



2024:DHC:8437



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Date of Decision: 27th September, 2024*+ **CRL.M.C. 2791/2022 & CRL.M.A. 28235/2023**

SAHNE ALAM @ SAHIL CAUDHARYPetitioner
Through: Mr. Sony & Mr. Krishan
Parashar, Advs.

versus

STATE OF NCT OF DELHI & ANR.Respondents
Through: Mr.Naresh Kumar Chahar,
APP for the State
SI Partap Singh, PS-
Mohan Garden

CORAM:
HON'BLE MR. JUSTICE AMIT MAHAJAN

AMIT MAHAJAN, J.

1. The present petition is filed challenging the orders dated 06.12.2021 and 11.03.2022 passed by the learned Additional Sessions Judge ('ASJ'), POCSO Court, Dwarka Courts, New Delhi, in FIR No. 611/2021 dated 28.10.2021 registered at Police Station Mohan Garden for offences under Sections 328/376 of the Indian Penal Code, 1860 (**IPC**) and Sections 4/6 of the Protection of Children from Sexual Offences Act, 2012 (**POCSO Act**).

2. By the impugned order dated 06.12.2021, the learned ASJ disregarded the petitioner's recorded date of birth as mentioned in the school he was attending and directed a bone-age

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ossification test to determine his age. Subsequently, by the order dated 11.03.2022, the learned ASJ dismissed the petitioner's application to be declared a juvenile.

3. Briefly stated, the FIR was registered on the basis of the complaint filed by the complainant, a minor at the time of the incident, wherein she alleged that she got acquainted with the petitioner through a common contact at a dance academy. On the alleged date of the incident, the petitioner invited her to a meeting, during which he offered her a drink alleged to be spiked, and then committed sexual assault upon her.

4. The petitioner claimed to be aged 17 years at the time of the alleged incident. The learned Trial Court, while dismissing the application filed by the petitioner seeking the benefit of juvenility, observed as under :

"14. Though in JJ Act, 2015 under Section 94, there is no mention of any margin to be given on the approximate age determination of the accused by way of bone ossification test, nonetheless, in view of the above dictum of the Supreme Court and Delhi High Court, it is clear that radiological examination being an accurate determination, sufficient margin on either side has to be allowed and the benefit should go in favour of the accused. Thus, on the touchstone of this principle, in the instant case, even if the margin of two years is accorded to the accused on the date of the alleged offence i.e. 28.10.2021, he is found to be around 19 years of age and is to be treated as an adult."

5. The learned counsel for the petitioner contends that at the time of the incident, the petitioner was a minor and therefore ought to have been tried as a juvenile. The petitioner relies on his school records, which indicate that his date of birth is



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10.07.2004, thereby making him less than 18 years old at the time of the alleged offence. The petitioner also challenges the ossification test that was conducted, arguing that the margin of error should be considered in his favor.

6. He argues that the benefit of doubt, when determining age in such matters, should go in favor of the accused, especially when the ossification test can have a margin of error of two years.

7. He submits that in terms of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 ('**JJ Act**'), the recourse to ossification test could have only been taken in the absence of a school certificate.

8. He submits that, in the present case, the school certificate of the petitioner clearly indicated that the date of birth of the petitioner was 10.07.2004 and, therefore, at the time of incident, he was a minor.

9. *Per Contra*, the learned Additional Public Prosecutor for the State opposes the present petition. He submits that the learned ASJ had adequately applied its mind to the proposition of law and the precedents adduced by the petitioner.

10. He submits that the age of the petitioner was adjudged to be in a very specific age range in the ossification test report and the same could not be unduly lowered further so as to treat the petitioner as a juvenile.

11. The limited issue for consideration before this Court, is whether the petitioner was a juvenile at the time of the alleged



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incident and whether the learned Trial Court erred in rejecting his claim of juvenility.

12. The ossification test report dated 15.12.2021, which was duly exhibited before the learned ASJ, assessed the petitioner's age to be between 21 and 22 years at the time of the medical examination. The petitioner's reliance on his school records was considered by the learned ASJ; however, it was observed that the ossification test, being a medical determination of age, held significant weight in the absence of conclusive documentary proof from the petitioner.

13. In the present case, the date of birth of the petitioner was recorded as 01.01.2001 in the Aadhar Card, whereas in his school record and birth certificate, the date of birth was recorded as 10.07.2004. It was noted that the birth certificate was issued on 01.11.2021 i.e. after the date of the commission of the alleged offence and the school certificate was obtained without furnishing any supporting documents at the time of admission of the petitioner in the concerned school.

14. Section 94 of the JJ Act provides that in case the Committee or Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board shall undergo the process of age determination by obtaining the date of birth certificate from school and a birth certificate given by the Corporation and in the absence of both determination by ossification test. It is, however, relevant to note that the present case was tried by the Court of



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Sessions since the accused was stated to be not minor as per the Aadhaar Card. The application seeking declaration as juvenile was filed by the accused placing reliance on the school record which shows his date of birth as 10.07.2004. The reliance by the accused was also placed upon the date of birth certificate issued by Registrar (Birth and Death) Grama Panchyat Baseda Kanjor.

15. The learned ASJ noted that birth certificate was issued on 01.11.2021, that is, after commission of the alleged offence and directed to conduct Bone Ossification Test.

16. Section 9 of the JJ Act prescribes the procedure to be followed by the Magistrate who has not been empowered under the JJ Act. When a doubt is created on the age of the accused, it provides that – in case the accused is found to be juvenile, he / she shall be immediately forwarded to the Board having jurisdiction. Section 9 of the JJ Act reads 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



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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.

17. Section 9(2) of the JJ Act thus categorically provides that when such claim is made before a Court, that is, other than Board or a Committee and if the Court is of the opinion that the person was a child on the date of commission of offence, it shall make an inquiry and take such evidence as may be necessary to determine the age of such person.

18. The learned ASJ rightly observed that the date of birth of the petitioner was recorded as 01.01.2001 in the Aadhaar Card whereas his school record and birth certificate records the date of birth as 10.07.2004. The birth certificate was admittedly issued on 01.11.2021 – after the commission of the alleged offence. Further, it was noted that the school certificate was obtained



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without furnishing any supporting documents at the time of admission of the petitioner in the concerned school.

19. The learned ASJ further took evidence of the mother of the petitioner where she was not able to reveal the exact date of birth of the petitioner.

20. Thus, in the opinion of this Court, the procedure as prescribed in the Section 9 of the JJ Act has been rightly observed by the learned ASJ.

21. In regard to the argument that the benefit of margin of error should have been granted to the petitioner is concerned, this Court places the reliance on the judgements in *Mohd. Wasim v. State* : 2012 SCC OnLine Del 2862; *Satbir v. State GNCTD* : 2024:DHC:7256; and *Jarnail Singh v. State of Haryana* : (2013) 7 SCC 263.

22. The Hon'ble Apex Court in the case of *Jarnail Singh v. State of Haryana* (supra) has held that while determining age, a margin of error may exist in the ossification test, however the benefit of doubt is not be applied arbitrarily, particularly when the test involves the examination of multiple joints. The margin of error in such cases is reduced, making the results more reliable.

23. A Coordinate Bench of this Court in *Mohd. Wasim v. State* (supra), held as under:

“10. In the present case, medical board opined that in the ossification test, the epiphysis of shoulder, elbow, wrist, hip, knee and ankle joints as well as iliac crest and is chiel tuberosity have appeared and fused. The medial ends of clavicle were not found. In the dental examination, all teeth



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were found and on the general appearance of the accused, the medical board came to the conclusion that age of the accused is between 21-22 years.

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13. It is, therefore, apparent that test is done in respect of the multiple joints and therefore the margin of error is significantly on the lower side and thus medical board came to an acceptable and reasonable conclusion in respect of the age of the accused.

14. The ossification test was conducted on 28.11.2017 and the alleged incident is stated to have occurred on 20/21.10.2015.

15. Taking into consideration age of the accused was opined to be 21-22 years on 28.11.2017 and if the same is relate back to the date of offence i.e. 20/21.10.2015, the accused would be about 19 years of age i.e. more than 18 years.

16. In view of the above-mentioned discussion and considering the totality of the facts and circumstances, the application/request for declaring the accused juvenile or 'or sending the matter to Juvenile Justice Board is dismissed."

24. This Court in the case of **Satbir v. State GNCTD : 2024:DHC:7256**, while considering the question that whether the petitioner therein could have been treated as a juvenile on the basis of the ossification test report and whether he is entitled to the benefit of the margin of error, held as under :

"28.It is trite law that a hyper technical approach cannot be taken while determining the question of juvenility, however, in view of the passage from Jhala and Raju's Medical Jurisprudence that was relied upon by the Coordinate Bench of this Court in **Lal Bahadur v. The State : (Crl. R. 145/2003 decided on 25.07.2003**, when multiple joints have been tested, the margin can be reduced to six months.

29.The said view also finds support from Modi's Medical Jurisprudence and Toxicology, 24th ed., page 238 which provides that the a fairly close estimate can be given within a



margin of two years in young boys between 20-21 years of age. In the present case as well, the age of the petitioner has been assessed within a margin of one year. It also provides that the correct method in such cases is to allow a margin of error of six months on either sides. The relevant portion of the same is reproduced hereunder:

“In ascertaining the age of young persons, radiograms of several main joints of the upper of the lower extremity of one or both sides of the body should be taken, and an opinion should be given according to the following table. However, it must be remembered that too much reliance should not be placed on this table as it merely indicates an average and is likely to vary in individual cases even of the same province, owing to the eccentricities of development (see the following table). According to Dr HS Mehta, ‘from puberty to the consolidation of skeleton (about 18 years in girls and about 20-21 years in boys), a fairly close estimate within a margin of two years may be made, mainly on the progress of the epiphyseal union (ossification test)’. This agrees with Flecker’s observation. The method of estimating age is to calculate the approximate age after considering the (a) physical characteristics, (b) secondary sex characteristics, and (c) ossification tests and after allowing a margin of error of six months on either side. Thus, if the sum total of all these rests seems to indicate that the age is between fifteen and sixteen, a margin of error of six months on either side would make, according to the recommended method, an estimated age of between 14½ to 16½ years.””

25. In the present case also the ossification test of the petitioner was done in multiple joints. The doctor who conducted the ossification test was also examined to confirm that the radiological examination of the multiple joints had been performed reducing the margin of error typically associated with the ossification test.

26. The learned ASJ on the basis of the evidence, rightly concluded that the petitioner was aged between 21-22 years at the time of examination and, therefore, was not a juvenile at the time of incident. Further, noting that, even if, the error of two years as



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claimed by the petitioner is given, still the petitioner would have been around 19 years of age at the time of alleged incident, dismissed the application filed by the petitioner.

27. In view of the discrepancies in the documents, as noted above, the reliance of the learned ASJ on strong medical evidence in the form of ossification test, cannot be faulted. I, therefore, find no infirmity in the order passed by the learned ASJ.

28. The present petition is, therefore, dismissed.

29. Pending application(s) also stand disposed of.

AMIT MAHAJAN, J

SEPTEMBER 27, 2024