

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

CRL.REV.P. 860/2019 and CRL.M.A.33853/2019

Reserved on : 02.03.2020

Date of Decision : 17.03.2020

IN THE MATTER OF:

ABHISHEK @ SONU

..... Petitioner

Through: Mr.Ramesh Gupta, Sr. Advocate with
Mr.Jitender Tyagi and Ms. Ananya Roy,
Advocates

Versus

STATE

..... Respondent

Through: Dr. M.P.Singh, APP for State

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

MANOJ KUMAR OHRI, J.

1. The present revision petition has been filed assailing the order dated 11.07.2019 passed by the Addl. Sessions Judge in FIR No.465/2013, registered under Sections 363/376 IPC & Section 4 of POCSO Act at Police Station Dabri, Delhi. Vide impugned order, the Trial Court has directed that the petitioner's ossification test be conducted by a duly constituted medical board.

2. Learned Senior Counsel for the petitioner submitted that the present FIR was registered on 23.08.2013 on the basis of the statement of the complainant with respect to an incident dated 22.08.2013. It was stated by the prosecutrix that when she left her house to buy sweets for her aunt, the petitioner, who was already known to her, met her at the

sweet shop. The petitioner forcibly took her to his flat and committed rape upon her.

3. Learned Senior Counsel for the petitioner submitted that on the date of the incident, the petitioner was a juvenile however, no investigation to this effect was carried out by the Investigating Officer.

4. During trial, the petitioner took the plea of juvenility on the basis of a birth certificate issued on 10.05.2019 by Nagar Nigam, Chhapra, Bihar and a transfer certificate dated 10.05.2019 issued by Upgraded Middle School, Hari Har Chhapra District Siwan (Bihar). In the trial court, a Status Report was filed on behalf of State verifying the attested copies of admission form, school certificate and the admission register of the school of the petitioner.

5. On 03.06.2019, the trial court issued notice to the Head Master of the school where the petitioner had studied. On 11.07.2019, Shri Param Hans Mishra, Principal & In-charge, Upgraded Middle School, Hari Har, Chhapra District Siwan (Bihar) was examined as a Court Witness No.1. He produced the admission register of the school, according to which the petitioner was admitted in Class II of their school on 12.02.2002 vide admission No.36. The relevant entry in the admission register was exhibited as Ex.CW-1/A. The witness also stated that the relevant entry was made by the erstwhile Head Mistress, Ms. Girija Sharma. He identified her signatures, having worked with her in the school. The admission register shows the petitioner's date of birth as 14.07.1996. The witness was cross-examined by the learned APP for the State wherein it was admitted that no documents including any affidavit were produced at the time of admission of the petitioner in the school and the date of birth

was recorded as told by the guardian of the petitioner. During cross-examination by the learned counsel for the petitioner, the witness stated that prior to 2010, no document or undertaking regarding date of birth of the student at the time of admission was required to be taken.

6. Learned Senior Counsel for the petitioner urged that as the alleged incident has occurred on 22.08.2013, the petitioner being born on 14.07.1996 was a juvenile on the date of the incident. It is the grievance of the petitioner that despite availability of the evidence in the form of school admission register, duly proved by the Principal of the school (CW-1), the trial court instead of declaring the petitioner a juvenile, rather directed the petitioner to undergo the Ossification test. He further contended that the direction to conduct ossification test of the petitioner was contrary to Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

7. Learned APP for the State, on the other hand, has supported the impugned order. He submitted that the petitioner did not take the plea of juvenility before the trial court at the first instance and that the trial is now at the fag end. He further submitted that the petitioner himself has mentioned a different date of birth not only in the Customer Application Form submitted at the time of obtaining a mobile telephone connection but also in his PAN Card, where he mentioned his date of birth as 14.07.1990. Lastly, it was submitted that the certificates on which the reliance is placed are recent and not of the contemporaneous time.

8. I have heard the learned Senior Counsel for the petitioner and also the learned APP for the State and have also gone through the case records.

9. The Juvenile Justice Act is a legislation with an underlying objective to give children, who have gone astray for any reason to enable them to realize their mistakes, rehabilitate them and rebuild their lives to become useful citizens of the society instead of degenerating into hardened criminals.

10. So far as the contention raised by learned APP for the State that the plea of juvenility cannot be taken at the fag end of the trial is concerned, the same is entirely misplaced. Time and again, it has been held that the plea of juvenility can be raised at any stage before any Court. The law on the subject was crystalized by Supreme Court in Hari Ram v. State of Rajasthan, reported as **(2009) 13 SCC 211** where it was held as under:

“59. The law as now crystallized on a conjoint reading of Sections 2(k), 2(I), 7-A, 20 and 49 read with Rules 12 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1-4-2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted.”

11. In Abdul Razzak v. State of UP, reported as **(2015) 15 SCC 637**, the Supreme Court while referring to its earlier decision in Hari Ram (*supra*) clarified that in terms of proviso appended to Section 7A of the Juvenile Justice Act (2000), the claim of juvenility can be raised before any Court even if the same is raised after the final disposal of the case and even if the juvenile has ceased to be so on or before the date of commencement of the Act.

12. To the similar effect are the decisions of Supreme Court in Union of India v. Ex-GNR Ajeet Singh, reported as **2013 4 SCC 186** and Division Bench of this Court in Faeem v. State reported as **(2019) 25 DLT 541** and Jitender @ Jitu v. State reported as **2011 (124) DRJ 1**.

13. The determination of age of an accused in the context of his plea of juvenility is to be considered in terms of either Rule 12 of J.J. Rules 2007 or Section 94 of the J.J. Act, 2015 depending on the date of the incident.

14. The scope of ‘Age determination inquiry’ was considered by the Supreme Court in Ashwani Kumar Saxena v. State of M. P., reported as **(2012) 9 SCC 750**, wherein after analyzing the entire conspectus of law, it was held as under :-

“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.

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 to 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 needs to 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 abovementioned 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 abovementioned procedures, 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."

15. Later, in Parag Bhati v. State of U.P., reported as **(2016) 12 SCC 744**, the Supreme Court held as under :

"33. In Abuzar Hossain, wherein a three-Judge Bench of this Court has already summarised the position regarding 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 credibility and/or acceptability of the documents 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 and 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 appellant.

34. It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled to the special protection under the JJ Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice.

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, an enquiry for determination of the age of the accused is permissible which has been done in the present case."

(emphasis added)

16. Recently, in Sanjeev Kumar Gupta v. State of Uttar Pradesh & Anr., reported as **(2019) 12 SCC 370**, the Supreme Court while setting aside the decision of the High Court and dismissing the petitioner's claim of juvenility observed that there were two different dates of birth appearing in two different school registers which were attended by the accused. The date of birth mentioned in the first school register which the accused attended up-to 4th standard was found matching with his other documents i.e., the Driving License and Aadhaar card. In these circumstances, the date of birth mentioned in the matriculation certificate was disbelieved as the same was recorded on the basis of an entry forwarded by the subsequent school attended by the accused.

17. In the present case, although the petitioner has placed on record his birth certificate, school transfer certificate and the relevant entry in the school admission register was also proved by the concerned Head Master (CW-1) but at the same time, the petitioner has used a different date of birth in the Customer Application Form and his PAN Card. According to the date of birth mentioned in above two documents, the petitioner was not a juvenile on the date of the incident.

18. As such, from the evidence, two different dates of birth of the petitioner are available on the record. The birth certificate and school transfer certificate produced on record are of the year 2019 (i.e., after the date of the incident) and the entry in the school record was not made on the basis of any supporting document. Be that as it may, the trial court is yet to take a view on the petitioner's plea of juvenility. It is therefore imperative that in the facts and circumstances of the case, the Ossification test of the accused to ascertain his age from a duly constituted medical board be conducted, at the earliest. In this view of the matter, the petition is dismissed alongwith the pending application.

19. The observations made hereinabove are only for the purpose of deciding the present petition. The trial court shall decide the plea of juvenility uninfluenced by the observations made in this judgment.

20. A copy of this judgment be communicated to the trial court.

(MANOJ KUMAR OHRI)
JUDGE

MARCH 17, 2020/dc