

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Revision No.138 of 2017

Order reserved on: 10-2-2017

Order delivered on: 27-2-2017

Manoj Vishwkarma, S/o Raju @ Videshi Vishwkarma, aged about 18 years, R/o Imalipara, PS Sarkanda, Bilaspur, Distt. Bilaspur (C.G.), present R/o Village Mahli, Police Station Kunda, Kabirdham (C.G.)

---- Applicant

Versus

State of Chhattisgarh, through Police Station Kunda, Distt. Kabirdham (C.G.)

---- Respondent

For Applicant:	Mr. Dheerendra Pandey, Advocate.
For State/Non-applicant:	Mr. Ashish Surana, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. The State of Chhattisgarh through the Station House Officer, Police Station Kunda, charge-sheeted the applicant herein for commission of offence punishable under Sections 363, 366, 376 of the IPC; Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'the Act of 2012'). The case of the applicant is being tried by the jurisdictional special court, Kawardha constituted to try the offences under the Act of 2012.
2. The applicant herein/accused raised the issue of juvenility by filing an application to the effect that on the date of alleged

offence i.e. 25-3-2016, the applicant was juvenile as his actual date of birth is 6-8-2000 which is less than 18 years and therefore he be sent to the observation home, whereas, it is the case of the prosecution that the date of birth of the applicant/accused is 1-10-1997 as such, he was major on the date of occurrence of the offence i.e. more than 18 years and not juvenile. Learned Special Judge previously by order dated 22-7-2016 rejected the application holding that the applicant was not juvenile on the date of alleged commission of offence which was questioned by the applicant herein in Criminal Revision No.800/2016 and this Court by order dated 30-8-2016 directed the Special Judge to hold an enquiry and to decide the issue of juvenility afresh.

3. The Special Judge constituted under the Act of 2012, considered the application afresh after making enquiry and finally held that the applicant was not juvenile on the alleged date of commission of the offence.
4. Feeling aggrieved against the order of the learned Special Judge, this revision has been preferred under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015, incorrectly mentioned as "Section 397 read with Section 401 of the Code of Criminal Procedure, 1973", questioning the order by which the learned Special Judge held the applicant not to be juvenile on the date of alleged commission of offence.

5. Mr. Dheerendra Pandey, learned counsel for the applicant, would submit that the learned Special Judge has committed illegality in rejecting the application holding that the applicant was not juvenile on the date of offence. He would further submit that the Special Court has ignored the school certificate in which the applicant's date of birth is still recorded as 6-8-2000 which has duly been corroborated, as the Principal of Geetanjali Middle School, Bandhuvapara, Sarkanda, Bilaspur, has been examined on oath and she has clearly stated that the date of birth of the applicant is 6-8-2000 meaning thereby, the applicant was juvenile on the date of offence i.e. 25-3-2016 and he was less than 18 years, therefore, the finding of the Special Judge deserves to be quashed.
6. Mr. Ashish Surana, learned Panel Lawyer for the State, would support the impugned order and would submit that the Special Judge is absolutely justified in holding that the applicant was not juvenile on the date of commission of alleged offence and therefore the criminal revision deserves to be dismissed.
7. I have heard learned counsel for the parties and considered their rival submissions and also gone through the record critically and carefully.
8. On being charge-sheeted, the applicant herein raised the plea of juvenility before the trial Court by making an application which was rejected by the Special Court and pursuant to the

order of this Court in the revision filed by the applicant herein, enquiry has been made and the impugned order has been passed.

9. The question for consideration is, what is the correct procedure to be followed in making enquiry to determine the juvenility of an accused person who raises an issue of juvenility having brought before the Court for trial.

10. The Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, 'the Act of 2015') came into force with effect from 1-1-2016 and the Juvenile Justice (Care and Protection of Children) Act, 2000 was thereby repealed. Section 9 of the Act of 2015 provides for procedure to be followed by a Magistrate who has not been empowered under this Act and states as under: -

“9. Procedure to be followed by a Magistrate who has not been empowered under this Act.—

(1) When a Magistrate, not empowered to exercise the powers of the Board under this Act is of the opinion that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay, record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction.

(2) In case a person alleged to have committed an offence claims before a court other than a Board, that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence, the said court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly

as may be:

Provided that such a claim may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such a claim shall be determined in accordance with the provisions contained in this Act and the rules made thereunder even if the person has ceased to be a child on or before the date of commencement of this Act.

(3) If the court finds that a person has committed an offence and was a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.

(4) In case a person under this section is required to be kept in protective custody, while the person's claim of being a child is being inquired into, such person may be placed, in the intervening period in a place of safety.”

11.A studied perusal of sub-section (2) of Section 9 of the Act of 2015 would show that if a person alleged to have committed an offence claims before a court other than a Board, that he is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that he was a child on the date of commission of the offence, the said court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of that person. Proviso to sub-section (2) of Section 9 prescribes the procedure to be followed by that court by providing that such a claim shall be determined in accordance with the provisions contained in the Act of 2015 and the rules made thereunder even if the person has ceased to be a child on or before the date of commencement of the Act

of 2015.

12. Section 94 (2) of the Act of 2015 provides for presumption and determination of age by the Board which states as under: -

“94. Presumption and determination of age.—(1)
*** *** ***

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –

- (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
- (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
- (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) *** *** ***”

13. Section 94 of the Act of 2015 requires the Court to make enquiry regarding determination of age of the person accused and manner of holding enquiry is provided in Section 94 (2). Thus, the procedure to be followed in determination of age under the Act of 2015 has been provided under Section 94 (2) which is pari materia to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rule, 2007.

14. Thus, age determination contemplated under sub-section (2) of Section 94 of the Act of 2015 enables the court to seek evidence and in that course, the Court has to undertake the process of age determination by seeking evidence by obtaining firstly, the date of birth certificate from the school, or the matriculation or other equivalent certificate from the concerned examination Board, if available; and in absence thereof, secondly, the birth certificate given by a corporation or a municipal authority or a panchayat, and thirdly, only in the absence of documents mentioned in (i) and (ii) above, age shall be determined by an ossification test or any other latest medical determination test conducted on the orders of the Committee or the Board. Time limit for conducting age determination test has also been provided to be within fifteen days from the date of order in the above-stated provision.
15. Recently, the procedure prescribed in the Juvenile Justice (Care and Protection of Children) Rules, 2007 (enacted under the JJ Act, 2000) for determination of juvenility came to be considered by the Supreme Court in the matter of **Ashwani Kumar Saxena v. State of Madhya Pradesh**¹, wherein Their Lordships of the Supreme Court have held that a duty is cast on the courts/juvenile Boards functioning under the Act to seek evidence by obtaining the certificate mentioned in Rules 12(3) (a)(i) to (iii) of the Rules of 2007, and observed as under: -

¹ (2012) 9 SCC 750

“30. Consequently, the procedure to be followed under the JJ Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. We cannot import other procedures laid down in the Code of Criminal Procedure or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the court exercising powers under Section 7-A of the Act. In many of the cases, we have come across, it is seen that the criminal courts are still having the hangover of the procedure of trial or inquiry under the Code as if they are trying an offence under the penal laws forgetting the fact that the specific procedure has been laid down in Section 7-A read with Rule 12.

31. We also remind all courts/Juvenile Justice Boards and the Committees functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate, etc. mentioned in Rules 12 (3) (a) (i) to (iii). The courts in such situations act as a *parens patriae* because they have a kind of guardianship over minors who from their legal disability stand in need of protection.”

16. In the later part of the judgment in **Ashwani Kumar Saxena**

(supra), Their Lordships of the Supreme Court further held that Court or Board functioning under the Juvenile Justice Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, and observed as under: -

“32. “Age determination inquiry” contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the

court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

33. Once the court, following the above mentioned procedure, passes an order, that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in sub-rule (5) of Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of Rule 12. Further, Section 49 of the JJ Act also draws a presumption of the age of the juvenility on its determination.

34. Age determination inquiry contemplated under the JJ Act and the 2007 Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion, etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. But court, Juvenile Justice Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination.”

17. Similarly, the principle of law laid down in **Ashwani Kumar**

Saxena (supra) has been reiterated and followed by Their Lordships of the Supreme Court in the matter of **Kulai Ibrahim**

**alias Ibrahim v. State Rep. by the Inspector of Police B-1
Coimbatore².**

18. In the matter of **Abuzar Hossain v. State of W.B.**³, a three-Judge Bench of the Supreme Court had summarised the legal position for determining the juvenility of an accused and held as under in paragraph 39.3 of the judgment: (SCC pp. 509-10)

“39.3. As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rules 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voter's list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard-and-fast rule can be prescribed that they must be prima facie accepted or rejected. In *Akbar Sheikh*⁴ and *Pawan*⁵ these documents were not found prima facie credible while in *Jitendra Singh*⁶ the documents viz. school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the delinquent.”

19. Very recently, in the matter of **Parag Bhati (Juvenile) Through**

2 2014 AIR SCW 4022

3 (2012) 10 SCC 489

4 Akbar Sheikh v. State of W.B., (2009) 7 SCC 415

5 Pawan v. State of Uttaranchal, (2009) 15 SCC 259

6 Jitendra Singh v. State of U.P., (2010) 13 SCC 523

Legal Guardian-Mother-Rajni Bhati v. State of Uttar

Pradesh and another⁷, the question for consideration before the Supreme Court was, when the date of birth mentioned in the matriculation certificate is doubtful, the ossification test can be the last resort to prove the juvenility of the accused and the Supreme Court noticed and relied upon **Ashwani Kumar Saxena** (supra) wherein it was held that only in cases where those documents or certificates are found to be fabricated or manipulated, the Court or the Board need to go for medical report for age determination, and held as under: -

“35. The benefit of the principle of benevolent legislation attached to the JJ Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue.

36. It is settled position of law that if the matriculation or equivalent certificates are available and there is no other material to prove the correctness of date of birth, the date of birth mentioned in the matriculation certificate has to be treated as a conclusive proof of the date of birth of the accused. However, if there is any doubt or a contradictory stand is being taken by the accused which raises a doubt on the correctness of the date of birth then as laid down by this Court in *Abuzar Hossain* (supra), an enquiry for determination of the age of the accused is permissible which has been done in the present case.”

20. Extremely recently, in the matter of **Sri Ganesh v. State of Tamil Nadu and another**⁸, again the issue of juvenility came-up before the Supreme Court in which Their Lordships relying upon **Ashwani Kumar Saxena** (supra) with approval reiterated that the court determining the juvenility has first to take into consideration the documents contemplated in Rule 12 (1), (2) and (3) of the Rules of 2007 and only in absence of those documents, the court has to determine the age by taking into consideration the medical evidence only in absence of documentary evidence, and observed as under: -

“12. In the present case the trial court took into account the documentary evidence as contemplated in the statutory provisions and returned a finding that the date of birth of the appellant was 19.10.1991. During the course of its judgment the High Court could not find such conclusion to be vitiated on any ground. In the face of the relevant documentary evidence, there could be no medical examination to ascertain the age of the appellant and as such the consequential directions passed by the High Court were completely unwarranted. Further, if the allegations of the prosecution are that the offence under Section 376 IPC was committed on more than one occasion, in order to see whether the appellant was juvenile or not, it is enough to see if he was juvenile on the date when the last of such incidents had occurred. The trial court was therefore justified in going by the assertions made by the victim in her cross examination and then considering whether the appellant was juvenile on that date or not.”

21. After having noticed the statutory provisions and the principles of law laid down in this behalf to determine the question of juvenility, coming back to the facts of the present case, it would

8 AIR 2017 SC 537

appear that pursuant to the order of this Court, the learned Special Judge examined applicant's father Raju Vishwakarma and the Principal of Geetanjali Middle School, Bandhuvapara, Sarkanda, Bilaspur on behalf of the applicant and Kotwar of Village Mahli Vishali Ram on behalf of the prosecution. The applicant's father and the Principal of the school stated the age of the appellant to be 6-8-2000, whereas the Kotwar maintained that age of the appellant is 1-10-1997. Pradeep Sori, Inspector of Police, examined on behalf of the prosecution, has stated that date of birth of the applicant is 1-10-1997. The Special Judge relying upon the Kotwari register accepted the date of birth of the applicant as 1-10-1997 and did not accept the date of birth brought by the applicant as 6-8-2000.

22. The question to be considered is whether the Special Judge has determined the age of the applicant, in enquiry, in accordance with Section 94 (2) of the Act of 2015 or not.
23. It is apparent on record that either of the parties did not submit date of birth certificate from school or matriculation certificate or equivalent certificate from the concerned Board and as such there is no date of birth certificate of the applicant from any school or recognized board except the progress report of the applicant of Class-I from Geetanjali Higher Secondary School, Yadunandan Nagar, Tifra, Bilaspur in which the applicant's date of birth is recorded as 6-8-2000 and also the Primary School Certificate in which also date of birth of the applicant is

recorded as 6-8-2000. Both the parties have also not produced date of birth certificate given by the corporation or municipal authority. In absence of documents contemplated in clauses (i) and (ii) of sub-section (2) of Section 94 of the Act of 2015, age has to be determined by an ossification test or by any other latest medical age determination test. Since the documents enumerated in clauses (i) and (ii) of sub-section (2) of Section 94 of the Act of 2015 were not available and have not been produced, the only course open to the Special Court was to get the age determined by an ossification test or by any other latest medical age determination test. The Special Judge instead of getting the ossification test or other latest medical age determination test to be conducted for determination of age, preferred to accept the Kotwari register which is not a statutory document as prescribed under Section 94(2) of the Act of 2015.

24. In view of above-stated legal analysis, the impugned order dated 17-1-2017 passed by the Special Judge under the Act of 2012, Fast Track Court, Kabirdham, holding the applicant not to be juvenile on the date of commission of offence, is hereby set-aside and the matter is remitted back to the Special Judge to get the age of the applicant determined in accordance with Section 94 (2) (iii) of the Act of 2015 by determining the age by an ossification test or any other latest medical age determination test. In order to conduct the said test, the Special Judge is directed to call for the opinion of Medical

Board presided by the Chief Medical and Health Officer also to find out as to which is the other latest medical age determination test to determine the age of a person and depending upon its opinion, all such medical tests will be conducted to determine the juvenility of the applicant. Such an exercise will be done expeditiously.

25. A word of caution is necessary while parting with the record.

The trial Court while making enquiry into the juvenility of the accused is expected to keep in mind the pertinent observation made by Their Lordships of the Supreme Court in paragraph 39.5 of **Abuzar Hossain's** case (supra) that while determining the plea of juvenility the court should always be guided by the objectives of the JJ Act and be alive to the position that the beneficent and salutary provisions contained in the JJ Act are not defeated by the hyper-technical approach and the persons who are entitled to get benefits of the JJ Act get such benefits. Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at the threshold whenever raised and keeping in mind the binding observations of the Supreme Court in **Ashwani Kumar Saxena** (supra) noted herein-above.

26. The revision is allowed to the extent indicated herein-above.

Sd/-
(Sanjay K. Agrawal)
Judge