

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

% **Reserved on : 14.11.2019**
Pronounced on : 03.02.2020

+ **CRL.REV.P. 884/2019**

FAIZAN @ SALMAN

..... Revisionist

Through: **Mr. Sumeet Verma, Adv. with Mr.
Mahinder Pratap Singh, Adv.**

versus

STATE

..... Respondent

Through: **Mr. Amit Ahlawat, APP for the State
with Insp. Ratnesh and ASI Suresh
Kumar.**

CORAM:
HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

JUDGMENT

1. The revisionist has filed the present revision petition U/s 102 of the Juvenile Justice Act read with section 482 Cr.P.C with the following prayer :

- (a) Call record of FIR No. 68/15, PS Usmanpur, U/s 363/328/376D/342 IPC & 4/6/10 POCSO Act, from the JJB-II, Delhi Gate, Delhi to examine the correctness, legality and propriety of order/judgment dated 31.07.2015 passed by Sh. Punam Singh, Member, JJB-II, Sh. V.K. Pandey, Member, JJB-II, & Sh. Murari Prasad Singh, Principal Magistrate JJB-II, Delhi Gate, New Delhi.

(b) Call record of FIR No. 68/15, PS Usmanpur, U/s 363/328/376D/342 IPC & 4/6/10 POCSO Act, S.C. No. 44256/2015 tilted as "State Versus Faizan @ Salman" from the Court of Sh. Praveen Singh, ASJ, (North-East), Karkardooma Courts, Delhi.

(c) Set aside order dated 31.07.2015 passed by Sh. Punam Singh, Member, JJB-II, Sh. V.K. Pandey, Member, JJB-II & Sh. Murari Prasad Singh, Principal Magistrate, JJB-II, Delhi Gate, New Delhi.

(d) Stay order upon proceedings of case S.C. No. 44256/2015 (FIR No. 68/15, PS Usmanpur, U/s 363,328/376D/342 IPC & 4/6/10 POCSO Act pending before the Court of Sh. Praveen Singh, ASJ, (North-East), Karkardooma Courts, Delhi) may also be granted till the disposal of present revision.

2. In brief the facts of the case are that an FIR bearing No. 68/15 was lodged in P.S. New Usmanpur U/s 363/328/376D/342 IPC and U/s 4/6/10 POCSO Act and the date of offence was mentioned as 18.01.2015. At the time of the alleged offence the age of the revisionist was considered as 17 years and he was sent before Juvenile Justice Board-II. In the absence of birth certificate of the revisionist, the medical examination of the revisionist was conducted in Guru Teg Bahadr Hospital, Shahadara on 20.05.2015 in which Dr. Harpreet Garwal, Dental has opined that the age of the present revisionist is between 18-21 years and Dr. Gopesh Mehindra, Member Radiology opined the age of the revisionist between 20 to 21 years and they

both concurred their opinion in regard to the age of the revisionist being 20 to 21 years at the time of examination.

3. On 31.07.2015, the members of JJB-II and Principal Magistrate after recording the statements of doctors came to the conclusion that the age of the revisionist at the time of examination would be at least 20 years and passed the impugned order and sent the revisionist to Tihar Jail and transferred the trial of the FIR No. 68/15, PS New Usmanpur before the Ld. Sessions Judge, North East.

4. It is urged on behalf of the revisionist that the Ld. Members and the Principal Magistrate failed to appreciate the fact that two opinions were given by the doctors, i.e. one by Dr. Harpreet Garewal, Dental who opined the age of the revisionist between 18-21 years and another opinion by Dr. Gopesh Mehindra, Member Radiology who opined the age of the petitioner between 20-21 years and as per the basic calculation as mentioned in Rule 12 of the Juvenile Justice Rules 2007, the revisionist age should have been considered as 18 years which was on the lower side of the opinion given by Dr. Harpreet Garewal, Dental.

5. The only contention raised by the counsel for the revisionist is that the age of the revisionist should have been determined on the basis of the assessment done by Dr. Harpreet Garewal, Dental who has opined his age to be between 18 to 21 years and on that basis he was a juvenile on the date of the incident and when there are two opinions the opinion which is in favour of the accused should have found favour with the JJB and the Principal Magistrate.

6. It is urged by the Ld. APP for the state that there is no infirmity in the impugned order dated 31.07.2015. It is further urged that the dental age is not as accurate as the determination done on the basis of ossification test. He further urged that the report of the dental and member radiology cannot be read in isolation and they both concurred and opined that the age of the revisionist is between 20-21 years. He further urged that the petitioner is involved in a grave and serious offence committed by him in a well planned manner which reflects his maturity of mind.

7. The short question falling for consideration in this revision petition is that whether the petitioner was juvenile on the date of occurrence.

8. The relevant portion of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, the JJ Act), which prescribes the manner of conducting the age determination inquiry, is reproduced as under:

“94. Presumption and determination of age:

(1) xx xx xx

(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 pachayat;

(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.....”

9.5. Section 94 of the JJ Act lays down the manner of determining the age of a child conclusively. Under the said provision, the age of a child is ascertained by adopting the first available basis, out of a number of options postulated therein. An option expressed in a preceding clause has overriding effect over an option expressed in a subsequent clause. The highest rated option available determines the age of a minor conclusively. If the date of birth certificate from the school of the child, or the matriculation or equivalent certificate from the concerned examination Board is available, no other evidence can be relied upon. When no such certificate is available, then the reliance can be placed on a birth certificate issued by a corporation or municipal authority or panchayat. It is only in

the absence of any of the aforesaid, that Section 94(2) postulates the determination of the age of the child on the basis of medical opinion.

9.6. In *Ashwani Kumar Saxena v. State of M.P.*, (2012) 9 SCC 750, while considering the scope and nature of the inquiry contemplated under Rule 12 of the JJ Rules, 2007, which was broadly on the similar lines as that of Section 94 of the JJ Act, 2015, the Hon'ble Supreme Court observed thus:

“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.

35. We have come across several cases in which the trial courts have examined a large number of witnesses on either side including the conduct of ossification test and calling for odontology report, even in cases, where matriculation or equivalent certificate, the date of birth certificate from the school last or first attended, the birth certificate given by a corporation or a municipal authority or a panchayat are made available. We have also come across cases where even the courts in the large number of cases express doubts over certificates produced and carry on detailed probe which is totally unwarranted.”

9. In the instant case (i) and (ii) are not available so only way by which the age of the revisionist would be determined was the medical test which was got conducted vide report dated 20/05.2015.

10. The Ld. APP for the State has referred to the method of age assessment by forensic odontology from the book written by 'Loins' on Age Estimation in the Living which provides as under :

"The average boy or girl on reaching the age of puberty is already in possession of all the permanent teeth except the wisdom teeth. As far as the permanent twenty-eight teeth are concerned, there are few exceptions. The time of eruption of the wisdom teeth is much more uncertain though various authorities state that their eruption

occurs between the ages of eighteen and twenty-five. Wisdom teeth have been found present in boys of about fifteen years of age and absent in men of sixty and seventy. Therefore, the mere fact that wisdom teeth have not erupted is not of great importance except in relation to other evidence."

11. To sum up his arguments Ld. APP for the state has submitted that from all angles the age of the revisionist is more than 18 years as on the date of the commission of the crime in the present case and the reports of the two doctors cannot be read in isolation and therefore, the revision petition deserves to be dismissed.

12. I have heard the Ld. counsel for the revisionist, Ld. APP for the state and perused the record of the case.

13. Vide instant revision petition, the revisionist is seeking setting aside of the order dated 31.07.2015 passed by Sh. Punam Singh, Member, JJB-II, Sh. V.K. Pandey, Member, JJB-II & Sh. Murari Prasad Singh, Principal Magistrate, JJB-II, Delhi Gate, New Delhi. The powers in the revision are Limited. The Ld. Members, JJB-II and Principal Magistrate, JJB-II in the impugned order dated 31.07.2015 have observed as follows :

"CW1 and 2 had been examined earlier and today CW3 has been examined and discharged. They all have proved the report of medical examination Ex. CW1/A as per which the age of the JCL has been opined to be between 20-21 years as on 20.05.2015 and on Board query CW2 and CW3 stated that the age of the JCL on the date of examination i.e. 18.01.2015 would remain the same as opined. Perusal of report also shows that iliac crest and ischial tuberosity have fused in the instant case.

As per Modi's Medical Jurisprudence the age for appearance of iliac crest is 17 years and for fusion is 19-20 years and the age of the appearance of ischial tuberosity is 16-18 years and for fusion is 20 years. The date of commission of the alleged offence in the present case is 18.01.2015. In these circumstances the age of the Faizan @ Salman would be at least 20 years on the date of his examination. As such **Faizan @ Salman is found not to be a juvenile** on the date of commission of offence for the purpose of Juvenile Justice (Care and Protection of Children) Act, 2000 and for the purpose of this enquiry. He is directed to be shifted to Tihar Jail and be produced before the Court concerned on 03.08.2015. Ahlmad to send relevant documents to the concerned court."

14. The Ld. Members and the Principal Magistrate, JJB-II have considered the testimony of the doctors and their report and found that the revisionist was more than 18 years of age as on the date of commission of the crime. The Courts are not super doctors and the revisionist could not point out any lapse in the procedure adopted by the doctors while determining the age of the revisionist. The doctors are experts in their field and after their due consultation the doctors have opined about the age of the revisionist. This is not for this Court to substitute its own opinion against the opinion of the doctors who are experts in their respective fields.

15. Therefore, in view of the above discussions, I am of the opinion that there is no reason to interfere in the impugned order dated 31.07.2015, the same is therefore, upheld and consequently, the revision petition is dismissed.

RAJNISH BHATNAGAR, J

FEBRUARY 3, 2020

Sumant