Reserved
AFR

In Residence

Case :- HABEAS CORPUS WRIT PETITION No. - 1160 of 2019
Petitioner :- Kiranpal @ Kinna
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Santosh Yadav,Saurabh Yadav
Counsel for Respondent :- G.A.

Hon'ble Mrs. Sunita Agarwal,J.
Hon'ble Pradeep Kumar Srivastava,J.

1. Heard Sri Santosh Yadav learned counsel for the petitioner and Sri D.P.S Chauhan learned Additional Advocate General for the State respondents.

2. The instant petition has been filed for issuance of a writ in the nature of habeas corpus for release of the petitioner namely Kiranpal @ Kinna from the District Jail Agra, on the plea that his detention in jail is contrary to the fundamental rights guaranteed under Article 21 of the Constitution of India.

3. It is contended that vide order dated 19.9.2018, the Juvenile Justice Board, Bulandshahr had declared the petitioner juvenile as he was found to be 17 years, 9 months and 25 days on the date of the incident.

The brief facts of the case relevant to appreciate the plea of the petitioner are that a first information report dated 26.3.2000 was lodged against the petitioner and 13 others co-accused persons under Sections 147, 148, 302/149, 307/149, 323/149 IPC and 7th Criminal Law Amendment Act, registered as Case Crime No. 33 of 2000 at the Police Station Khanpur, District Bulandshahr. The time and date of the occurrence of the incident as per the said report was 9.30 AM on 26.3.2000.

It is contended that the petitioner was a minor at the time of the incident. Since the father of the petitioner was also one of the accused in the said criminal case, there was no one to pursue the matter except the illiterate mother of the petitioner. As a result of it, defence of juvenility of the petitioner could not be taken at the relevant point of time.

The investigating officer had submitted charge sheet and trial was commenced but neither the investigating agency nor the trial court made

any effort on its own to find out the age of the petitioner at any point of time, during the course of the investigation or trial of the petitioner. The petitioner along with co-accused was convicted and sentenced vide judgment and order dated 29.9.2003 passed in the Sessions Trial No. 884 of 2000 for life imprisonment for the charges under section 302 read with Section 149 IPC; for seven years rigorous imprisonment for the charges under Section 307 read with Section 149 IPC; and six months rigorous imprisonment for the charges under Section 323 read with Section 149 IPC. All the sentences were to run concurrently. Aggrieved, the petitioner along with other co-accused filed Criminal Appeal No. 5009 of 2003, which was also dismissed vide judgment and order dated 27.3.2013 passed by this Court.

It is stated that on an application dated 21.3.2018 filed by the mother of the petitioner before the Juvenile Justice Board, Bulandshahr that the petitioner was minor at the time of the incident and he was entitled for the benefits of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as “the Act, 2000”) as amended from time to time, the Juvenile Justice Board, Bulandshahr vide order dated 19.9.2018 had declared the petitioner being 17 years, 9 months and 25 days of age on the date of the incident. It is then contended that the order of the Juvenile Justice Board, Bulandshahr had never been challenged and hence has attained finality.

4. With the above facts, it is vehemently contended by Sri Santosh Yadav learned counsel for the petitioner that with the declaration of juvenility of the petitioner, he cannot be retained in jail and this Court has to issue a writ of habeas corpus for release of the petitioner declaring his detention in the District Jail, Agra as illegal. It is contended that even if, the petitioner had been found to be guilty of the offence under Section 302 read with Section 149 IPC, his detention had exceeded the maximum period provided in Section 15 of the Juvenile Justice Act, 2000 and as such, the detention of the petitioner in jail amounts to violation of Article 21 of the Constitution of India.

The submission is that the Juvenile Justice Act, 2000 is a benevolent legislation and based on the decision of the Apex Court in such matters,

the benefit of juvenility is to be accorded to the petitioner. It is contended that with the dismissal of the criminal appeal by this Court against the order of conviction, no other forum is available to the petitioner to ventilate his grievances except seeking relief in this extraordinary writ jurisdiction of habeas corpus under Article 226 of the Constitution.

5. Reliance is placed upon the decisions of the Apex Court in **Home Secretary (Prison) vs. H. Nilofer Nisha**[1] and **Amit Singh vs. State of Maharashtra**[2] as also the decision of the Punjab and Haryana High Court in **Gurdarshan Singh vs. State of Punjab and another**[3] to assert that the writ of habeas corpus is to be issued to quash the sentence awarded to the petitioner and direct for his release from the District Jail, Agra forthwith.

Placing reliance on the decisions of the Apex Court in **Satya Deo alias Bhoorey vs. State of Uttar Pradesh**[4]; **Arnit Das vs. State of Bihar**[5] and **Hari Ram vs. State of Rajasthan and another**[6] , it is contended that the benefit of Juvenile Justice Act, 2000 is to be accorded to the petitioner, as the crucial date for determination of juvenility of a person is the date of alleged commission of offence, that means if on the date of commission of alleged occurrence a person is found to be juvenile, he cannot be denied benefit of 2000, Act as the provisions of the said Act would apply by virtue of Section 7-A (inserted by Amendment Act, 33 of 2006), which provides that a claim of juvenility can be raised before any Court, at any stage, and even after the final disposal of the case.

6. It is vehemently argued by the learned counsel for the petitioner that in the case of **Hari Ram**[6] , the Apex Court has dealt with the amendments brought by Act No. 33 of 2006 and held that with the introduction of Section 7-A in the 2000 Act, retrospective effect has been given to the provision of Juvenile Justice Act, 2000 and as such, the claim of juvenility of the petitioner could be raised, before any Court, at any stage, as has been done in the instant case. The Juvenile Justice Board, Bulandshahr had entertained the application moved by the mother of the petitioner keeping

1 (2020) 14 SCC 161
2 AIR ONLINE 2011 SC 556
3 (2013) 2 AICLR 368
4 AIR 2020 Supreme Court 4826
5 AIR 2000 Supreme Court 2264
6 AIR 2011 SC (Criminal) 2053

in mind the above decisions of the Apex Court and upon enquiry found the petitioner being juvenile on the date of the incident.

It is vehemently argued that in view of the aforesaid position of law and the facts of the case, the petitioner is entitled to be released from the jail by issuance of a writ of habeas corpus.

7. Learned Additional Advocate General appearing for the State respondents, on the other hand, raised the issue of maintainability of the present petition. It is contended that a writ of habeas corpus can only be issued when the detention or confinement of a person is without the authority of law. The detention of the petitioner in the District Jail, Agra is pursuant to the decision of the Court of law. The petitioner had been held to be an accused, guilty of commission of heinous offences under Section 302 read with Section 149 IPC on appreciation of evidence by two courts of law, the trial Court as well as the appellate Court. Only remedy available before the petitioner was to challenge the decision of the appellate Court, upholding the judgment of conviction and sentence passed by the trial court, in appeal before the Supreme Court. In a proper proceeding before the Apex Court, the petitioner could have filed an application seeking determination of his claim of juvenility. In such a proceeding, the Apex Court may have examined his claim on its own or would have directed the Juvenile Justice Board to determine the same. In any eventuality, the writ of habeas corpus cannot be issued for release of a prisoner, after conviction by a Court of law.

8. In the light of the above contentions of the learned counsels for the parties and the factual back ground of the case, three questions arise for determination by this Court; (i) Whether the writ of Habeas Corpus is an appropriate remedy and this Court can release the petitioner treating his detention or confinement in jail without the authority of law?; (ii) whether the Juvenile Justice Board, Bulandshahr had adopted the prescribed procedure while declaring the petitioner juvenile by the order dated 19.9.2018 ?; (iii) whether the petitioner is entitled to the benefits of the Juvenile Justice Act in view of the said order?

The above three questions are interlinked to each other and cannot be answered individually. The legal position in regard to each question has

to be examined and, thereafter, answer can be given only on appreciation of the facts of the instant case. According to us, it is necessary to be examined as to whether the order passed by the Juvenile Justice Board determining the claim of juvenility on the material before it, is justifiable so as to invoke the extraordinary power to issue a writ of habeas corpus for release of the petitioner.

9. Dealing with the question no. (i) regarding the maintainability of the habeas corpus petition, we would refer to the decision of the Apex Court relied by the learned counsel for the petitioner in the case of **Home Secretary (Prison)**[1]. The legal position with regard to the scope and ambit of the jurisdiction of the High Court while dealing with the writ of habeas corpus has been summarised by the Apex Court therein in the following words:-

> *"***13.** *Article 226 of the Constitution of India empowers the High Courts to issue certain writs including writs in the nature of habeas corpus, mandamus, prohibition, quo Warranto and certiorari for the enforcement of any right conferred under Part III of the Constitution dealing with the fundamental rights. In this case, we are concerned with the scope and ambit of the jurisdiction of the High Court while dealing with the writ of habeas corpus.*
>
> **14.** *It is a settled principle of law that a writ of habeas corpus is available as a remedy in all cases where a person is deprived of his/her personal liberty. It is processual writ to secure liberty of the citizen from unlawful or unjustified detention whether a person is detained by the State or is in private detention. As Justice Hidayatullah (as he then was) held; "The writ of habeas corpus issues not only for release from detention by the State but also for release from private detention" [Mohd. Ikram v. State of U.P., AIR 1964 SC 1625]. At the same time, the law is well established that a writ of habeas corpus will not lie and such a prayer should be rejected by the Court where detention or imprisonment of the person whose release is sought is in accordance with the decision rendered by a court of law or by an authority in accordance with law.*
>
> **15.** *According to Dicey, "if, in short, any man, woman, or child is, or is asserted on apparently good grounds to be, deprived of liberty,*

1 (2020) 14 SCC 161

the Court will always issue a writ of habeas corpus to anyone who has the aggrieved person in his custody to have such person brought before the Court, and if he is suffering restraint without lawful cause, set him free."[A.V. Dicey, Introduction to the Study of the Law of the Constitution, Macmillan And Co., Limited, p. 215 (1915) 3 Halsbury's Laws of England, (4th Edn.) Vol. 11, para 1454 p. 769]

16. *In Halsburry's Laws of England, a writ of habeas corpus is described as "a remedy available to the lowliest subject against the most powerful."[V.G. Ramachandran's Law of Writs, revised by Justice C.K. Thakker & M.C. Thakker, Eastern Book Company, , p.1036, 6th Edn. (2006)] . It is a writ of such a sovereign and transcendent authority that no privilege of person or place can stand against it.*

17. *A writ of habeas corpus can only be issued when the detention or confinement of a person is without the authority of law. Though the literal meaning of the Latin phrase habeas corpus is 'to produce the body', over a period of time production of the body is more often than not insisted upon but legally it is to be decided whether the body is under illegal detention or not. Habeas corpus is often used as a remedy in cases of preventive detention because in such cases the validity of the order detaining the detenu is not subject to challenge in any other court and it is only writ jurisdiction which is available to the aggrieved party. The scope of the petition of habeas corpus has over a period of time been expanded and this writ is commonly used when a spouse claims that his/her spouse has been illegally detained by the parents. This writ is many times used even in cases of custody of children. Even though, the scope may have expanded,* ***there are certain limitations to this writ and the most*** **basic of such limitation is that the Court, before issuing any writ of habeas corpus must come to the conclusion that the detenue is under detention without any authority of law."**

(Emphasis supplied)

The question before the Apex Court therein was as to whether a writ of habeas corpus would lie, for securing release of a person who is undergoing a sentence of imprisonment imposed by a Court of competent jurisdiction praying that he be released in terms of some Government orders/rules providing for premature release of prisoners. The answer given by the Apex Court with the above observations was 'No' as it was held that the grant of remission or parole is not a right vested with the

prisoner. It is a privilege available to the prisoner on fulfilling certain conditions. The earlier decision of the Apex Court in **Kanu Sanyal vs. District Magistrate, Darjeeling and others**[7] had been referred in paragraph '21' of the said decision in the following words:-

> *"21. In Kanu Sanyal v. District Magistrate, Darjeeling reported in (1973) 2 SCC 674 this Court while dealing with the writ of habeas corpus has held as follows:*
>
> > *"4. It will be seen from this brief history of the writ of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty...."*

In paragraphs '23' and '24' of the said decision (**Home Secretary (Prison) vs. H. Nilofer Nisha**), it was said that:-

> *"23. In Saurabh Kumar v. Jailor, Koneila Jail [(2014) 13 SCC 436], this Court came to the conclusion that the petitioner was in judicial custody by virtue of an order passed by the judicial magistrate and, hence, could not be said to be in illegal detention. Justice T.S. Thakur, as he then was, in his concurring judgment held as follows:*
>
> > *"22. The only question with which we are concerned within the above backdrop is whether the petitioner can be said to be in the unlawful custody. Our answer to that question is in the negative. The record which we have carefully perused shows that the petitioner is an accused facing prosecution for the offences, cognizance whereof has already been taken by the competent court. He is presently in custody pursuant to the order of remand made by the said Court. A writ of habeas corpus is, in the circumstances, totally misplaced…"*
>
> *24. The same view has been taken in the State of Maharashtra and Others v. Tasneem Rizwan Siddiquee [(2018) 9 SCC 745] wherein it was observed that no writ of habeas corpus could be issued when the detenue was in detention pursuant to an order passed by the Court. As far as the present cases are concerned, it is not disputed that the detenues are behind bars pursuant to conviction and sentence imposed*

---

7 (1973) 2 SCC 674

upon them by a court of competent jurisdiction and confirmed by this Court, whereby they were sentenced to undergo imprisonment for life."

It was, thus, held by the Apex Court that a writ of habeas corpus is maintainable by a person who is in detention,even a prisoner in judicial custody by virtue of a judicial order, if his fundamental rights are violated.

10. Invoking the said principle, the petitioner herein is seeking release from the jail on the ground that his fundamental right to life and liberty is being restrained as after declaration of his juvenility his detention is illegal. The right to freedom claimed by the petitioner,thus,is dependent on the determination of his age/ claim of juvenility and not otherwise. The issue,thus, can be answered with reference to the legal provisions pertaining to the Juvenile Justice Act, 2000 amended from time to time. The Juvenile Justice Act, 2000 provided the age of "juvenile" under Section 2(k) means a person, who has not completed eighteenth (18) year of age. The "juvenile in conflict with law" under Section 2(l) means a juvenile who is alleged to have committed an offence and has not completed eighteenth (18) year of age on the date of commission of such offence. Section 7-A inserted in the Juvenile Justice Act, 2000 by Amendment Act No. 33 of 2006 reads as under:-

*"[**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 inquiry, 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.]"

The sub section(1) thus, provides that a claim of juvenility can be raised before any court and whenever such a claim is raised, 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.

The proviso to Section 7-A ,however, states that a claim of juvenility may be raised before any court at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in the 2000 Act and the Rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of the Act. Thereby, retrospective effect has been given to the Juvenile Justice Act'2000 ,which came into force w.e.f 1.4.2001, by the Amendment Act' 2006.

Sub-section (2) of Section 7-A of the Act, 2000 further says that if upon an enquiry {which has to be made under sub-section (1)}, this Court finds a person to be juvenile on the date of commission of the offence, 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.

In the instant case, the date of commission of the offence was 26.3.2000 ; there is, thus, no quarrel about the applicability of the Juvenile Justice Act, 2000. The legal position is also well settled that the application raising a claim of juvenility cannot be rejected on the ground of being filed at the belated stage.

11. We may further note that in **Anil Agarwala & another VS. State of West Bengal**[8] , the order passed by the High Court in rejection of the application of the appellant therein on the ground of being filed at the belated stage came up for consideration before the Apex Court. It was held therein:-

"6. Having regard to the above provisions, we set aside the order passed by the High Court which is incompatible with the

8 2012 (9) SCC 768

provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and direct the trial court to first of all look into the question of juvenility, as claimed by the appellants herein and after disposal of the claim made by the appellants that they were minors on the date of the alleged incident, it shall proceed with the trial. In the event the trial court comes to a finding that the appellants were minors at the time of commission of the offence, it shall immediately send them to the Juvenile Justice Board concerned for considering their cases in accordance with the provisions of the 2000 Act. It is expected that these applications which have been filed on behalf of the appellants will be disposed of within three months from the date of receipt a copy of this order."

In **Ashwani Kumar Saxena vs State Of M.P.**[9], while examining the scope of Section 7-A of the Act, it was held by the Apex Court that the said statutory provisions obliges the Court to make an inquiry under the Juvenile Justice Act regarding age of the accused/appellant on the date of the incident.

From a careful reading of the provisions of Section 7-A of the Juvenile Justice Act, 2000, it is,thus, clear that a claim of juvenility when raised, an enquiry is to be made by the Court before which the claim is made and if the Court upon such an enquiry finds a person to be juvenile on the date of alleged commission of the offence, benefit of Juvenile Justice Act shall be given to him. The Court making such an enquiry shall be required to take necessary evidence to determine the age of such person.

The enquiry into the claim of the petitioner herein has already been made by the Juvenile Justice Board and his age has been determined on the basis of the report of the medical board. The right of the petitioner to seek release from the prison,thus,would depend upon the result of the said enquiry which has to be necessarily based on the evidence brought on record, having been completed by adopting due procedure of law.

12. Necessary question, therefore, arise for our consideration is as to whether the Juvenile Justice Board, Bulandshahr had followed the procedure prescribed under the Juvenile Justice Act for determination of age of the petitioner on the date of commission of the crime and the order

9 2012 (9) SCC 750

declaring juvenility of the petitioner is legally sustainable.

The answer to these questions would require consideration of the legal provision in the matter of determination of age of a person under the Juvenile Justice Act.

The Juvenile Justice Act, 2000 does not lay down any fixed criteria for determining the age of a person. Section 49(1) of the Act, 2000 provides for presumption and determination of age in the following words:-

> *"**49. Presumption and determination of age.-** (1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be."*

13. From a reading of the said provision, it is clear that it provides that when a person is brought before the Court (Juvenile Justice Board), it is obliged to ascertain the age of that person and for the purpose of enquiry, the board shall take such evidence as may be necessary and then record a finding whether the person is a juvenile or child or not, stating his age as nearly as may be. Under Rule 12 of Rules, 2007 framed under Juvenile Justice Act, 2000, the Board is enjoined to take evidence for determination of age.

Rule 12 reads as under:-

> *"**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 7A, 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 off cases, where the status of juvenility has not been determined

in accordance with the provisions contained in subrule (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.."

14. In **Abuzar Hossain alias Gulam Hossain vs. State of West Bengal**[10] , the provisions of Juvenile Justice Act, 2000 and the Rules, 2007 framed thereunder came for consideration. The three Judges Bench of the Apex Court has observed that the credibility and acceptability of the documents including the certificate of education of the person with regard to whom enquiry is made would depend on the facts and circumstances of each case and no hard and fast rule as such can be prescribed.

It was observed as under:-

*"***39.3.** *As to 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 Rule 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 statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction 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. In Akbar Sheikh vs. State of W.B. [(2009) 7 SCC 415] and Pawan vs. State of Uttaranchal [(2009) 15 SCC 259] these documents were not found prima facie credible while in Jitendra Singh vs. State of U.P. [(2010) 13 SCC 523] the documents viz., school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7A and order an enquiry for determination of the age of the delinquent.*

39.5. *The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in 2000 Act are not defeated by hyper-technical approach and the persons who are entitled to get benefits of 2000 Act get such benefits. The courts should not*

10 2012 (10) SCC 489

be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.

39.6 *Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at threshold whenever raised."*

In his concurring judgment, Hon'ble Justice T.S. Thakur (as the Chief Justice then was) speaking for the Bench added a note of caution in the matter of enquiry under the Act, it was observed that the words "physical appearance" of the accused used in Rule 12(2) of the Rules, 2007 loose its efficacy where the claim is made before the Higher Court for the first time. The advantage of "physical appearance" of the accused is reduced because of considerable lapse of time between the incident and hearing of the matter by the Court. It was observed that there may be cases where the accused may not be in a position to provide a birth certificate from the competent authority as they may not have maintained it. It was held that the approach at the stage of directing the enquiry as of necessity has to be more liberal, lest, there is avoidable miscarriage of justice. But directing an enquiry is not the same thing as declaring the accused to be a juvenile. **The standard of proof required is different for both the stages. In the former, the Court simply records a prima facie conclusion. In the latter, the Court makes a declaration on evidence that it scrutinises and accepts only if it is worthy of such acceptance.**

In Om Prakash vs. State of Rajasthan and another[11], the Apex Court while considering the question whether medical evidence and other attending circumstances would be of any value and assistance while determining the age of a juvenile, if the academic record certificates do not conclusively prove the age of the accused, has held that the claim of juvenility taking benefit of the benevolent legislation can be made applicable in favour of only those delinquents who undoubtedly have been held to be juvenile which leaves no scope for speculation about the age of

11 2012 (5) SCC 201

the alleged accused. It was held that if there is a clear and unambiguous case in favour of the juvenile accused, he would be entitled for the special protection under the Juvenile Justice Act. But it was observed that 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.

In paragraphs '22' and '23', the Apex Court observed as under:-...

> *"22. xxxxxxxxxxxxxxxx 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.*
>
> *23. Hence, while the courts must be sensitive in dealing with the juvenile who is involved in cases of serious nature like sexual molestation, rape, gang rape, murder and host of other offences, the accused cannot be allowed to abuse the statutory protection by attempting to prove himself as a minor when the documentary evidence to prove his minority gives rise to a reasonable doubt about his assertion of minority. Under such circumstance, the medical evidence based on scientific investigation will have to be given due weight and precedence over the evidence based on school administration records which give rise to hypothesis and speculation about the age of the accused. Xxxxxxxxxxxxxxx."*

It was said that the principle of benevolent legislation would apply only to such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority.

In **Parag Bhati vs. State of U.P.**[12], after referring **Abuzar Hossain**[10]**, Om Prakash**[11] and other decisions of the Apex Court,It was held that the Courts are enjoined upon to perform their duties with the object to protect the confidence of common man in the institution entrusted with the administration of justice. A casual or cavalier approach while recording as to whether the accused is a juvenile or not cannot be permitted.

12 2016 (12) SCC 744
10 2012 (10) SCC 489
11 2012 (5) SCC 201

It was held that the claim of juvenility cannot be allowed to be raised merely to create a mist or a smokescreen to seek shelter by using it as a protective umbrella or Statutory shield. The provisions of a benevolent legislation (Juvenile Justice Act) cannot be used to subvert or dupe the cause of justice

In **Mukarrab v. State of Uttar Pradesh**[13], the question fell for consideration was whether the opinion of the Medical Board of AIIMS determining the age of the appellants therein can be accepted or not. Considering the report of the Medical Board, having regard to the facts and circumstances of the case, it was observed therein that:-

> **26.** *xxxxxxxxxx a blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of the medical opinion by the radiological examination. At page 31 of Modi's Text Book of Medical Jurisprudence and Toxicology, 20th Edn., it has been stated as follows:*
>
> *"In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken, an opinion should be given according to the following table, but 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." Courts have taken judicial notice of this fact and have always held that the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person but the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error. 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 circumstances.*
>
> **27.** *In a recent judgment, State of Madhya Pradesh v. Anoop Singh (2015) 7 SCC 773, it was held that the ossification test is not the sole criteria for age determination. Following Babloo Pasi and Anoop Singh's cases, we hold that ossification test cannot be regarded as conclusive when it comes to ascertaining the age of a person. More so, the appellants herein have certainly crossed the age of thirty years which is an important factor to be taken into account as age cannot be determined with precision. In fact in the medical report of the appellants, it is stated that there was no indication for dental x-rays since both the accused were beyond 25 years of age.*

13 2017 (2) SCC 210

28. *At this juncture, we may usefully refer to an article "A study of wrist ossification for age estimation in pediatric group in central Rajasthan", which reads as under:-*

"There are various criteria for age determination of an individual, of which eruption of teeth and ossification activities of bones are important. Nevertheless age can usually be assessed more accurately in younger age group by dentition and ossification alongwith epiphyseal fusion.

[Ref: Gray H. Gray's Anatomy. 37th ed. Churchill Livingstone Edinburgh London Melbourne and New York: 1996; 341-342];

A careful examination of teeth and ossification at wrist joint provide valuable data for age estimation in children.

[Ref: Parikh CK. Parikh's Textbook of Medical Jurisprudence and Toxicology. 5th edn.: Mumbai Medico-Legal Centre Colaba:1990;44-45];

Variations in the appearance of centre of ossification at wrist joint shows influence of race, climate, diet and regional factors. Ossification centres for the distal ends of radius and ulna consistent with present study vide article "A study of Wrist Ossification for age estimation in pediatric group in Central Rajasthan" by Dr. Ashutosh Srivastav, Senior Demonstrator and a team of other doctors, Journal of Indian Academy of Forensic Medicine (JIAFM), 2004; 26(4). ISSN 0971-0973].

29. *In the present case, their physical, dental and radiological examinations were carried out. Radiological examination of Skull (AP and lateral view), Sternum (AP and lateral view) and Sacrum (lateral view) was advised and performed. As per the medical report, there was no indication for dental x-rays since both the accused were much beyond 25 years of age. Therefore, the age determination based on ossification test though may be useful is not conclusive. An X-ray ossification test can by no means be so infallible and accurate a test as to indicate the correct number of years and days of a person's life."*

The Court observed that age determination using ossification test does not yield accurate and precise conclusions after the examinee crosses the age of 30 years which is an important factor to be taken into account.

The Apex Court in **Ramdeo Chauhan vs. State of Assam**[14] has said that the Courts are enjoined upon to perform their duties with the object of strengthening the confidence of the common man in the institution entrusted with the administration of justice. Any effort which weakens the system and shakes the faith of common man in the justice

14 2001 (5) SCC 714

dispensation system has to be discouraged.

The Juvenile Justice Act, 2000 has been repealed with the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "the Act, 2015"), which has been brought into force on 15.1.2016.

15. Section 94 of the Act, 2015 provides the criteria of presumption and determination of age by the Committee or the Board on the appearance of a person before it and make an enquiry to determine the age of that person.

Section 94 reads as under:-

"94. Presumption and determination of age- (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(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 panchayat;

(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:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

A comparison of Section 94 of Act, 2015 and the Rule 12(3) of the Rules, 2007 shows that the procedure prescribed in Section 94 of the Act, 2015 is not materially different from the provision in Rule 12 of the Rules,

2007 to determine the age of the person. There are though some minor variation as the Rule 12(3)(a)(i) and (ii) have been clubbed together.

Section 94, thus, treats both the birth certificate from the school certificate or the matriculation or equivalent certificate from the concerned examination board at the same ***level/pedestal***. However, the importance of ossification test as a means of the determination of age has not undergone change with the enactment of Section 94 of the Act.

16. It was observed in **Ram Vijay Singh v. State of U.P.**[15], a recent decision of the Apex Court that the reliability of the ossification test remains vulnerable under Section 94 of the Act, 2015 as was under Rule 12 of the Rules. The Court observed that as per the scheme of the Act, it is only in case of doubt, the process of age determination by seeking evidence becomes necessary. At that stage, when a person is around 18 years of age, the ossification test can be said to be relevant for determining the approximate age of a person in conflict with law. However, when the person is around 40-45 years of age, the structure of bones cannot be helpful in determining the age.

It was observed in paragraph '16' as under:-

> *"**16.** xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx This Court in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors. 7 held, in the context of certificate required under Section 65B of the Evidence Act, 1872, that as per the Latin maxim, lex non cogit ad impossibilia, law does not demand the impossible. Thus, when the ossification test cannot yield trustworthy and reliable results, such test cannot be made a basis to determine the age of the person concerned on the date of incident. Therefore, in the absence of any reliable trustworthy medical evidence to find out age of the appellant, the ossification test conducted in year 2020 when the appellant was 55 years of age cannot be conclusive to declare him as a juvenile on the date of the incident."*

Taking note of its earlier decisions in **Mukarrab**[13], **State of Madhya Pradesh vs. Anoop Singh**[16] & **Babloo Pasi vs State of Jharkhand**[17], it was held in paras '15' & '16' as under:-

> *"**15.** We find that the procedure prescribed in Rule 12 is not*

15 2021 ONLINE SC 142
13 2017 (2) SCC 210
16 2015 (7) SCC 773
17 (2008) 13 SCC 133

materially different than the provisions of Section 94 of the Act to determine the age of the person. There are minor variations as the Rule 12(3)(a)(i) and (ii) have been clubbed together with slight change in the language. Section 94 of the Act does not contain the provisions regarding benefit of margin of age to be given to the child or juvenile as was provided in Rule 12(3)(b) of the Rules. The importance of ossification test has not undergone change with the enactment of Section 94 of the Act. The reliability of the ossification test remains vulnerable as was under Rule 12 of the Rules.

16. *As per the Scheme of the Act, when it is obvious to the Committee or the Board, based on the appearance of the person, that the said person is a child, the Board or Committee shall record observations stating the age of the Child as nearly as may be without waiting for further confirmation of the age. Therefore, the first attempt to determine the age is by assessing the physical appearance of the person when brought before the Board or the Committee. It is only in case of doubt, the process of age determination by seeking evidence becomes necessary. At that stage, when a person is around 18 years of age, the ossification test can be said to be relevant for determining the approximate age of a person in conflict with law. However, when the person is around 40-55 years of age, the structure of bones cannot be helpful in determining the age. xxxxxxxxxxxxxxxxx."*

17. From the above discussion, it is evident that the statutory provisions in the matter of determination of age of the person brought before the Board, lays down the manner of enquiry which has to be done strictly in accordance with the provisions mentioned therein by the Court before whom the matter is brought. The credibility or accountability of the documents would depend on the fact and circumstances of each case and no strait-jacket formula can be prescribed as to how and when the Court can record its prima facie satisfaction or reject the claim of juvenility at the stage of initiation of inquiry. However, once enquiry is initiated, the evidence brought before the Court have to be appreciated to ascertain the age of the person who claims to be a juvenile. The claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improper claim of juvenility must be rejected. (emphasis added)

At this juncture, we would be benefited by the following observations of the Apex Court in **Om Prakash**[11] and **Parag Bhati**[12] as under:-

11 2012 (5) SCC 201
12 2016 (12) SCC 744

"**(Om Prakash)**[11] para 37.....Juvenile Justice Act which undoubtedly is a benevolent legislation but cannot be allowed to be availed of by an accused who has taken the plea of juvenility merely as an effort to hide his real age so as to create a doubt in the mind of the courts below who thought it appropriate to grant him the benefit of a juvenile merely by adopting the principle of benevolent legislation but missing its vital implication that although the Juvenile Justice Act by itself is a piece of benevolent legislation, the protection under the same cannot be made available to an accused who in fact is not a juvenile but seeks shelter merely by using it as a protective umbrella or statutory shield. We are under constraint to observe that this will have to be discouraged if the evidence and other materials on record fail to prove that the accused was a juvenile at the time of commission of the offence."

"(Parag Bhati)[12] para 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 evidene regarding his minority as the benefit of the possibilities of two vies 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 dube the arms of law, cannot be allowed to come to his rescue."

In **Om Prakash**[11] , the Apex Court had drawn a parallel between the plea of minor or plea of alibi to observe as under:-

"32. Drawing parallel between the plea of minority and the plea of alibi, it may be worthwhile to state that it is not uncommon to come across criminal cases wherein an accused makes an effort to take shelter under the plea of alibi which has to be raised at the first instance but has to be subjected to strict proof of evidence by the court trying the offence and cannot be allowed lightly in spite of lack of evidence merely with the aid of salutary principle that an innocent man may not have to suffer injustice by recording an order of conviction in spite of his plea of alibi.

33. Similarly, if the conduct of an accused or the method and manner of commission of the offence indicates an evil and a well planned

11 2012 (5) SCC 201

design of the accused committing the offence which indicates more towards the matured skill of an accused than that of an innocent child, then in the absence of reliable documentary evidence in support of the age of the accused, medical evidence indicating that the accused was a major cannot be allowed to be ignored taking shelter of the principle of benevolent legislation like the Juvenile Justice Act, subverting the course of justice as statutory protection of the Juvenile Justice Act is meant for minors who are innocent law breakers and not accused of matured mind who uses the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him."

In the same context, while considering the relevance and value of medical evidence in the inquiry by the Juvenile Justice Board in **Ramdeo Chauhan**[14] , the Apex Court has observed that:-

"21. ..... The statement of the doctor is no more than an opinion. the court has to base its conclusions upon all the facts and circumstances disclosed on examining of the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available. An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much of reliance cannot be placed upon text books, on medical jurisprudence and texicology while determining the age of an accused. In this vast country with varied latitude, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform." (emphasis supplied)

"22. .....there is not an iota of doubt in my mind to hold that the petitioner was not a child or near or about the age of being a child within the meaning of the Juvenile Justice Act or the Children Act. He is proved to be a major at the time of the commission of the offence. No doubt, much less a reasonable doubt is created in the mind of the Court, for the accused entitling him the benefit of a lesser punishment. It is true that the accused tried to create a smoke screen with respect to his age but such efforts appear to have been made only to hide his real age and not to create any doubt in our mind. The judicial system cannot be allowed to be taken to ransom by having resort to imaginative and concocted grounds by taking advantage of loose sentences appearing in the evidence of some of the witnesses, particularly at the stage of special leave petition. The law insists for finality of judgments and is more concerned with the strengthening of the judicial system. The courts are enjoined upon to perform their duties with the object of strengthening the confidence of the common man in the institution entrusted with the administration of justice. Any effort which weakens the system and shakens the

14 2001 (5) SCC 714

faith of the common man in the justice dispensation system has to be discouraged."

"23. After committing the crime of murder of four innocent persons, the petitioner cannot be permitted to resort to adopt means and tactics or to take measures which, if accepted or condoned, may result in the murder of the judicial system itself. The efforts made by the accused by way of this petition, are not likely to advance the interests of justice but on the contrary frustrate it."

18. From the above discussion, it is evident that as far as the medical evidence is concerned, the same has been considered as a last resort in the matter of determination of age. The ossification test at a belated stage after advancement of age of the accused/convict cannot be conclusive to determine him as a juvenile on the date of the incident, as the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of the person but is not of a conclusive and incontrovertible nature and it is subject to a margin of error.

Thus, it is held in **Mukarrab**[13]**; Ramdeo Chauhan**[14] **& Ram Vijay Singh**[15] that the medical evidence as to the age of a person though a very useful guiding factor, is not conclusive and has to be considered in conjunction with other circumstances and oral testimony as may be available. It is fallible and in absence of reliable, trustworthy medical evidence to find the age of a person, the ossification test conducted at a belated stage cannot be conclusive to declare him a juvenile on the date of the incident.

19. In light of the above legal position in the matter of determination of age of a person who claims to be juvenile, the facts of the instant case are to be appreciated.

20. The supplementary affidavit dated 16.12.2019 filed in this habeas corpus petition states that a public interest litigation no. 855 of 2012 was filed before this Court wherein an order dated 24.5.2012 was passed to identify those prisoners who were juvenile at the time of commission of offence and direction was issued to take *suo moto* action and extend legal aid. Pursuant thereto, the petitioner moved an application before the Secretary, District Legal Services Authority, Agra through the Senior Superintendent, Central Jail, Agra to provide him an advocate to do pairavi on his behalf. On the said application, a letter was forwarded to the

13 2017 (2) SCC 210
14 2001 (5) SCC 714
15 2021 ONLINE SC 142

Secretary, District Legal Services Authority and an advocate was provided to the petitioner. An application dated 3.5.2017 was then moved through Dhirendra Singh Kushwaha, Advocate Civil Court, Agra to state that the petitioner Kiran Pal @ Kinna is an illiterate person and as such he does not possess documentary evidence relating to his age. In that eventuality, age determination of the petitioner/applicant was required to be done through a Medical Board. The copy of the application dated 3.5.2017, appended as Annexure S.A. '2' to the supplementary affidavit moved before the Juvenile Justice Board, Agra, is not supported by any affidavit of the petitioner to depose the statement made therein. It seems that the Juvenile Justice Board, Agra on the presentation of the said application on 3.5.2017, ignoring the said fact, had directed for the medical examination of the petitioner/ applicant. The record further indicates that on 1.7.2017, on an objection raised by the prosecution regarding the jurisdiction of the Juvenile Justice Board, Agra, the application dated 3.5.2017 was returned for placing it before the appropriate Court.

After return of the application by the Juvenile Justice Board, Agra, it seems that the mother of the petitioner had filed an application dated 21.3.2018 before the Juvenile Justice Board, Bulandshahr stating therein that her son was a juvenile on the date of the incident which was registered as Case Crime No. 33 of 2000 and tried as S.T. No. 884 of 2000 under Section 304, 307 IPC. Later an affidavit dated 5.9.2018 was filed by the mother of the petitioner in Misc. Case No. 19 of 2018 which has been appended at ‘page 27’ of the supplementary affidavit. The statement on oath therein are that her son was a juvenile and no appeal before the High Court or Supreme Court against S.T. No. 884 of 2000 in relation to Case Crime No. 33/2000 was pending. It may be noteworthy that in the said application, the mother of the petitioner did not disclose that the criminal appeal filed before this Court had already been dismissed in the year 2013. It further seems that the mother of the petitioner insisted for determination of age of the petitioner on the basis of the medical report given by the Chief Medical Officer,Agra. The medical report dated 31.5.2017 was submitted under the directions of the Juvenile Justice Board, Agra, which had no jurisdiction in the matter. This said report, however, was brought

on record by the counsel for the applicant before the Board at Bulandshahr. The issuance of the said report was though verified from the office of the Chief Medical Officer,Agra and considering the observations in **Mukarrab**[13], determination of age of the petitioner was made, giving a variation of two years in upper age limit i.e. treating the age of appellant as 36 years and then giving additional benefit of lowering his age by one year in terms of rule 12(3)(b) to 35 years as on the date of the medical examination, in May, 2017. That way the petitioner was held to be 17 years 9 months and 25 days on the date of occurrence on 26.3.2000.

21. A perusal of the medical report dated 31.5.2017 shows that the three member Board which was comprised of the Chief Medical Officer, Agra, Radiologist, District Hospital Agra and a Dentist, performed X-rays of 'skull and sternum' as also made an assessment of physical characteristics of the petitioner so as to ascertain his physical and dental development. The general physical examination findings are consistent with the physical characteristics of a normal adult male. Dental examination shows presence of complete 16 sets of permanent teeth. Moreover,the estimation of age from the teeth by physical and X-ray examination is not possible after 20 to 25 years of age. No X-ray of any other joint of lower extremity or sacrum was performed. As stated at 'page 218' of Modi's textbook of Medical jurisprudence 25th edition, the age estimation should not be based entirely on X-ray of a single joint or bone. A number of factors including race, gender, nutritional status etc influence the age of appearance and fusion of epiphysis.

At page '216' of the said text book it is stated that:-

> "*In ascertaining the age of young persons, radiograms of several main joints of the upper or 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).*"

It would be useful to reproduce the X-ray report as under:

> *"X-ray sternum-All pieces of sternum body found. X.P. & M.S. not found.*
>
> *X-ray Skull-Sagital Suture is obliterated. Coronal & others not obliterated."*

13 2017 (2) SCC 210

The X-ray of sternum, however, seems incomplete in as much as reading of the report shows that 'X.P &M.S (two upper & lower parts of sternum) not found' whereas all pieces of sternum body found. As far as the X-ray report of sternum is concerned ,the guidelines in MODI'S 25th edition at page '216' read as under:-

> *"The four middle pieces of the sternum, which constitute its body, fuse with one another from below upwards, between 14 and 25 years of age. The xiphoid unites with the body at about the 40th year of age, while the manubrium rarely unites with the body, except in old age. Singh et al. studied the time of fusion of mesosternum with manubrium and xiphoid process in the population of Punjab, Haryana and Chandigarh. They examined the sterna of 524 males and 228 females at the time of postmortems. It was observed that the fusion between mesosternum and manubrium began in the age group of 10-14 years (males, 40%) and 15-17 years (females, 16.66%). The fusion between mesosternum and xiphoid process commenced at 18-20 years (both genders) and complete fusion was observed in 21-25 years age group. They concluded that neither the fusion of mesostenum with manubrium nor with xiphoid process is useful to estimate age if a subject is above 18-20 years of age".*

The X-ray report signed by the Senior Consultant,Radiologist,District Hospital,Agra is, thus, also found sketchy and as such can not be treated even a complete Ossification test for age determination as required under the medical jurisprudence.

22. This apart, the other factors which could have thrown light in the matter of determination of age have been completely ignored. The mother of the petitioner was examined as ACW1 by the Juvenile Justice Board, Bulandshahr and was cross-examined by the Prosecution Officer on behalf of the applicant. Her statement extracted in the order of the Juvenile Justice Board disclosed that she has four children, two daughters and two sons, and the petitioner is youngest of them. The age of other siblings of the petitioner has not been disclosed by her nor any effort seems to have been made to extract the said fact during the course of her cross-examination by the Prosecution Officer or the Board, as nothing in this regard has been indicated in the order of the Juvenile Justice Board, Bulandshahr.

There is one more aspect of the matter that a perusal of the order dated 19.9.2018 further reflects that on the presentation of the application, notice was issued to the informant/complainant by the Board. There is no mention of service of notice upon the informant. Rather, a photostat copy of an affidavit of the informant and a certified copy of statement of PW-1

in Session Trial Court No. 360 of 2001 were filed by the counsel for the applicant, based on which it is recorded in the order of the Board that in the said affidavit and the statement,the informant had denied the presence of the accused at the site of the incident and had also entered into a compromise. It is not known as to how statement of PW-1 dated 12.5.2006 in Session Trial No. 360 of 2001 is relevant for this case wherein the petitioner was convicted in Session Trial No. 884 of 2000 arising out of Case Crime No. 33 of 2000. It is, thus, clear that the notice to the informant had not been given in the matter of enquiry in Misc. Case No. 19 of 2018 made by the Juvenile Justice Board, Agra. Irrelevant material such as the alleged affidavit of the informant filed before the Governor, State of U.P. as also the statement in some other criminal cases were considered. It is, thus, clear that a casual and cavalier approach had been adopted by the Juvenile Justice Board, Bulandshahr in making enquiry in the matter of determination of age. The relevant material which could bring the surrounding circumstances for determining the age of the accused have been completely ignored. Had the questions relating to age of elder siblings of the petitioner and difference in their age asked by the Board from his mother, answers to them might have thrown some light in regard to the estimated age of the petitioner. Being liberal in directing for the enquiry is another thing but at the stage of determination of age, decision has to taken on proper appreciation of evidence on the record and not on whims and fancies.

23. It may also be considered that the petitioner did not file appeal before the Supreme Court against the order of conviction and had directly approached the Juvenile Justice Board through the Legal Services Authority after a period of 15 years to get his age determined *albeit* under a general direction issued by this Court in a PIL. No doubt the standard of proof for age determination is the degree of probability and not proof beyond doubt. But the determination of age, in a given case, has to be made keeping in mind the object of the benevolent legislation, the Juvenile Justice Act, that all persons who were juvenile on the date of commission of offence should be given benefit of the Act but those who are taking plea of minor as a plea of alibi should be shown the doors at the threshold. It is

settled legal position that all scrupulous claims of juvenility should be thrown at the threshold and genuine claims should be examined with a liberal approach. No doubt that a hyper technical approach in the matter of enquiry would result in miscarriage of justice but a casual or cavalier approach in the matter of determination of age would result in travesty of justice, which according to us, has happened in this case.

24. In the words of R. Banumathi J. (as the Hon'ble Judge then was), speaking for the bench in **Mukarrab**[13], a blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of the medical opinion by the radiological examination. (Reference Para 26) (Emphasis supplied).

25. We, therefore, have no doubt in concluding that the proper procedure upholding the object of the Juvenile Justice Act has not been followed in the instant matter of determination of age of the petitioner. The ossification tests/radiological examination of the petitioner is not complete. The Juvenile Justice Board has committed a grave error of law in treating the radiological report as ossification test and making determination of age of the petitioner/applicant solely on the basis of that.

The decisions of the Apex Court in **Amit Singh**[2] and the judgment of Punjab and Haryana High Court in **Gurdarshan Singh**[3] relied by the learned counsel for the petitioner have been rendered in the facts and circumstances of those cases. No benefit can be derived by the petitioner on the basis of the same.

26. In view of the above discussions, three questions posed by us in this matter are answered in 'Negative'. The writ of habeas corpus cannot be issued in the instant case to release the petitioner as his detention in the District Jail, Agra cannot be said to be illegal. No other instance of violation of fundamental rights of the petitioner (a prisoner in jail) could be placed before us. The order of determination of age of the petitioner passed by the Juvenile Justice Board, Bulandshahr is not sustainable in the eye of law. The Juvenile Justice Board had committed a grave error of law in not following the proper procedure in the matter of determination of age of the

13 2017 (2) SCC 210
2 AIR ONLINE 2011 SC 556
3 (2013) 2 AICLR 368

petitioner keeping in mind the object of the benevolent legislation namely the Juvenile Justice Act, in as much as, the appreciation of evidence was made in a cursory manner.

In view of the above observations, the habeas corpus petition is **dismissed**.

(Pradeep Kumar Srivastava,J.) (Sunita Agarwal,J.)

Order Date :- 10.6.2021
Brijesh