

**JUDGMENT SHEET  
IN THE PESHAWAR HIGH COURT,  
MINGORA BENCH (DAR-UL-QAZA), SWAT  
(Judicial Department)**

**Cr.R No. 71-M/2019**

***Muhammad Kamal s/o Muhammad Idrees r/o Khan Ghari  
Sakhakot, Tehsil Dargai, District Malakand.***

***(Petitioner)***

***Versus***

***Jamshid Khan and one other***

***(Respondents)***

**Present:**

***Mr. Anwar Hussain Khan, Advocate for  
petitioner.***

***Mr. Wilayat Ali Khan A.A.G. for State.***

***Muhammad Raziq Khan, Advocate for  
Respondent No.1.***

Date of hearing: **09.10.2019**

**JUDGMENT**

**SYED ARSHAD ALI, J.-** Through the instant criminal revision petition, the petitioner who is accused in case F.I.R No. 101 dated 27.07.2012 u/s 302/324/114/148/149 P.P.C of Police Station Sakhakot, District Malakand, has challenged the order of learned trial Court dated 20.08.2019 whereby, after an inquiry regarding determination of his age, he was found major at the time of commission of the offence.

**2.** Brief but essential facts of the case are that the present petitioner alongwith the acquitted accused were charged by the complainant/ respondent through F.I.R No. 101 dated 27.07.2012

for murders of Usman and Fazal Subhan and firing on the complainant and others. The local police, after investigating the matter had submitted challan before the competent Court of law. On conclusion of the trial, the present petitioner was *inter alia* sentenced to death on two counts subject to confirmation by this Court. The present petitioner had challenged the said sentence through Cr.A No. 09-M/2015 which came up for hearing before this Court on 04.12.2017. This Court, while noticing an apparent disparity in his age mentioned in the charge and statement u/s 342, Cr.P.C, had reached at the conclusion that since age of the present petitioner was not determined u/s 7 of the Juvenile Justice System Ordinance, 2000, therefore, had remitted the case to the trial Court for to first determine the age of the petitioner and thereafter proceed with the case accordingly.

3. The order of this Court was challenged before the august Supreme Court of Pakistan through Criminal Petition No. 14 of 2018, however, without any success. Pursuant to the said direction of this Court, the learned trial Court has conducted an inquiry regarding the age of the present petitioner and finally came to the conclusion vide order dated

22.08.2019 that at the time of commission of the offence he was major.

4. Arguments heard and record of the case was perused with able assistance of learned counsel for the parties.

5. It is evident from the record that the present petitioner is charged vide F.I.R No. 101 dated 27.07.2012 for the murders of Usman and Fazal Subhan and attempting at the lives of complainant and his cousins Luqman and Amir Rahman by causing firearm injuries to them. Thus, the date of commission of offence is 27.07.2012 at 19:30 hours. According to CNIC issued to the present petitioner on 22.04.2010, his date of birth is recorded as 01.01.1991, however, pursuant to the directions of this Court, the learned Trial Court has conducted an inquiry during which Nasrullah, Assistant Superintendent NADRA at Dargai has appeared as CW-1. He has produced Form (الف) as Ex.CW-1/2, Passport copy of his brother Muhammad Shahab as Ex.CW-1/3, Overseas Form of the petitioner as Ex.CW-1/4, Family Tree of his father Muhammad Idrees comprising three sheets as Ex.CW-1/5 whereas Form (ب) of Rahmatullah, and elder brother of the petitioner was Exhibited as Ex-



CW-1/7. He has also produced record of the Civil Suit No. 39/1 filed by petitioner on 20.02.2018 for rectification of his date of birth.

Zubair Shah, Head Teacher of G.P.S Ahmad Said Banda, appeared as CW-2. He produced before the Court register داخل خارج of the school where petitioner Muhammad Kamal had allegedly received his primary education. The relevant page of the said record was exhibited as Ex.CW-2/1 according to which date of birth of the petitioner is 20.04.1995, date of birth of his brother Muhammad Shahab according to page Ex.CW-2/2 is 23.03.1994 whereas that of his sister Mst. Falak Naz per page Ex.CW-2/3 is 08.03.1989.


Syed Inayat-ur-Rahman, Incharge G.P.S Sakhakot No.1, appeared as CW-3. He produced داخل خارج register of the said school wherein the date of birth of Rahmat Ullah, the elder brother of the petitioner, is 16.04.1985 and the relevant document was exhibited as Ex.CW-3/1 whereas the date of birth of his another brother Muhammad Arif is 28.09.1986 and the document in this regard is Ex.PW-3/2.

Miraj Begum, Head Mistress of G.G.P.S Khan Gharai appeared as CW-4 and

according to her record i.e رجسٹر داخل خارج the date of birth of Mst. Falak Naz, sister of the petitioner, is 08.03.1989 and the relevant document in this regard was exhibited as Ex.CW-4/2 whereas according to another page of the same register Ex.CW-4/3 the date of birth of his another sister Mst. Kalsoom is 15.03.1999.

6. The present petitioner was also sent for Ossification Test, the report of which was received by trial Court vide letter No. 520 dated 11.01.2019. According to the said report, the present petitioner was examined by Standing Medical Board on 20.12.2018 according to which the petitioner was found to be more than 25 years of age. Section 7 of the erstwhile Juvenile Justice Ordinance, 2000 envisages for determination of the age of accused for the purpose of the Ordinance as following.

**7. Determination of age.** If a question arises as to whether a person before it is a child for the purpose of this Ordinance, the Juvenile Court shall record a finding after such inquiry which shall include a medical report for determination of the age of the child”.

 The Close perusal of the above provision of law would reveal that it envisages a criterion regarding determination of age of a child for the purpose of the Ordinance and one of the

considered materials is the medical report i.e Ossification Test. Thus, the legislature in its wisdom has left open to the trial Court to determine the age of the child accused by considering all the available material on the record. In the case of "Nasib Ahmad V/s. The State" PLD 2000 Supreme Court 813, the august Supreme Court held that mere reliance on the School Leaving Certificate by the Courts was not enough to come to a definite conclusion as to the age of the minor at the time of the commission of the offence. Ossification Test or any other medical test for that purpose should also be conducted, the age of the accused be determined in accordance therewith and then decide the case should be decided accordingly.

In "Muhammad Akram V/s. Muhammad Haleem alias Hamayun and others" 2004 SCMR 218, the august Supreme Court of Pakistan when found that the trial Court had conducted an inquiry regarding juvenility of the accused without conducting Ossification Test had remanded the case to the trial Court for re-determining the age of the accused afresh.

In the case of "Muhammad Zakir V/s. the State and another" 2004 SCMR 121, the august

Supreme Court had confirmed the order of the trial Court where the age of the accused was determined on the basis of Ossification Test excluding the date of birth mentioned in the School Leaving Certificate.

In "Muhammad Aslam V/s. The State and another" PLD 2009 Supreme Court 777, the Hon'ble apex Court has laid down a detailed guideline for the determination of the age of the accused in Prara-11 of the judgment which is reproduced as under:

**"11. While we are on the subject, we consider it necessary to re-iterate the principles regulating the determination of age of accused persons vis-a-vis their claim of minority and the procedure to be followed for the purpose. The same are summarized as under:---**

- (a) The normal penalty for an offence punishable with death, is death, and in view of the provisions of section 367(5), Cr.P.C., special reasons must exist to impose, on the convict, a punishment other than a sentence of death;**
- (b) the plea of minority by an accused is a special plea intended to take the accused off the noose and onus is thus on him to prove the same;**
- (c) such a plea of minority must be taken by the accused at the earlier possible opportunity, preferably during the course of investigation so that the requisite evidence about the age of the accused could also be properly collected during the said exercise of collection of evidence and any delayed claim on the said account should be met by adverse inferences;;**
- (d) whenever such a question of age is raised or arises at the trial, the courts should not**

- deal with the same in a cursory or in a slipshod manner but must proceed to hold an inquiry in the matter as commanded by the provisions of section 7 of the Juvenile Justice System Ordinance including medical examination of the accused for the purpose;
- (e) the said inquiry should not be understood to mean only to entertain documents from across the bar and then giving a decision thereon. Such a practice needs not only to be discouraged but, in fact, to be discontinued. Basing judicial decisions on untested and scrutinized documents was a dangerous path to tread;
  - (f) proper compliance of the said provisions of section 7 would be to call upon the parties to lead their evidence -- oral or documentary in accordance with the provisions of Qanun-e-Shahadat Order of 1984 with a right to the other party to test the veracity or the genuineness of the same in accordance with law and then to arrive at a judicial decision in terms thereof;
  - (g) a medical examination of the accused person could furnish a useful guideline in the matter and should be resorted to; and finally,
  - (h) we must always keep in mind that while it is important, being a legal command, that a "child" should not be sent to the gallows, it is equally important that the one who deserves death must not be allowed to escape the same on the strength of false and fabricated material.

In "OM Parkash V/s. State of Rajasthan and another" 2012 SCMR 1400 the Indian Supreme Court has held as following.

3.2  
"Where the conduct of an accused or the method and mannerism of the commission of the offence indicated an evil and a well-planned design of the accused, which indicated more towards the mature 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 could not be allowed to be ignored taking shelter of the principle of benevolent legislation. Statutory protection of the legislation on juvenile justice was meant for a minor who was an innocent law breaker and was not an accused having a mature mind who used the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him.

7. By evaluating the evidence produced by the parties in the light of the law laid down in the afore-referred judgments, it is evident that the present petitioner had applied for his CNIC which was issued to him on 22.04.2010 wherein his date of birth is recorded as 01.01.1991. The representative of NADRA has also produced the Family Tree Ex.CW-1/5 of Muhammad Idrees, father of the petitioner, according to which Muhammad Idrees has 4 sons and two daughters. The detail of dates of birth of children of Muhammad Idrees mentioned in the said Family Tree is as under:

Rahmatullh (son)	16.04.1985
Muhammad Arif (son)	28.09.1986
Falak Naz (daughter)	14.01.1990
Muhammad Kamal (son) (Petitioner)	01.01.1991
Muhammad Shahab (son)	08.03.1992
Kalsum Begum (daughter)	15.03.1999

Although the petitioner in support of his age has produced رجسٹر داخل خارج, however, the same register does not inspire confidence and cannot be

given preference over his age recorded in the NADRA record. It would be pertinent to note that the present petitioner himself had never claimed his juvenility before the police at the time of investigation nor during the trial. This fact was not agitated even in appeal but was noticed by this Court while deciding his appeal that there was an apparent disparity in his date of birth which was recorded in his charge-sheet and statement u/s 342, Cr.P.C being one and the same. Thus, as an abundant caution the case was remitted to the trial Court for determining the age of the petitioner. After remand of the case to the trial Court, the petitioner had filed a civil suit for correction of his date of birth which appears to have been filed on the basis of *mala fide*. According to Medical Report dated 11.01.2019, the petitioner is more than 25 years of age. The date of birth mentioned in the CNIC inspires more confidence which was rightly considered by learned trial Court for determination of his age.

8. In light of the above, the instant revision petition having no merits is accordingly dismissed.

Announced.  
Dt: 09.10.2019

  
**JUDGE**