

PESHAWAR HIGH COURT ABBOTTABAD
BENCH

JUDICIAL DEPARTMENT

JUDGMENT SHEET

Cr. A No. 216-A/2019.

Date of hearing 05.10.2022.

***Appellant/s (Muhammad Azam) by Mr.
Faraz Ahmad, Advocate.***

***Respondent/s (The State) by Sardar Ali
Raza, AAG and complainant by
Muhammad Nasim Khan, Advocate.***

FAZAL SUBHAN, J. Appellant

(Muhammad Azam) has filed the instant appeal against the judgment dated: 14.06.2019 passed by learned Additional Sessions Judge-IV/Judge MCTC, Haripur, in case FIR No. 168 dated: 23.06.2013 under section 302 PPC, registered at Police Station, *Saddar*, District, Haripur, whereby, appellant was convicted and sentenced to suffer life imprisonment for two counts under section 302 (b) PPC alongwith fine of Rs. 200,000/- on two counts (total four lacs) to be paid to the legal heirs of deceased in terms of section 544-A Cr. P. C.

2. On 23.06.2013, at 12:00 AM, Chanzeb/complainant alongwith dead body of deceased Mst. Misbah, his wife reported the matter to the local police in emergency ward of DHQ, Hospital, Haripur that he and his father are barbers by profession, working in Deh Pind Hashim Khan. That on that day at morning time, his father Muhamamd Riaz went to the house of Ahmed Khan in Mohallah for cooking meal in connection with Khatam Sharif, while he along with his mother Rashida Bibi and wife Mosbah Bibi were present at their house, when at about 08:00 AM, his paternal cousin Azam son of Abdul Rasheed came to their house and after staying for a while, when out back after some time and thereafter, he alongwith Azam proceeded towards the house of Ahmed Khan, however, in the way Azam returned to (complainant's) asking him to bring his meal there to their house. That he alongwith his father were serving the guests in the house of Ahmed

Khan, when at about 11:00 AM, he heard firing shots from his house's upon which he alongwith his father rushed towards their house, where they saw, Azam having pistol in his hand, came out from their house and decamped towards village Maira and when he alongwith his father entered the house, his wife Mst. Misbah Bibi was lying near the door of room in injured condition, while dead body of his mother Mst. Rashida Bibi was lying inside the room. Mst. Misbah Bibi succumbed to injuries while shifting to hospital. Motive behind the occurrence was stated to be dispute over the wall of house between his father and his paternal uncle, Abdul Rasheed, father of accused/Azam.

3. After completion of investigation, complete challan was put in Court. Provision of section 265 (C) Cr. P.C were complied with, thereafter, charge was framed against the accused. In order prove its case against appellant,

prosecution examined as many as 14 witnesses. After recording of prosecution evidence, statement of accused was recorded under section 342 Cr. P.C. Learned trial Court after hearing of arguments, vide impugned judgment convicted the appellant as mentioned above, hence, aggrieved from the conviction and sentence, appellant preferred this appeal.

4. Arguments of learned counsel for appellant as well as Additional Advocate General heard and record perused.

5. Perusal of record reveals that appellant/convict was charged in the case for the murder of Mst. Rashida Bibi (mother) and Mst. Misbah Bibi (wife) of the complainant Chanzeb son of Muhammad Riaz. Initially he remained absconder, however, he was later on arrested at Chaman (Quetta) Baluchistan province and was transferred to Khyber Pakhtunkhwa. His card of arrest is on file, wherein, his age is recorded as 18/19

years at the time of his arrest, whereas, the occurrence took place on 23.06.2013 i.e almost one year prior to his arrest. Similarly, in the formal charge framed on 25.08.2014, his age is recorded as 18/19 years. On our query, it is intimated that the date of birth of the appellant is 02.01.1998 and after calculation his age at the date of alleged commission of offence comes to be about 15-1/2 years and therefore, on the date of occurrence, he was a child within the meaning of section 2 (b) of the Juvenile Justice System Ordinance, 2000, which is now repealed and substituted by Juvenile Justice System Act, 2018, (Act of 2018). Child in the repealed Ordinance and Act of 2018, is defined as:

Child: *“means for the purpose of this Act a person who has not attained the age of eighteen years”.*

Similarly, Juvenile is defined in section 2 (h), which means *“a child who may be dealt with for an offence in a manner which is different from an adult”.* The

Act of 2018, in section 7 has provided the procedure of investigation of Juvenile cases, which is reproduced herein below:

Investigation in juvenile

cases- (1) A Juvenile shall be

interrogated by a police

officer not below the rank of

sub-Inspector under

supervision of Superintendent

of Police or SDOP.

(2) The investigation officer

designated under sub-section

91) shall be assisted by

probation officer or by a

social welfare officer notified

by the Government to prepare

social investigation report to

be annexed with the report

prepared under section 173 of

the code.

Similarly, a special procedure for determination of age has been provided in section 8 of the Act of 2018, which is as following.

Determination of age. ---(1)

Where a person alleged to have committed an offence physically appears or claims to be a juvenile for the purpose of this Act, the officer-in-charge of the police station or the investigation officer shall make an inquiry to determine the age of such person on the basis of his birth certificate, educational certificates or any other pertinent documents. In absence of such documents, age of such accused person may be determined on the basis of a medical examination report by a medical officer.

(2) When an accused person who physically appears to be a juvenile for the purpose of this Act is brought before a Court under section 167 of the Code, the Court before granting further detention shall record its findings regarding age on the basis of available record including the report

submitted by the police or medical examination report by a medical officer.

6. From the record, we have noticed that the age of appellant/convict is recorded 18/19 years in the card of arrest but the investigation officer has failed to conduct any inquiry to determine his age on the basis of birth certificate, education certificate or any other document, nor he has been medically examined. Similarly, the Court granting custody of the appellant/convict has also failed to discharge its functions in light of section 8(2) of the *ibid* Act. On the face of record, when the appellant at the time of arrest was 18/19 years, while the occurrence took place 1 year before his arrest, then, presumption arises that he was under 18 years of age at the time of alleged offence and was juvenile. Non observance of mandatory provisions of law regarding determination of his age has deprived him of the special rights and protection

available to him as a child/juvenile. In the case of *Sultan Ahmed-Vs-Additional Sessions Judge-I, Mianwali and 2 others*, reported in **PLD 2004 Supreme Court 758**, it has been authoritatively held that:

The opening phrase of the said section is, 'IF A QUESTION ARISES' and not 'IF A QUESTION IS RAISED': The selection by the legislature of the words comprising this expression is sufficient to demonstrate that the commencement of an exercise to find out the age of an accused person is not dependent upon such a question being raised by some party to the proceedings i.e. the accused person himself or the State or even by the complainant or by a WALL in cases involving QATL-I-AMD. The word 'ARISE' means 'TO RISE UP' WHILE THE WORD 'RAISE' means 'TO CAUSE TO RISE'. ARISES' thus indicates rising up by itself whereas 'RAISES' involves someone else causing it to rise. Therefore, what is meant by the said provisions of the said section is not that the Courts are required to wait to undertake an inquiry to determine the age of an accused person till such a question is

raised before them. Dispensation of justice is the obligation cast on the Courts of law. The parties; their agents; their learned counsel; their witnesses and others are only an instrument provided to them for the proper discharge of the said duty. It would be horrendous to visualize 'CHILD' or a 'MINOR' being hanged to death only because the question of his minority had not been raised before the relevant Court. It is the function of a Court to ensure that no illegality is permitted to occur and no injustice is allowed to creep into its decisions. To conclude, therefore, it is stated that irrespective of the fact whether the issue of the age of an accused person is or is not raised before the Court, it is the obligation of the learned Presiding Officer to suspend all further proceedings in a trial and to hold an inquiry to determine the age of an accused person if and whenever it appears to him that such a determination was necessary.

7. For the above reasons and while relying on the above referred case law, we are of the affirmed view that the question of determination of age was vital before putting the appellant/convict to

trial, hence, without dilating upon merits of the case, this appeal is accepted and impugned conviction and sentence is set-aside, and case is remanded to the Child Protection Court to first determine the age of appellant/accused and if it is proved that at the time of alleged offence, he was minor/juvenile, then to conduct fresh trial under the relevant law. In the meanwhile, appellant/accused shall remain under trial prisoner.

Announced.

05.10.2022.

Tahir PS

J U D G E

J U D G E

Hon'ble Justice Wiqar Ahmad & Hon'ble Justice Fazal Subhan.