

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

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Judgment reserved on : 28th May, 2018
Judgment delivered on: 08th August, 2018

+ **CRL.REV. P.195/2018**

SHWETA GULATI & ANR.

..... Petitioners

versus

THE STATE GOVT. OF NCT OF DELHI

..... Respondent

Advocates who appeared in this case:

For the Petitioners	:	Mr Vikram Dua with Mr Vinod Kumar
For the Respondent	:	Mr Mukesh Kumar, APP. SI Sanjeet Singh, PS Rajouri Garden

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J.

1. The petitioners impugn order dated 06.09.2017 passed by the Child Welfare Committee (CWC) as well as the order of the Appellate Court dated 21.02.2018 holding the victim girl to be a minor.
2. Petitioner No.1 is the employer of the minor victim 'K' and is a co-accused along with her husband in FIR No.896/2016, Police Station Rajouri Garden under Sections 325/376 IPC and Section 6 POCSO read with Section 75 Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as '*J.J.Act, 2015*')
3. The impugned orders arise out of an issue, which arose before the CWC pertaining to payment of wages to the minor victim.

4. Since there was no document available, a Bone Ossification Test of the victim 'K' was conducted for her age determination. As per the Ossification Test Report, the age was estimated to be in range of 17 to 19 years, as on 05.12.2016.

5. By the impugned order dated 06.09.2017, the CWC determined the age of the Victim 'K' as 'Seventeen Years'. The said order was impugned by way of an Appeal before the Court of Additional Sessions Judge.

6. By the impugned order dated 21.02.2018, the learned Court of the Additional Sessions Judge has dismissed the Appeal.

7. It is these two orders, which are challenged in these proceedings.

8. In the impugned order dated 06.0.2017, the CWC has held as under:-

“.....Thence, CWC, in exercise of powers conferred by Section 94(2)(iii) and 94(3) of the JJ Act, 2005 has determined girl's age to be 17 years depending on the bone ossification test report wherein her age was estimated in the range of 17-19 years as on 05.12.2016. Thus, lower limit of the range has been fixed as girl's age taking note of her best interest...”

9. The Court of the Additional Sessions Judge (ASJ), in the impugned order dated 21.02.2018, while dismissing the Appeal, has

held as under:-

“9. Section 94(3) of the J.J.Act, 2015 provides that the age recorded by the Committee of the Board to be the age of the person so brought before it shall for the purpose of J.J.Act, 2015 be deemed to be the true age of that person.

10. It is well settled that a hyper technical approach should not be adopted while appreciating evidence adduced in respect of plea of juvenility and where two views are possible, the Court should lean in favour of holding the accused to be a juvenile in borderline cases. Same principle shall apply to the victim as well. In judgment dated 01.07.2013 in *Jarnail Singh versus State of Haryana*, Criminal Appeal No.1209 of 2010, it has been held by the Hon'ble Supreme Court of India that there is hardly any difference insofar as the issue of minority is concerned between a child conflict with law and a child who is a victim of crime.”

10. Since the Revisional Court in the impugned judgment has relied upon the judgment of the Supreme Court in *Jarnail Singh versus State of Haryana*, (2013) 7 SCC 263, it would be expedient to examine the same. In the facts of the case before the Supreme Court, the defence had sought to rely upon the ossification test results ignoring the evidence available from the school first attended.

11. The Supreme Court in *Jarnail Singh* (supra) held that even though Rule¹ 12 is strictly applicable only to determine the age of a

¹ *The Juvenile Justice (care and Protection of Children) Rules, 2007*

child in conflict with law, Rule 12 should be the basis for determining age, even of a child who is a victim of crime. For there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. The Supreme Court further explained that under Rule 12, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the

determination of age of the child concerned, on the basis of medical opinion.

12. In the facts of the present case none of the documents mentioned in Rule 12(3)(a) are available so there is no question of preferring an ossification test report over the said documents. It may be noticed that Section 94 of the *J.J.Act, 2015* is in similar terms to Rule 12 of the 2007 Rules.

13. The question that arises for consideration is as to whether, while determining the age of the victim, the benefit of doubt in age estimated by the bone ossification test is to go to the accused or the victim.

14. The settled principle is that the ossification test is not conclusive of age determination. It is settled that it is difficult to determine the exact age of the person concerned on the basis of ossification test or other tests. The Supreme Court, in several decisions, has taken judicial notice of the fact that the margin of error in age ascertained by radiological examination is two years on either side.²

15. Now the question that arises for consideration is as to whether the lower of the age or the higher of the age is to be taken. If benefit

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Ram Suresh Singh v. Prabhat Singh, (2009) 6 SCC 681
Jaya Mala v. Govt. of J&K (1982) 2 SCC 538
Jyoti Prakash Rai v. State of Bihar, (2008) 15 SCC 223

of doubt has to go to the accused then one would have to take the higher limit and if benefit of doubt has to go in favour of the prosecutrix then the lower of the two limits would have to be taken.

16. It is also settled position of law that benefit of doubt, other things being equal, at all stages goes in favour of the accused.³

17. In the present case as no document of age was available, the age has been determined by the Child Welfare Committee as 17 years based on the ossification report. The bone ossification test report has estimated the age as 17 to 19 years. So applying the margin of error principle, of two years on either side, the age could be between 15 to 21 years. In the present case even if the margin of error is not taken on the higher side, the upper limit of the age estimated by the ossification test is 19 years.

18. Giving the benefit of doubt to the accused, the age of the victim has to be taken as 19 years of age. Accordingly, the order dated 06.09.2017 passed by the Child Welfare Committee (CWC) as well as the order of the Appellate Court dated 21.02.2018 is not sustainable.

19. In view of the above, the impugned order dated 06.09.2017 passed by the Child Welfare Committee (CWC) as well as the order of the Appellate Court dated 21.02.2018 is set aside to the limited extent that it determines the age of the victim as 17 years.

³ *Triveniben v. State of Gujarat*, (1989) 1 SCC 678
Maru Ram v. Union of India, (1981) 1 SCC 107

20. In so far as the direction issued to the petitioner to pay the wages as well as childhood loss compensation to the victim is concerned, the same is not being interfered with, in the peculiar facts and circumstances of the case, because the same has been determined keeping in view the interest of the victim in mind. However, it is noticed that there is a calculation error in the order dated 06.09.2017. The wages have been calculated at Rs. 47,840/- and childhood loss compensation has been assessed at Rs. 10,000/- the total of both however, has been mentioned as 48,840/- instead of 57,840/-. Accordingly, the petitioner shall pay the said amount of Rs. 57,840/- in terms of the order dated 06.09.2017.

21. The petition is disposed of in the above terms.

22. Order *Dasti* under the signatures of Court Master.

SANJEEV SACHDEVA, J

August 08, 2018

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