

ORDER SHEET
IN THE HIGH COURT OF SINDH,
 CIRCUIT COURT, HYDERABAD.

Cr.Rev.Appl.No.S- 138 of 2016

DATE ORDER WITH SIGNATURE OF JUDGE

Date of hearing: 08.11.2016.

Date of order: 18.11.2016.

Mr. Aziz Ahmed Leghari, Advocate for applicant.

Mr. Mir Naeem Talpur Advocate for complainant.

Mr. Shahid Shaikh, A.P.G. for the State.

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SALAHUDDIN PANHWAR, J: Through instant revision application, applicant has challenged order dated 30th April 2016, whereby application filed by accused Khushal to be tried separately as *juvenile* was declined; with that academic certificates up-to matriculation are appended showing therein date of birth as 04.01.1997. Such verification reports were called as well ossification test was conducted by the trial Court. As per ossification test, conducted on 10.02.2016, it was opined that accused Khushal is about 20 years of age hence his request was turn down on the plea that at the time of offence he was aged about 18 years and 04 months.

2. Learned counsel for the applicant has argued that academic record was placed and found genuine but that was not considered and ossification test wherein difference was only 04 months, albeit exact age was not given by the Medical Board and the word about 20 years was mentioned hence the difference of 04 months was not material, in that eventuality documents of academic record were required to be considered but the learned trial Judge failed to appreciate

those documents. He has relied upon 2014 P.Cr.L.J.858, 2013 P.Cr.L.J. 1440 and PLD 2004 Supreme Court 758).

3. In contra, learned counsel for complainant has argued that result of medical board is not assailed by the applicant and according to law opinion of the Medical Officer prevails over the academic record hence the order is in accordance with law. He relied upon 2009 SCMR 1073. Learned A.P.G. also adopted his arguments.

4. I have heard the respective parties and have also perused the available record *carefully*.

5. Before proceedings further, it would be conducive to refer the relevant portion of order which is that:-

“I have considered the above submissions of the learned counsel representing the parties and have gone through the papers in hand. It has been determined that by consent of both the parties the matter was referred for Ossification. The Secretary Board of Intermediate and Secondary Education Mirpurkhas vide his letter No. BISE/VER:CELL/2015/MPS/-235 dated 17.03.2015 has submitted the particulars of accused Khushal Das specifying the date of birth of accused as 04.01.1997. The disclosed date is also mentioned in the General Register of the concerned School. The accused Khushal Das was produced before Medical Board on 10.02.2016 and he was examined by the experts who gave the opinion that accused Khushal Das is about 20 years of age. Such report has been sent to the Court. More than that the incident took place on 27.06.2014 at unknown time and the accused Khushal Dad is claiming that he was minor at the time of alleged incident. Admittedly, from the birth of accused till the date of alleged incident it appears that he was about 18 years old at the time of alleged incident. Besides, it is settled law that if the conflict between birth certificate and Medical Board arose then opinion of the Medical Board expert would prevail.”

It is pertinent to mention that the present case involves only one issue to be considered; value of *Ossification test*, in existence of undisputed *educational record / birth certificate*, in determining the age of an *accused*.

The *Ossification* is the process of formation of new bone by cells called **osteoblasts**. As per scientific evidence, by the age of 25 years nearly all bones are completely ossified in humans.

Timetable for human ossification

Time period	Bones affected
Third month of embryonic development	Ossification in long bones beginning
Fourth month	Most primary ossification centers have appeared in the diaphyses of bone.
Birth to 5 years	Secondary ossification centers appear in the epiphyses
5 years to 12 years in females, 5 to 14 years in males	Ossification is spreading rapidly from the ossification centers and various bones are becoming ossified
17 to 20 years	Bone of upper limbs and <u>scapulae</u> becoming completely ossified
18 to 23 years	Bone of the lower limbs and <u>os coxae</u> become completely ossified
23 to 25 years	Bone of the <u>sternum</u> , <u>clavicles</u> , and <u>vertebrae</u> become completely ossified
By 25 years	Nearly all bones are completely ossified

The above *table* itself shall speak that '*bone affection*' has been ranged as '**from... to.....**' therefore, Ossification test is a guess work based on the fusion of joints in the human body b/w birth and age 25. As per *expert* there may be an *error* of about 1 or 2 (*two*) years in the age, determined by the ossification test. This had been the reason that in existence of *undisputed* education record / birth certificate, coming from official(s), be given preference particularly when such record is got entered much prior to incident without having any intention of its being used in such *eventuality*. Since, the provision of Section 7 of Juvenile Justice System Ordinance, 2000 does not specify the mechanism of *inquiry* for determination of age but insists to base a finding' after an inquiry which shall include medical report. The Honourable Apex Court in the case of Sultan Ahmed v. Addl. Sessions Judge (2004 PLD SC 758), insisting benefit in quantum of punishment to a child/minor, guided as:

"24. The word 'INQUIRY' is defined by clause (k) of subsection (1) of section 4 of the Cr.P.C. but the said definition is not exhaustive. Various kinds of inquiries are envisaged by the Code of Criminal procedure e.g. the one ordained by section 117 thereof. We know it by

now from the judicial proceedings that the purpose of holding an inquiry, amongst others, is to determine the existence or non-existence of a fact or the falsity or correctness thereof and further that an inquiry is a judicial proceeding in which evidence could be legally taken. Therefore, whenever a Court is confronted with the question of the age of an accused person, it is incumbent upon it to hold an inquiry and the learned Presiding Officers should always feel free to requisition the original record; to summon and examine the authors and the custodians of such record and documents to determine the genuineness of the same; to summon persons, if need be who on account of some special knowledge, could depose about the age of the concerned accused person and to take such other and further steps which could help the Court in reaching a just conclusion about the said matter. As has been mentioned above, the issue about the age of an accused person at a trial which could result in a punishment of death, was now of vital significance and the learned Presiding Officer should never hasten to decide the said issue in summarily or in a slipshod manner.

25. *Medical report about the age of an accused person was a further aid placed at the disposal of a Court of law for the purpose of determining the age of an accused person. The opinion of medical experts could offer a valuable guide to a learned Presiding Officer in resolving the controversy in issue. The impression that an ossification test could be ordered only as a last resort, was not correct and thus not legally tenable. The reluctance of the Courts to benefit from such a mandated material was not understandable. Therefore, whenever, a question of the age of an accused person is raised or arises, he must be subjected to a medical test unless strong reasons existed or could be offered for not doing so. Such is the only course which is in accord with the provisions of section 7 of the Ordinance XXII 2000 which command that "... ..such inquiry shall include a Medical Report for Determination of the age... .." (Emphasis is ours)."*

Even per, above the *ossification* test was held to be helpful / aid in resolving the controversy *however* it was no where held to *solely* depend thereon else the said guidelines or even the provision of Section 7 of Ordinance would have made it *clear* so or would have said to conclude such finding with reference to *ossification* (medical report) *only* and not through an *inquiry*.

6. With regard to findings of Apex Court in the case of Muhammad Anwar v. Muhammad Suffiyan (2009 SCMR 1073), it is relevant to state that even in that case prevailing of medical report was consequence of dubious nature of *documentary*

evidence which shall stand evident from following operative part of the above judgment i.e:

“9.Therefore, the possibility of the said birth certificate having been maneuvered after the present occurrence only to bring Suffyan accused was the only child of his parents whose birth had been registered to the concerned Union Council seventeen years after the birth of said accused and that also after the murder in question had been committed. This means that Abu Suffyan accused had been borne 3-1/2 years after the birth of his elder brother, namely, Sajid but the brother immediately next to Abu Sufiyan accused had been born only four months and twenty-seven days after the birth of the said accused which is not a possibility by any standard of medical knowledge. **Therefore, even the evidence of his date of birth offered through the said birth certificates was thus a dubious affair.**
(Emphases supplied)

I would further add that it was the *scope* of inquiry which resulted in holding the said certificates as *dubious* and in consequence thereof the only available material was held to prevail as is evident from para-10 of case of Abbas Ali Khan i.e:

“10. The only other material available on record with respect to the age of Suffyan accused was the opinion of the Medical Board.....

Thus, suffice to say that *ossification* test cannot give an *exact* date but is a *guess* work which stands evident from the use of word '*about*' in such opinion of the Board. The word '*about*' itself is indicative of *uncertainty* therefore, benefit of such *normally* is to be stretched in favour of the accused who continues with presumption of '*innocence*' till his guilt is otherwise held. At this juncture a reference to Rule 12(3) of the Juvenile Justice (Care and Protection of Children) rules, 2007 (of India), having similar cultural and atmosphere, is made which reads as:-

“Rule 12(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 certificate, 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 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;*

The above Rule allows one year margin but it also provides a mechanism which *however* not matches with Section 7 of the Ordinance therefore, said would not be *stricto sensu* apply however, margin of benefit, being based on proper appraisal of value of Ossification, can well be taken into account. Therefore, where the academic record stands verified and *prima facie* is not found to be *dubious* or an arranged work for getting benefit then the Courts should give benefit to the accused within the margin of Six (6) months, if not of one year or two. In short, where the ossification test declares one to be six months older while academic or other record, not maneuvered one, shows the accused to be less than eight years, then the accused be declared as Child, as was rightly done in the cases of *Amanullah v. The State & 2 others* (2013 P Cr.LJ 1440).

7. Reverting to the merits of the case, the operative part of the order, impugned, would show that"

"The Secretary Board of Intermediate and Secondary Education Mirpurkhas vide his letter No. BISE/VER:CELL/2015/MPS/-235 dated 17.03.2015 has submitted the particulars of accused Khushal Das specifying the date of birth of accused as 04.01.1997. The disclosed date is also mentioned in the General Register of the concerned School.

The claim of the accused to have borne on **04.01.1997** stood verified not only with reference to his *matriculation* certificate but also with reference to **General Register** which the prosecution did not dispute or claimed to have been an arranged or *dubious* affair, therefore, the learned trial Court judge was not legally justified in declaring the accused as '**not juvenile**' merely with reference to *ossification* report which *even* showed the accused as '**about** 18 years and four months old' at time of offence. The margin of '**about**' ought to have been given to accused in existence of verified academic record, prepared and maintained by *officials* much prior to alleged date of incident or even without having any such intention of its (*academic record*) to be used in *future*.

8. In result of what has been discussed above, I am of the clear view that the order of the learned trial Court judge is not sustainable and is set-aside accordingly. The accused is declared as *juvenile* within meaning of Section 7 of the Ordinance and his case shall be tried separately.

Judge

