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IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Mushir Alam
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Munib Akhtar

Criminal Petition No.342/2018

(On appeal from the judgment dated 12.2.2018 passed by the Lahore High Court, Rawalpindi Bench, Rawalpindi in CrI.Rev.No.173/2017).

Taj Muhammad

...Petitioner

VERSUS

Khalid Mehmood alias Khalid Nawaz and others

....Respondents

For the petitioner

: Mr. Laiq Khan Swati, ASC

For the respondent:

: Mr. Muhammad Ikhlaque Awan, ASC

For the State:

Ch. Waheed Khan, Addl.P.G.Pb

Date of Hearing

: 12.9.2018

JUDGMENT

Mazhar Alam Khan Miankhel, J.- Khalid Mehmood alias Khalid Nawaz respondent No.1, the accused, was booked in case FIR No.73 dated 26.4.2015 registered under Sections 302/34 PPC at police station City-Talagang district Chakwal and during trial of the case, the accused-respondent No.1 for the first time on 25.11.2016 came forward with a plea that he being a child within the meaning of Section 2 (b) of the Juvenile Justice System Ordinance, 2000 (the Ordinance), his case be sent for trial before a Juvenile Court established under the Ordinance. Initially this application was dismissed by the trial court but the High Court in a Criminal Revision No.59/2017 on 22.5.2017 remitted back the matter to the trial court for reconsideration of the issue within the meaning of Section 7 of the Ordinance. This plea of the respondent No.1-accused after proper inquiry, was again turned down

by the trial court vide its order dated 5.7.2017 but the High Court in a Criminal Revision No.173/2017 filed by respondent No.1-accused, while allowing the same vide its judgment dated 12.02.2018 directed his trial before a Juvenile Court. 71

The petitioner being complainant of the above noted sessions case, feeling himself aggrieved has questioned the judgment dated 12.2.2018 for grant of leave to appeal. 70

2. Learned counsel for the parties and learned Additional Prosecutor General, Punjab were heard and record of the case was perused. Perusal of the record would reveal that instant case was registered on 26.4.2015 against respondent No.1 and his co-accused Shah Nawaz, who being his father and after recording of statement of PW-1 on 25.11.2016, respondent No.1 for the first time filed an application for determination of his age under Section 7 of the Ordinance. He neither disclosed his actual date of birth in his application nor filed any documentary piece of evidence like entry in the birth register or any school certificate showing his date of birth. He even didn't annex 'Form-B' of NADRA showing the entire data of his family including the age of every family member. Since the application for determination of his age was filed and under Section 7 of the Ordinance the trial court was under a legal obligation to record its findings in this regard after proper inquiry; the trial court in absence of any documentary evidence as stated above, ordered the ossification test of the accused-respondent No.1 through a medical board. As per opinion of the medical board dated 15.12.2016 the probable age of the respondent No.1-accused was declared between 20 to 25 years. In the

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light of said report the probable age of respondent No.1-acused calculated by the trial court at the time of occurrence was between 18 years 4 months 11 days, and 23 years 4 months 11 days. Perusal of the report would reflect that it was based upon the opinion of members of the medical board, though based on some scientific footings but under the law cannot be considered as a conclusive proof of age of respondent No.1 and many a times such like opinions are misleading. A reference in this regard can also be made to a case of Intiazar Hussain v. Hamza Ameer, etc (2017 SCMR 633). The settled law of the land in this regard is that it was for the respondent No.1 to prove the factum of his age as alleged/asserted by him through a positive evidence otherwise he cannot claim any benefit of this benevolent legislation. Such a claim is not more than an assertion of a fact, burden of proof of which heavily lies upon the person alleging/asserting the same. A reference in this regard can be made to the cases Ziaullah v. Najeebullah (PLD 2003 SC 656), Tauqeer Ahmed Khan v. Zaheer Ahmad (2009 SCMR 420), Muhammad Raheel @ Shafique v. The State (PLD 2015 SC 145). The record of the case would reflect that respondent No.1 has just claimed to be a child as defined in the Ordinance and has not given any of his date of birth or produced any documentary evidence reflecting his date of birth which might have helped the court in calculating his date of birth. He never raised any such plea during investigation of the above noted case nor at the time of framing of charge before the trial court but it was during the trial of the said case. There was nothing before the trial court to make a fair opinion and give its findings in this matter except the report of medical board which is based on ossification test.

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This alone in no way can be considered as a conclusive proof of age of the respondent No.1 especially when on the face of it he has tried to conceal the reliable documentary evidence as discussed above which reflects his conduct. We don't want to comment upon merits of the case lest it may prejudice the mind of the trial court but would say that this was nothing less than an effort by the accused-respondent No.1 which can only be termed as an afterthought to get the benefit of law but with malice which cannot be permitted. So in this view of the matter, this petition is converted into appeal and allowed and judgment of the High Court is set aside and that of the trial court i.e. Additional Sessions Judge, Talagang, district Chakwal dated 5.7.2017 is restored and maintained.

Short order of even date is reproduced herein-below for ready reference:-

"Heard the counsel; perused the record. For the reasons to follow, this petition is converted into appeal and allowed. The impugned judgment is set aside and that of the learned Additional Sessions Judge, Talagang dated 5.7.2017 is maintained".

Islamabad, the
12th September, 2018
Sarfaraz
Not approved for reporting'