

ORDER SHEET
IN THE LAHORE HIGH COURT
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

Case No Crl. Misc.No.1172-M of 2019

Versus State, etc.

S.No. of order/ proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties of counsel, where necessary.
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)	10.04.2019	Qazi Sadar-ud-Din Alvi, Advocate for petitioner. Mr. Abdul Wadood, DPG. Mr. M. Usman Sharif Khosa, Advocate for the respondent.
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Through this petition under Section 561-A Cr.P.C., the petitioner, seeks the relief, contained in the prayer clause, which is as follows:-

"Under the above submissions, it is, therefore, most respectfully prayed that the instant petition may very kindly be accepted and impugned order dated 21.01.2019 passed by the learned Magistrate Section-30 Dera Ghazi Khan and order 12.02.2019 passed by the learned Sessions Judge, Dera Ghazi Khan may kindly be declared as illegal, unlawful, against the law, facts and without lawful authority and the same may very kindly be set aside and in consequence thereof application filed by the petitioner for ossification test for determination of age of the petitioner may very kindly be accepted, in the interest of justice.

It is further prayed that till the final outcome of main petition, proceedings before the learned trial court may kindly be suspended/stayed, in the supreme interest of justice.

Any other relief which this Hon'ble Court deem fit may also be granted to the petitioner".

2. Tersely the facts out of which instant proceeding have arisen/emanated are that the petitioner stands booked in a case registered vide FIR No.136/2018, under sections 337F(ii)(iii), 324, 34, PPC with Police Station City Dera Ghazi Khan, on the

complaint of respondent No.2 presently pending trial before the court of learned Magistrate Section-30, Dera Ghazi Khan His application, for ossification test, in order to declare him a juvenile was dismissed by the learned trial Magistrate vide order dated 21.01.2019, which on challenge through a criminal revision petition has also been dismissed by the learned Sessions Judge vide his order dated 12.02.2019. The petitioner through the instant petition has challenged the propriety and legality of the above mentioned orders.

3. Learned counsel for the petitioner has mainly argued that holding of an ossification test is mandatory for declaring an accused juvenile, but both the courts below while ignoring this aspect, have passed the impugned orders illegally, which are not sustainable in the eyes of law and as such are liable to be set aside, and the application of the petitioner merits acceptance.

4. Contrarily, learned DPG assisted by learned counsel for the respondent/ complainant vociferously controverting the above noted/ submission have contended that under the provision of repealed Juvenile Justice System Ordinance, 2000, holding of an ossification test while inquiring into the question of juvenility was a pre-requisite but under the provision of the Juvenile Justice System Act, 2018, to hold ossification test, as a mandatory requirement, for declaring the accused to be juvenescent is subject to certain conditions, which are not met in this case. Adds that as per voters' list not only the petitioner but also his younger brother are major; hence, both the courts below have rightly rejected the plea of the petitioner through the impugned orders, which are result of proper appreciation of facts and law, hence, do not warrant any interference.

5. Arguments heard. Record perused.

6. In the light of above noted contentions of the learned counsel for the parties, in order to decide the moot question it will be advantageous to compare the relevant provisions of the repealed law.

Juvenile Justice System Ordinance, 2000, (hereinafter to be called the Ordinance), with the relevant provisions of Juvenile Justice System Act, 2018, (hereinafter to be called as Act). Initially the ordinance, was promulgated vide F.N.2(1)/2000-Pub., dated 01.07.2000, to provide for protection of the rights of children involved in criminal litigation. Child was defined in section 2(b) of the Ordinance *ibid* in definition clause, as under:-

(b) 'child' means a person who at the time of commission of an offence has not attained the age of eighteen years.

Upon raising, the plea of juvenility by an accused/person involved in criminal litigation, it was to be determined under section 7 of the Ordinance *ibid*, by the learned trial court, it is reproduced as under:-

7. Determination of age.---If a question arises as to whether a person before it is a child for the purposes 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.

7. The perusal of the above provision indicates that upon arising a question as to whether a person before the Court, for the purpose of the Ordinance, is a child or not, the court after inquiring into the matter, had to record its findings on it. It will be important to mention that for quite sometimes, there remained a controversy regarding the relevancy of material and mode of inquiry before the courts, consequently, many cases were even litigated in the Hon'ble Supreme Court of Pakistan. While deciding a number of cases, under the Ordinance, certain guidelines were laid down by the Hon'ble Supreme Court of Pakistan. A synopsis of important case law, enunciating guidelines and principles, to be followed by the courts with their binding effect under constitution from determining age of persons, claiming themselves as juvenile is referred as under:-

In **Muhammad Akram's** case reported in **2004 SCMR 218** the Honorable Supreme Court observed that trial court committed illegality by holding an enquiry without ossification test and found the accused under 18 years of age at the time of

occurrence and directed him to be tried by the Juvenile Court. Honorable Supreme remanded the case to the Trial Court to re-determine the age of the accused in terms of section 7 of the Juvenile Justice System Ordinance, 2000.

In **Muhammad Jamil's case** reported in **2004 S C M R 1871** the Honorable Supreme Court observed that question of minority was neither raised before Trial Court nor before High Court and as such leave to appeal was refused.

In **Sultan Ahmed's case** reported in **PLD 2004 SC 758** the Honorable Supreme Court laid down following guidelines regarding dealing with juvenile accused cases:-

- 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.
- 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 Officer 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.
- Medical report/ossification test 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. 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.

- A claim of minority should be lodged by an accused person at the earliest possible opportunity and preferably during the course of investigation so that the Investigation Officer could collect evidence even in this connection for the assistance of the competent Court. And adverse inference could be drawn where the concession in question was claimed after undue and un-explained delay.

In **Muhammad Aslam's case** reported in **PLD 2009 SC 777** the Honorable Supreme Court while dilating upon the accused's plea of juvenility observed that the accused could not be deemed to have discharged the said burden by merely placing a School Leaving Certificate on record and more so when no opportunity had been provided to the other side to test the veracity or the genuineness of the said document or the contents thereof. The Honorable Court laid down following 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 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;

(b) 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;,

(c) 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;

(d) 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 un-scrutinized documents was 'a dangerous path to tread;

(e) 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;

(f) a medical examination of the accused person could furnish a useful guideline in the matter and should be resorted to; and finally,

(g) 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 **Faisal Aleem's case** reported in **PLD 2010 SC 1080** the Honorable Supreme Court rejected the belated plea of juvenility and termed it as afterthought. The Court further observed that certificate issued by Director General of Registration, Ministry of Interior was of no use to accused wherein a futile attempt had been made to show the date of birth of accused as 6-5-1977, to make him a "child" for taking benefit as provided in S.2(b) of Juvenile Justice System Ordinance, 2000. Contents of the certificates showed that date of birth of accused had been shown 6-5-1977, while his brother was born on 4-1-1978 and another brother on 2-11-1978, which did not appeal to reason and logic and appeared to be incorrect. Appeal was dismissed.

In **Muhammad Raheel's case** reported in **PLD 2015 SC 145** the Honorable Supreme Court rejected the delayed claim of juvenility. Accused had never claimed at any stage of the trial that he was a child, he had never agitated before the High Court that he was a juvenile and he had led no evidence before any court regarding his date of birth. Mere mentioning of the accused's age in his statement recorded under S.342, Cr.P.C. was not a conclusive determining factor regarding his actual age for the purposes of declaring him a juvenile. Appeal was dismissed accordingly.

In **Sher Bahadur's case** reported in **2015 SCMR 955** the Honorable Supreme Court set aside judgment passed by High

Court in which conviction of accused was set aside while declaring him juvenile on the basis of school leaving certificate and CNIC without due verification of their genuineness and authenticity. The matter was remanded to the High Court for its hearing afresh, after calling for ossification report of accused through medical board of specialist doctors in the required field.

In **Sarfraz alias Shaffa's case** reported in **2007 SCMR 758** the Honorable Supreme Court rejected the belated plea of juvenility. Petition for leave to appeal was dismissed.

In **Nazeer alias Wazeer's case** reported in **PLD 2007 SC 202** the Honorable Supreme Court observed at **para 14** that the prosecution has not challenged the genuineness of the school leaving certificate or the correctness of the entries contained in the register with which the presumption of truth would be attached and this presumption, in absence of any evidence to the contrary, remained un-rebutted. There is no cavil to the proposition that for the purpose of determination of age, the birth certificate is considered authentic evidence and more reliable as compared to the school leaving certificate but the prosecution has not brought on record any evidence in rebuttal challenging the correctness of the date of birth of accused given in his school certificate. It is provided in section 7 of the Juvenile Justice System Ordinance, 2000 that for determination of age, medical report regarding the age can also be considered and we in the light of the school leaving certificate of the appellant and the medical evidence, according to which he was less than 18 years at the time of commission of offence, have no hesitation to hold that at the relevant time, he was a juvenile.

The Juvenile Justice System Ordinance, 2000, was promulgated, at a time of our political and constitutional history, when, there did not exist any democratic, and political order, based on the Constitution in the country. Therefore, being an Ordinance, its provisions were neither deliberated upon nor debated in the assembly. It will not be out of place to mention that, despite availability of authoritative pronouncements, on the subject, by the

Hon'ble Supreme Court of Pakistan with their binding effect, whereby guidelines were laid down for the courts, for their decision, on the subject, still the necessity was being felt, that, the Legislature, should either bring appropriate amendments in the existing law or enact a new law on the subject. It may not be out of context to say that the world history, bears this testimony, that the nations have treaded hard, on the thorny path, during their struggle, to change, the monarchical rule into a political system, of self-rule. Most of the nations of the world have succeeded in adopting, the political and constitutional frame works, based on democratic values, catering the eternal desire of humanity, of participatory political system to regulate the order of their lives in line with their aspirations, ensuring, certainty and stability, of the system so evolved. The written Constitution, plays the role as a supreme guarantor for determining the limitations and jurisdiction of organs of the State. A written Constitution provides a nicely evolved self-executory system of check and balance. In case of any transgression, by any one, the judicature acts as a defender of the fundamental rights of the citizens. The Legislature is known as Law giver whereas the judicature pronounced authoritatively interpret those laws. The Legislature consists of periodically chosen representatives by the electorates with a mandate to regulate the affairs of the state and order of lives of the citizens to transform their aspirations into a reality, while adopting appropriate legislative process in their supreme interest and for their welfare. The relevancy of the above discussion is that after restoration of the constitutional order, in the country, finally, the Legislature, rose to the occasion by enacting the Juvenile Justice System Act (XXII of 2018), 2018. It may be observed that the perusal of the provisions of the Act *ibid* reflect that they are an epitome of pronounced judicial and legislative wisdom, synthesized through a legislative process. The said Ordinance with the promulgation of Juvenile Justice System Act, 2018 on 22nd May, 2018, had been repealed.

A COMPARATIVE ANALYSIS OF JJSO, OF 2000 AND JJSA, OF 2018 IS GIVEN HEREUNDER:-

Sr. No.	JJSO of 2000	JJSA of 2018
1.	Deleted Definitions: "Borstal Institution", "offence",	Added Definitions: "Best interest of the child", "diversion", "heinous offence", "juvenile", "Juvenile Justice Committee", "Juvenile Rehabilitation Centre", "juvenile offender", "major offence", "minor offence", "medical officer", "Observation Home", "suitable person"
2.		Changed Definitions: "child", "guardian", "
3.	Sec. 3. Legal Assistance i. Right of LA to accused child and victim child. ii. Qualification of Leg. Practitioner: <u>5</u> years	Sec. 3. Legal Assistance i. Right of LA to juvenile or victim child ii. Qualification of Leg. Practitioner: 7 years Added clause. Duty to inform juvenile as to his rights
4.	Sec. 4 Juvenile Courts i. Establishment of Juvenile Courts ii. Power of HC to confer power or appoint presiding officer iii. Magistrate of 1 st class may be a JC iv. Qualification of 7 years for an advocate to be a Presiding Officer v. Period of disposal of case Four months	Sec. 4 Juvenile Courts i. Establishment or designation of Juvenile Courts ii. Power of HC to confer power or appoint presiding officer ABOLISHED iii. Magistrate 1 st class replaced with Sec. 30 iv. Qualification of 10 years for an advocate to be a Presiding Officer v. Period of disposal of case Six months extendable by HC vi. <u>Place of sitting of court may be other than the court room</u>
5.	Sec. 5 Joint Trial with Adult No joint trial of child with adult	Sec. 12 Joint Trial with Adult <ul style="list-style-type: none"> Joint trial, if in interest of justice, is permissible. Attendance of juvenile may be dispensed with without application if there is joint trial
6.	Sec. 6 Procedure of Court	Sec. 11 Procedure of Court Prohibition abolished

	No fixation of case on the day of trial of juvenile case	
7.	Sec. 7 Determination of Age Inquiry by court as to age of child	Sec. 8 Determination of Age <ul style="list-style-type: none"> • Newly Added Clause. Inquiry by OIPS/IO • By Court
8.	Sec. 8 Prohibition to publicize proceedings No publication of proceedings disclosing identity of child save with permission of the court	Sec. 13 Prohibition to disclose identity <ul style="list-style-type: none"> • Publication of child matter made an Offence with three years imprisonment except with permission of certain persons • Publication of proceedings before court made an Offence punishable with 2 years except judgments of SC or HC
9.	Sec. 9 Probation Officer Making of report by Probation Officer	Sec. 14 Report of Probation Officer Making of report by Probation Officer <u>on the direction of court on stipulated points</u>
10.	Sec. 10 Arrest and Bail <ul style="list-style-type: none"> • <u>This sec. contains provisions both for arrest and bail</u> • Arrested child may be kept in PS 	Sec. 5 Arrest <ul style="list-style-type: none"> • <u>This sec. contains provisions only for arrest.</u> • <u>Arrested juvenile shall be kept in Observation Home</u>
11.	Sec. 10 Arrest and Bail <ol style="list-style-type: none"> Offences with ten or less than ten years imprisonment bailable for a <u>child</u> under age of fifteen years ----- Bail after one year, six months and four months respectively for different categories of offences, if trial delayed. In above cases, bail may not be 	Sec. 6 Release on Bail <ol style="list-style-type: none"> Offences up to <u>seven years</u> imprisonment bailable for a <u>Juvenile</u> Bail may not be granted to juvenile of more than sixteen years if he is involved in <u>heinous offence</u> Bail after six months, if trial delayed in all cases

	<i>granted to child of 15 or above if offence is serious, heinous, gruesome etc even if trial is delayed</i>	<ul style="list-style-type: none"> <i>In no circumstances, juvenile shall be kept in PS or in Jail</i>
12.	Sec. 11 Release on Probation	Sec. 15 Power to order for release <i>Almost same with added clauses</i>
13.	Sec. 12. Orders not to be passed	Sec. 16. Orders not to be passed <i>Almost identical with change that juvenile shall not be sent to Prison</i>
14.	Sec. 13 Appeal	Sec. 18 Appeal <i>Identical with modification that Guardian of juvenile may file appeal</i>
15.	Sec. 14 <i>Ordinance did not derogate other laws.</i>	Sec. 23 <i>Act has overriding effect</i>
16.		Sec. 7 New Provision regarding Interrogation <i>Interrogation by SI under supervision of SP or SDPO</i>
17.		Sec. 9 New Provision regarding Disposal through Diversion
18.		Sec. 10 New Provision regarding Juvenile Justice Committee
19.		Sec. 17 New Provision. <i>Special provisions for female juvenile</i>
20.		Sec. 19. New Provision regarding Removal of Disqualification attached with conviction
21.		Sec. 20. New Provision regarding establishment of Observation Home and Juvenile Rehabilitation Centres

Let's examine now the most relevant provisions 2(h) and 2(l) and Section 8 of the Act relating to the point in issue which are reproduced as under

2(h) "juvenile" means a child who may be dealt with for an offence in a manner which is different from an adult.

2(1) "Juvenile offender" means a child who is alleged to have committed or who has been found to have committed an offence.

Section 8 of the Act *ibid* is reproduced as under:-

8. Determination of age.-(1) Where a person alleged to have committed an offence physically appears or claims to be 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, education 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 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.


9. Perusal of above provision reveals that a duty has been cast upon Incharge of Police Station or Investigating Officer that if a person alleged to have committed an offence, physically appears to them or accused himself claims to be a juvenile, immediately an inquiry shall be initiated for determination of his age. Under the previous dispensation, no such responsibility was placed either upon the shoulders of the SHO or the Investigating Officer of the case. In order to inquire into the factum of age, even some of the relevant material has also been pointed out, i.e. Birth Certificate, Educational Certificate or any other pertinent document (CNIC etc.) which may authenticate the actual age of the accused. The absence of stipulated documents, it appears, now is a condition precedent for seeking medical examination report. The scope of inquiry by the Investigating Officer, it looks, has been confined to the collection of stipulated document on the basis of which the police officer has to conclude his inquiry for determination of age. This is to eradicate the possible future difficulties which may arise out of a delayed claim of juvenility. It will also discourage unscrupulous elements from having

a resort to procure fabricated entries of date of birth for seeking benefit of the act. Needless to say that it will also reduce the litigation over the question of determination of juvenility. It will surely save precious public time of courts for its proper utilization for deciding some substantive litigation. It will also save the hard earned resources of the litigants. All the functions of inquiry by way of recording of finding on the point of juvenility of an accused, were previously entrusted to the court under the repealed Ordinance. Now, under the Act, 2018, function of inquiry has been assigned to investigating officer and that of recording of finding about the age of accused to the court on the basis of available record including report submitted by police and in absence of such report based on record of medical examination. It appears that the act, in the first place, has endeavoured the collection of all specific material for determination of question of juvenility to facilitate the court in recording a finding, at the time of very first appearance in the court under section 167, Cr.P.C; The court before authorizing further detention of an accused shall record its finding regarding his age on the basis of available record. Owing to the above mentioned authoritative pronouncements of Honorable Supreme Court of Pakistan, under the repealed Ordinance, it was obligatory on the courts to get medical examination report, however, the phraseology employed in present section 8 of the Act, is suggestive of holding medical examination only when the documents stipulated in this section are not forthcoming. If a person of an offence lays his claim, seeks a declaration of his juvenility after submission of a report under section 173 Cr.P.C. during trial, the trial court may entertain his claim but without defeating the object, and without rendering the provisions of the Act redundant.

10. The case was registered on 19.05.2018. The petitioner as per report u/s 173 Cr.P.C. was arrested in this case on 22.05.2019. The Juvenile Justice System Act, 2018 was promulgated on 22nd May, 2018. He remained on duly authorized physical remand by the

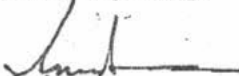
Magistrate with police. It appears that neither the petitioner appeared to the SHO or Investigating Officer from his physical appearance to be a juvenile nor he laid any claim about his juvenility. After submission of the challan, the petitioner had moved application before the learned trial court claiming that his date of birth according to his school leaving certificate is 02.02.2003, therefore, he may be declared as a juvenile. The claim of the petitioner regarding juvenility is a delayed one. The revisional court found that according to the voters list, the name of the petitioner figures at Sr. No.180 with his CNIC number, issued on his attaining of 18 years of age. The perusal of the voter list further reveals that name of younger brother of the petitioner namely [REDACTED] is also mentioned in the same voter list at Sr. No.181 with his CNIC number meaning thereby, even his younger brother was not less than eighteen years of his age at the time of preparation of voters list. The petitioner has also not been able to rebut the entries in the voters list or his CNIC. It appears that at a belated stage, the petitioner is trying to make an abortive effort/attempt for getting himself declared to be a juvenescent. Both the learned courts below have passed the impugned orders while taking into consideration the material available on the record in its true perspective which are quite in accordance with law, therefore, the same call for no interference by this Court.

11. For what has been discussed herein above, the petition in hand being patently devoid of any force is hereby dismissed.


(Anwaarul Haq Pannun)
Judge

Javaid.S.

Approved for reporting.


Judge.