Bench of

this Court gave directions to the competent authorities in dealing with the issue of juvenility. The Juvenile Justice Board have been directed to conduct proper age inquiry of each child brought before it as per the procedure laid down in Rule 12 of the Delhi Juvenile Justice (Care and Protection of Children), Rules 2009. One of the major guidelines given in the aforesaid judgment is that the Juvenile Justice Board shall determine the age of a person by way of recording the evidence brought forth by the juvenile and the prosecution/complainant and the parties shall be given an opportunity to examine, cross examine or re-examine witnesses of their choice. In case of medical age examination, the parties, are directed, to be given copies of such medical age examination report by the Juvenile Justice Boards. The parties, the Bench holds, shall have a right to file objection thereto, including the right to cross examine before final age determination is done.

33. From the perusal of the order dated 11.5.2012 it becomes evident that the Juvenile Justice Board did not associate the complainant/petitioner in the inquiry. The doctors who constituted the board were also not examined. These aspects have been completely overlooked by the learned Sessions Judge while upholding the order dated 11.5.2012. Even the medical report is found to be incomplete as dental X-ray is missing from such report. Dental X-ray is important as the formation and number of teeth/tooth are another important and guiding indicia to come to a near exact conclusion about the age of a person.

34. The petitioner ought to have been associated with the inquiry. A perusal of the petition preferred before the Sessions Judge, challenging

the age estimation of respondent no.2, reveals that the petitioner had categorically stated that the respondent no.2, at the time of his appointment as a full time servant, informed that he was 21 years of age and was married. He also informed that he had studied in school till class VIII in Nepal. Respondent no.2 promised to bring the school certificate from his home when he would have next visited his home country. The respondent no.2 had also disclosed about his previous employment at Gandhi Nagar, Delhi, which fact was promptly communicated by the petitioner to the police for the purposes of investigation for ascertaining the previous conduct of respondent no.2. Had the petitioner been associated with the inquiry, these facts could have been put to the witnesses.

35. May be, the materials could have been supplied by the petitioner for challenging the claim of juvenility of the respondent and it could have changed the course of investigation.

36. Thus on the basis of the aforementioned discussion, the order dated 4.7.2012 passed by the Sessions Judge upholding the correctness of the finding of the Juvenile Justice Board and the order dated 11.5.2012 passed by the Juvenile Justice Board cannot be countenanced and approved.

37. The aforesaid orders have to go necessarily. Both the orders are, therefore, set aside.

38. It is informed at the bar that during the period when respondent no.2 was in the observation home/remand home, he was made an accused in FIR No.241/2012 (P.S.Timarpur) dated 3.11.2012 for offences under Sections 147/149/186/353/332 and 34 of the IPC. The

respondent no.2 was alleged to have attacked police personnel and Sewa Kutir staff inside the juvenile home. At the time of committing the aforesaid offence, respondent no.2 had already attained majority and, therefore, he was sent to judicial custody at Central Jail, Tihar.

39. In the aforesaid case also the respondent no.2 pleaded guilty and was imposed a fine of Rs.2000 and was let off with a sentence of one year and one month, the period which he had already undergone in custody.

40. During the hearing of this petition because of the paucity of correct information with the parties, this Court was surprised at the fact that despite the respondent no.2 having served the sentence awarded to him after his being declared a juvenile, he was stated to be in jail. The above clarification came only later by way of status report filed by the State. It is further stated at the bar that after this Court expressed its concern about the respondent no.2 being in jail, he was shifted to the remand home. This is also preposterous as an adult cannot be sent to remand home which is meant for housing juveniles in conflict with law. The whole purpose of setting up a juvenile home would be frustrated and the juveniles housed there would get in company of an adult who is at cross roads with the law.

41. Considering the aforementioned facts, the State is directed to straightway remove respondent no.2 from the remand home and produce him before the Juvenile Justice Board for redetermination of his age so that the correct age could be ascertained in accordance with law.

42. The Juvenile Justice Board is directed to conduct an inquiry in

accordance with rules prescribed in that regard. Till such time the inquiry is concluded, respondent no.2 would be allowed to remain free after taking sufficient surety and an undertaking of a local person that he shall offer himself to the process of law in case required after the inquiry is over.

Crl.M.A. No.12275/2012

1. In view of the petition having been disposed of, no order is required to be passed in the instant application.
2. Dismissed as infructuous.

ASHUTOSH KUMAR, J

SEPTEMBER 17, 2015

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