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**(2013) 01 DEL CK 0169**

**In the Delhi High Court**

**Case No : Criminal Rev. P. 510 of 2012**

Aakash Juvenile Through his Father Malkhan Singh

APPELLANT

Vs

N.C.T. of Delhi and Another

RESPONDENT

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**Date of Decision : 03-01-2013**

**Acts Referred:**

**Citation :** (2013) 1 AD 792 : (2013) CriLJ 2030 : (2013) 2 Crimes 737 : (2013) 2 ILR Delhi 799 : (2013) 1 JCC 644

**Hon'ble Judges :** G.P. Mittal, J

**Bench :** Single Bench

**Advocate :** Ravinder Narayan, with Mr. Mukul Kumar Gupta, for the Appellant; Rajdipa Behura, APP for the State, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

G.P. Mittal, J.—By way of this Revision Petition, the Petitioner Aakash takes exception to the order dated 24.08.2012 passed by the learned Additional Sessions Judge (ASJ), Dwarka whereby the order dated 31.03.2012 passed by the Juvenile Justice Board (JJB) holding the Petitioner Aakash to be a juvenile was reversed and the Petitioner was held not to be a juvenile. FIR No. 63/2011 u/s 363/366/376(2)(f)/308 IPC, Police Station Sagarpur was registered against the Petitioner. The Petitioner was declared to be a juvenile by an order dated 08.04.2011, while the case was at the stage of defence's evidence. The order dated 08.04.2011 was assailed in an Appeal before the learned ASJ. By an order dated 10.10.2011 the matter was remanded to the JJB with the direction to conduct a fresh inquiry into the age and date of birth of the Petitioner. The JJB conducted a fresh inquiry to determine the question of Petitioner's juvenility and held that his date of birth was to be taken as 05.04.1995. Consequently, on the date of commission of the offence the Petitioner was held to be 15 years 11 months and 4 days and thus, a juvenile under the Juvenile Justice (Care and Protection of Children) Act 2000 (the Act of 2000).

2. The Complainant, that is, the Prosecutrix through her natural guardian

successfully assailed the order dated 09.04.2012 passed by the JJB. While reversing the order dated 31.03.2012, the learned ASJ was swayed by the fact that the date of birth, that is, 05.04.1995 mentioned in the MCD Primary School, Dabri at the time of the admission was only by approximation on the basis of the Affidavit Ex. CW-1/1 sworn in by the Petitioner's father Malkhan Singh. Thus, the learned ASJ preferred the ossification test according to which the Petitioner was more than 22 years on the date of commission of the offence. Paras 9 to 12 of the impugned order are extracted hereunder:-

9. In the instant case, it is not disputed that the respondent No. 2 had sought admission for the first time, in MCD Primary School, Dabri, in the records of which his date of birth has been mentioned as 05.04.1995 vide Ex. CW1/A. However, it is to be noted that the father of the respondent No. 2 had not produced any documentary proof regarding the date of birth of respondent No. 2 in the aforesaid school. The school had recorded the aforesaid date of birth of respondent No. 2 merely on the basis of an affidavit sworn by the father of respondent No. 2 (Ex. CW1/C) which also is un-attested. Therefore, it is manifests that there was no reliable and authentic document produced before the school authorities regarding date of birth of respondent No. 2 and his date of birth has been recorded as 05.04.1995 merely on the basis of the representation of his father and un-attested affidavit (shapathpatra) filed by him. For these reasons, the date of birth of respondent No. 2 mentioned in his school records cannot be taken to be true and correct.

10. On the contrary, as per the report submitted by the Medical Board, which conducted the ossification test upon the respondent No. 2, his age on the date of commission of offence comes to between 21 to 24 years. As noted herein above, the doctors who conducted the ossification test of respondent No. 2 have been examined before the Board. They have been cross examined in detail and nothing contrary has come out in their cross examination. CW-2 Dr. Sameer Dhari, SR Dental Department, DDU Hospital had conducted the clinical dental examination of respondent No. 2 and according to him, he had 32 permanent teeth in his mouth. He further stated that the third molar had erupted in all corners and that the third molar does not erupt before the age of 17 years. Doctor Sameer Raghuvanshi who had done radiological examination of respondent No. 2 has been examined as CW-3 and as per his estimation, the age of respondent No. 2 as on date of commission of offence would be more than 22 years and less than 25 years. During his cross examination, he deposed that there was no effect of physical exercise like push up, bench press and sit ups in fusion process of bones and there was also no effect of geographical distribution in fusion process of bones. According to him, the racial background of the person upon his hereditary traits, has no effect on the fusion process.

11. Dr. Sunil Kakkar, who was the Chairman of the Medical Board, deposed that as per the medical, dental and radiological examination of respondent No. 2, his age would be between 22 to 25 years as on the date of his examination i.e.

23.01.2012 which means that his age on the date of commission of offence would be between 21 to 24 years. He further deposed that he had assessed the age of the respondent No. 2 on the basis of fusion of medial end of clavicle and incomplete fusion of the sacrum. According to him, if the clavicle was not completely fused, the age would be assessed as 20 to 22 years. He also deposed that geographical factor, food, certain medical disorder can affect the fusion. He admitted that in the present case, no such, disorder was mentioned.

12. The father of the respondent No. 2 has been examined as JW-1 and he deposed that he was married in February, 1991 and the respondent No. 2 was born in village Habibpur in District Bulandshahar on 05.04.1995. He further deposed that at that time, he had not obtained the birth certificate from the village Panchayat regarding the birth of respondent No. 2.

3. In *Ashwani Kumar Saxena Vs. State of M.P.*, the Hon'ble Supreme Court deprecated the practice of converting an inquiry as envisaged u/s 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (Act of 2000) to a full-fledged trial under the Code of Criminal Procedure. The Supreme Court explained the scope of 7A of the Act of 2000 and Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (Rules of 2007). Paras 24 to 43 of the report is extracted hereunder:-

24. We may, however, point out that none of the abovementioned judgments referred to earlier had examined the scope, meaning and content of Section 7-A of the Act, Rule 12 of the 2007 Rules and the nature of the inquiry contemplated in those provisions. For easy reference, let us extract Section 7-A of the Act and Rule 12 of the 2007 Rules:

7-A. Procedure to be followed when claim of juvenility is raised before any court.  
(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

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

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect.

(emphasis supplied)

12. Procedure to be followed in determination of age.--(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry

shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

(emphasis added)

25. Section 7-A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the JJ Act. The criminal courts, Juvenile Justice Board, committees, etc. we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. The statute requires the court or the Board only to make an "inquiry" and in what manner that inquiry has to be conducted is provided in the JJ Rules. Few of the expressions used in Section 7A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7A has used the expressions "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates, etc. as evidence, need not be oral evidence.

26. Rule 12 which has to be read along with Section 7-A has also used certain expressions which are also to be borne in mind. Rule 12(2) uses the expression "prima facie" and "on the basis of physical appearance" or "documents, if available". Rule 12(3) uses the expression "by seeking evidence by obtaining". These expressions in our view re-emphasise the fact that what is contemplated in Section 7A and Rule 12 is only an inquiry. Further, the age determination inquiry has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The word "inquiry" has not been defined under the JJ Act, but Section 2(y) of the JJ Act says that all words and expressions used and not defined in the JJ Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

27. Let us now examine the meaning of the words "inquiry", "enquiry", "investigation" and "trial" as we see in the Code of Criminal Procedure and their several meanings attributed to those expressions. "Inquiry" as defined in Section 2(g) CrPC reads as follows:

2. (g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;

The word "enquiry" is not defined under the Code of Criminal Procedure which is

an act of asking for information and also consideration of some evidence, may be documentary.

"Investigation" as defined in Section 2(h) CrPC reads as follows:

2. (h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;

The expression "trial" has not been defined in the Code of Criminal Procedure but must be understood in the light of the expressions "inquiry" or "investigation" as contained in Sections 2(g) and 2(h) of the Code of Criminal Procedure.

28. The expression "trial" has been generally understood as the examination by court of issues of fact and law in a case for the purpose of rendering the judgment relating to some offences committed. We find in very many cases that the court/the Juvenile Justice Board while determining the claim of juvenility forget that what they are expected to do is not to conduct an inquiry u/s 2(g) of the Code of Criminal Procedure, but an inquiry under the JJ Act, following the procedure laid down under Rule 12 and not following the procedure laid down under the Code.

29. The Code lays down the procedure to be followed in every investigation, inquiry or trial for every offence, whether under the Penal Code or under other penal laws. The Code makes provisions for not only investigation, inquiry into or trial for offences but also inquiries into certain specific matters. The procedure laid down for inquiring into the specific matters under the Code naturally cannot be applied in inquiring into other matters like the claim of juvenility u/s 7A read with Rule 12 of the 2007 Rules. In other words, the law regarding the procedure to be followed in such inquiry must be found in the enactment conferring jurisdiction to hold the inquiry.

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 u/s 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.

32. "Age determination inquiry" contemplated u/s 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.

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41. This Court in Babloo Pasi Vs. State of Jharkhand and Another, held, in a case

where the accused had failed to produce evidence/certificate in support of his claim, medical evidence can be called for. The Court held that:

22. ... The medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.

This Court set aside the order of the High Court and remitted the matter to the Chief Judicial Magistrate heading the Board to redetermine the age of the accused.

42. In *Shah Nawaz Vs. State of U.P. and Another*, the Court while examining the scope of Rule 12, has reiterated that medical opinion from the Medical Board should be sought only when matriculation certificate or equivalent certificate or the date of birth certificate from the school first attended or any birth certificate issued by a corporation or a municipal authority or a panchayat or municipality is not available. The Court had held that entry related to date of birth entered in the marksheet is a valid evidence for determining the age of the accused person so also the school leaving certificate for determining the age of the appellant.

43. We are of the view that admission register in the school in which the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility.

4. Thus as per Rule 12 (3)(a) of the Rules 2007 only three certificates are to be taken into consideration for the purpose of determining the juvenility. First of all the Matriculation or equivalent certificate, if the same is not available the date of birth certificate from the school other than a play school first attended, and if the same is also not available then the birth certificate given by a Corporation or a Municipal Authority or a Panchayat.

5. In the instant case much emphasis has been laid on a certificate issued by the Municipal Corporation (although its genuineness was not established). In fact, order dated 31.03.2012 passed by the JJB makes a specific reference to the said certificate. Relevant portion of the order dated 31.03.2012 passed by the JJB is extracted hereunder:-

The IO was directed vide order dated 18.10.11 to get the birth certificate which had been obtained by the complainant verified by the concerned authority and report was received that record of birth certificate was not available in the West Zone. The Sub-Registrar MCD Births and Deaths from West Zone was summoned with the record and when he appeared before the Board on 24.11.11 he stated that the register containing the entries after no. 2600 was not available and not traceable despite efforts. He was directed to conduct an enquiry and to file a report. Thereafter, the Sub-Registrar submitted that report of enquiry regarding

the missing record pertaining to the birth certificate and alongwith that statement of two persons Shri Bagga Singh Maan and Shir Harvinder Pal Singh Kohli who were posted at the relevant time had also been recorded and they had stated that the birth certificate did not bear the signatures nor the code number which was necessary and that probably it was a fake certificate....

6. There was no dispute about date of birth certificate issued by the School first attended as given in Rule 12 (3)(a) (ii) of the Rules 2007. The Petitioner's date of birth at the time of admission in the year 2000 was mentioned as 05.04.1995. Of course, no document was produced by the Petitioner's father in support of the said date of birth except the Affidavit but that would not be of any significance in view of the provisions of Rule 12 of the Rules 2007. Thus, even if, the certificate issued by the Municipal Corporation is found to be genuine although it was held to be fake by the JJB, the same could not be looked into for the purpose of determining the issue of juvenility as the precedent has to be given to the date of birth certificate issued by the School first attended. The opinion of the Medical Board is relevant only when the certificates as envisaged in Rule 12 (3)(a) are not available.

7. The learned ASJ committed an error of law in relying on the ossification test in preference to the date of birth certificate from the school first attended.

8. The Petition has to succeed. The impugned order is set aside and the order passed by the JJB is restored. The Petitioner Aakash is declared to be juvenile.

9. The Petition is allowed in above terms. Pending Application also stands disposed of.