

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Criminal Revision No. 44/2019

Muhammad Mahboob Ellahi

Versus

The State, etc.

Petitioner by: Syed Zia ul Haq and Mr. Ahmed Zahoor Sawati,
Advocates.

Respondents by: Ms. Saima Naqvi, State Counsel.
Raja Rizwan Abbasi, Advocate.
Asif Raza, ASI, P.S. Aabpara, Islamabad.

Date of Decision: 28.06.2019.

MOHSIN AKHTAR KAYANI, J. Through this criminal revision, the petitioner has assailed the order dated 04.05.2019, passed by learned Additional Sessions Judge-VII (West), Islamabad, whereby application filed by respondent No.2 for conducting ossification test of victim Misbah Laraib was allowed.

2. Learned counsel for the petitioner contends that petitioner is complainant in case FIR No.183, dated 23.04.2018, U/S 364-A, 371-A, 371-B, 376 PPC, P.S. Aabpara, Islamabad, whereby his minor daughter Misbah Laraib, aged about 13 years was kidnapped from her school IMCG, Sector G-6/1-2, Islamabad and respondent No.2 is nominated in the said case; that the charge has been framed on 19.03.2019 in the said case, whereby respondent No.2/accused has filed an application for conducting ossification test of alleged victim, the said application was allowed by the trial Court without considering the documentary evidence qua the age i.e. birth certificate and form B, which are available on record; that

documentary evidence has preference over the ossification test and medical evidence could not be relied as substantive piece of evidence.

3. Conversely, learned counsel for respondent No.2/accused contends that challan has been submitted in the Court and charge has been framed and the question of age of victim is material for determination of liability in terms of Section 364-A PPC and as such the other evidence claimed by the petitioner/complainant is yet to be brought on record, which will be scrutinized during the course of trial, even ossification test will be a corroborative piece of evidence and will cause no harm to the prosecution case rather it will give a detailed insight to the trial Court for just decision of the case.

4. Arguments heard, record perused.

5. From the perusal of record, it reveals that petitioner is complainant in case FIR No.183, dated 23.04.2018, U/S 364-A, 371-A, 371-B, 376 PPC, which was registered against respondent No.2 and co-accused at P.S. Aabpara, Islamabad regarding the abduction and rape of Misbah Laraib minor girl, 13 years of age. Challan has been submitted in the Court and charge has been framed, however, respondent No.2/accused has filed an application for conducting ossification test of Misbah Laraib, which was allowed by the trial Court vide order dated 04.05.2019 and petitioner/complainant being aggrieved with the said order has challenged the same through instant criminal revision. The primary question before this Court is as to whether ossification test will be given preference or the documentary evidence relating to birth entries would be given preference and both the parties have argued this aspect in order to substantiate their claims.

6. I have gone through the judgments relied upon by the parties. In judgment reported as 2017 SCMR 633 (Intezar Hussain Vs. Hamza Ameer, etc.), it has been laid down:-

(a) Juvenile Justice System Ordinance (XXII of 2000)---

---Ss. 2(b) & 7---Penal Code (XLV of 1860), S. 302(b)---Qatl-i-amd---

Juvenile accused---Determination of age---Medical expert, opinion of---

---اہمیت--- موجودہ کیس میں ماہر معالجین نے ملزم کی ہڈیوں اور دانتوں سے اندازہ لگایا کہ وقوعہ کے وقت اس کی عمر 21 سال تھی جبکہ نادرا کا فارم "ب" اور اسکول میں درج شدہ عمر کے سرٹیفکیٹ کے مطابق ملزم وقوعہ کے وقت کم سن تھا۔۔۔ معالجین خصوصی کی رپورٹ ماہرین کی رائے پر مشتمل تھی جس کو قانون کے مروجہ اصولوں کے تحت حرف آخر یا حتمی نہیں سمجھا جاسکتا کیونکہ X-Ray یعنی برق قاطبی شعاعوں کے ذریعے ہڈیوں کے عکس کی بنیاد پر طبی ماہر/ماہرین سو فیصد غلطی سے پاک اور حتمی رائے انسانی عمر کے متعلق نہیں دے سکتے کیونکہ اس میں زیادہ سے زیادہ ۲ سال یا کم سے کم ایک سال تک کمی بیشی کا احتمال رہتا ہے۔۔۔ برق قاطبی شعاعوں کے ذریعے عکس لینے والی مشین کی ساخت اور اس کی درست کارکردگی بھی ہمیشہ ایک سوالیہ نشان رہتا ہے اور ان پر قائم کردہ رائے اندازوں پر مبنی ہوتی ہے لہذا اس کو ہر گز قطعی نہیں سمجھا جاسکتا۔۔۔ یونین کونسل کے پیدائش سے متعلق رجسٹر اور فارم (ب) جو کہ نادرا کے محفوظ شدہ یادداشت کا حصہ تھے، ان دونوں سرکاری دستاویزات میں وقوعہ سے کئی سال پہلے ملزم کی تاریخ پیدائش درج کی گئی تھی۔۔۔ سکول کے رجسٹر میں درج تاریخ پیدائش ملزم کی مکمل اور پوری تائید کرتی تھی جس کو صرف مضبوط شہادت کے ذریعے ہی رد کیا جاسکتا تھا لیکن مثل مقدمہ پر ماسوائے مذکورہ طبی ماہرین کی رائے کسی اور قسم کی شہادت موجود نہ تھی۔۔۔ عرصہ است برائے حصول اجازت اپیل مسترد کر دی گئی۔

7. Whereas the Supreme Court of India in reported judgment 2012 SCMR 1400 (OM Prakash Vs. State of Rajasthan and another), it was held that opinion of the medical experts based on x-ray and ossification test would have to be given preference over the shaky evidence based on school records and plea of circumstantial inference. Opinions of the medical jurist and radiologist, in circumstances, were significant and could not be overlooked. Similarly, I have also gone through the judgments reported as 2017 YLR Note 71 (Mohammad Ilyas Vs. The State and another), 2014 P.Cr.L.J 1680 (Muhammad Zubair Vs. The State and others), 2014 P.Cr.L.J 858 (Ghulam Abbas Vs. The State and another), 2013 P.Cr.L.J 1440 (Aman Ullah Vs. The State and 2 others), 2010 YLR 1812 (Muhammad Shahbaz Vs. The State and another), 2016 P.Cr.L.J 1745 (Muhammad Basit Vs. The State and 3 others), 2017 YLR 1605 (Farhan Vs. The State and another), NLR 2007 Criminal 46 (Petitioners Vs. The State), 2015 SCMR 955 (Sher Bahadur Vs. Fayyaz and another) and 2019 MDL 348 (Mir Ghulam Vs. The State).

8. The above referred judgments cited by both the parties give complete insight on the ossification test, medical evidence for determination of age as well

as the concept of documentary evidence on the basis of school leaving certification, form B, birth certificate, whereby it was settled that determination of age on the basis of ossification test would only be necessary when no reliable document is available on record about the age. However, where certain differences come on record qua the age, the matter could have been referred for ossification test, although the result of the ossification is tentative with certain margins of error on either side, however, all these questions have to be looked into by the trial Court after appreciating the evidence brought by the parties in evidence, therefore, at this stage, order passed by the trial Court has to be seen in the light of available record, whereby medico legal report of Misbah Laraib/victim issued by PIMS refers her age as 15 years, statement U/s 164 Cr.P.C. recorded by the victim Misbah Laraib reveals that she herself stated her age as 13 years and birth certificate appended with this petition reveals her date of birth as 18.12.2005, issued by Union Council Sultan Khail Mianwali and the NADRA registration form appended with this petition also reveals the same date of birth, whereas date of issuance is 11.12.2008.

9. Keeping in view the above background and different dates referred in different documents, trial Court was left with no other choice to get conducted the ossification test, which is otherwise corroborative piece of evidence and same will be appreciated at the time of trial. Hence, order passed by learned trial Court is in accordance with law and no illegality has been observed in the impugned order, therefore, instant criminal revision is hereby dismissed. However, trial Court shall consider the law quoted above while deciding the matter at final stage.

(MOHSIN AKHTAR KAYANI)
JUDGE