

(2008) 08 P&amp;H CK 0179

**High Court Of Punjab And Haryana At Chandigarh****Case No:** Criminal Miscellaneous 11840-M of 2007

Pawan

APPELLANT

Vs

State of Haryana

RESPONDENT

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**Date of Decision:** Aug. 13, 2008**Acts Referred:**

- Constitution of India, 1950 - Article 21
- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Evidence Act, 1872 - Section 106, 35, 73, 74
- Representation of the People Act, 1951 - Section 36(2)

**Citation:** (2009) 1 RCR(Criminal) 419**Hon'ble Judges:** Ajai Lamba, J**Bench:** Single Bench**Advocate:** Vikram Singh, for the Appellant; Narender Sura, AAG, Haryana, for the Respondent**Final Decision:** Dismissed

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**Judgement**

Ajai Lamba, J.

This petition has been filed u/s 482, Code of Criminal Procedure, for setting aside order dated 18.3.2008 (Annexure P4), passed by the Additional Sessions Judge, Panipat, vide which the application for sending the case of the petitioner to Juvenile Justice Board, has been declined.

I have gone through the impugned order.

The trial Court has come to the conclusion that the petitioner is more than 19 years of age, for detailed reasons given in the impugned order.

2. Learned counsel for the petitioner wants this Court to re-appreciate the evidence to come to a different conclusion while exercising jurisdiction u/s 482, Code of Criminal Procedure.

3. Having considered the reasons given by the trial court, I find that no illegality can be traced therein. The trial court has taken notice of the fact that at the time of his arrest on 4.6.2007, the petitioner had disclosed his age as 19 years. The other circumstance that has been taken into account is that the Birth Certificate had not been placed on the record. Only the school certificate has been placed on the record to say that the petitioner was a juvenile on the date of the commission of the offence. Baldev Raj, father of the accused, appeared as AW-3 and stated that Ration Card had been issued, however, the Ration Card has not been placed on the record for consideration of the Court.

4. The parents of the accused could not tell the date of birth of any of other children. This assumes relevance and importance because the petitioner and others are 7 brothers and sisters. In case, the age of other brothers/sisters of the petitioner was given, the court could have considered the veracity of the statement. Even the birth certificates of other brothers and sisters had not been placed on the record.

5. Another factor that has been considered is the statement of Smt. Murti, mother of the petitioner, who was examined as AW-2. The cross-examination of Smt. Murti is reproduced hereunder:

"My marriage with Baldev Raj had taken place 27 years ago. My eldest child is daughter named Kamlesh. She was born after three years of the marriage. Younger of Kamlesh is another daughter Suman. She was born after 2/2-1/2 years of the birth of Kamlesh. Pawan accused was born after 2/2-1/2 years of the birth of Suman. Pawan accused was born in village Assan Kalan. My all the children were born there. I cannot tell the date of birth of any of my children. It is incorrect that at the time of occurrence my son Pawan accused was about 19 years of age."

6. The statement would clearly reflect that the petitioner was 19 years of age at the time of his arrest. This is the precise age which the petitioner had disclosed at the time of his arrest. In the impugned order, this is another circumstance that has been considered and no fault can be traced in this reasoning.

7. Learned counsel for the petitioner has relied on Ravinder Singh Gorkhi v. State of U.P., 2006 (3) RCR(Criminal) 156 : 2006 (3) RCR(Civil) 45 : 2006 (2) Apex Criminal 333 (SC), Balkar Singh v. State of Punjab, 2005 (1) RCR (Criminal) 576 : 2005 (1) ILR 356, Manoj Kumar v. The State, NCT Delhi, 2007 (1) RCR (Criminal) 687 (Delhi High Court) and Manjeet v. State, 2007 (1) RCR (Criminal) 370 (Delhi High Court).

8. In Ravinder Singh Gorkhi's case (supra), the following needs to be noticed in the context of the issue:

"21. Section 35 of the Evidence Act would be attracted both in civil and criminal proceedings. The Evidence Act does not make any distinction between a civil proceeding and a criminal proceeding. Unless specifically provided for, in terms of Section 35 of the Evidence Act, the register maintained in ordinary course of

business by a public servant in the discharge of his official duty, or by any, other person in performance of a duty specially enjoined by the law of the country in which, inter alia, such register is kept would be a relevant fact. Section 35, thus, requires the following conditions to be fulfilled before a document is held to be admissible thereunder: (i) it should be in the nature of the entry in any public or official register;; (ii) it must state a fact in issue or relevant fact; (iii) entry must be made either by a public servant in the discharge of his official duty, or by any person in performance of a duty specially enjoined by the law of the country; and (iv) all persons concerned indisputably must have an access thereto.

22. A question was raised as to whether the determination of the age of a child should be made on the basis of the date on which the occurrence took place or when, he was produced before the court. The said question came up for consideration in the context of the provisions of the Juvenile Justice Act, 2000 before a Constitution Bench in [Pratap Singh Vs. State of Jharkhand and Another](#), . It was held that the date of commission of the offence would be the relevant date.

23. In terms of the aforementioned decision of the Constitution Bench such determination is required to be made even if at the relevant time, the juvenile crossed the age of eighteen years. In absence of any other statute operating in the field, Section 35 will have application and the court, while determining such age would depend upon the materials brought on records by the parties which would be admissible in evidence in terms of Section 35 of the Act.

24. In *Birad Mal Singhvi v. Anand Purohit*, [(1988 Supp. SCC 604)], this Court held:

"To render a document admissible u/s 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible u/s 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded."

(Emphasis supplied)

25. In [Sushil Kumar Vs. Rakesh Kumar](#), this Court as regards determination of age of a candidate in terms of Section 36(2) of the Representation of the People Act, 1951 observed:

"32. The age of a person in an election petition has to be determined not only on the basis of the materials placed on record but also upon taking into consideration the circumstances attending thereto. The initial burden to prove the allegations made in the election petition although was upon the election petitioner but for proving the

facts which were within the special knowledge of the respondent, the burden was upon him in terms of Section 106 of the Evidence Act. It is also trite that when both parties have adduced evidence, the question of the onus of proof becomes academic [see *Union of India v. Sugauli Sugar Works (P). Ltd. and Cox and Kings (Agents) Ltd. v. Workmen*. Furthermore, an admission on the part of a party to the lis shall be binding on him and in any event a presumption must be made that the same is taken to be established."

This Court therein followed, inter alia, *Birad Mal Singhvi* (supra) and several other decisions.

26. In [Updesh Kumar and Others Vs. Prithvi Singh and Others](#), this Court having regard to the overwhelming evidence came to the opinion, that the Respondent No. 1 had attained the age of 21 years as on the date of his application for the allotment of the retail outlet. In that case also reliance was placed on the matriculation certificate holding that the correction of the date of the birth in the certificate was an official act and the must be presumed to have been done in accordance with law.

27. We, however, notice that in [Ram Deo Chauhan @ Raj Nath Vs. State of Assam](#), as regard applicability of the provision of Section 35 of the Indian Evidence Act, 1872 vis-a-vis a school register, it was stated:

"19. It is not disputed that the register of admission of students relied upon by the defence is not maintained under any statutory requirement. The author of the register has also not been examined. The register is not paged (sic) at all. Column 12 of the register deals with "age at the time of admission". Entries 1 to 45 mention the age of the students in terms of years, months and days. Entry 1 is dated 25-1-1988 whereas Entry 45 is dated 31-3- 1989. Thereafter except for Entry 45, the page is totally blank and fresh entries are made w.e. f. 5-1-1990, apparently by one person up to Entry 32. All entries are dated 5-1-1990. The other entries made on various dates appear to have been made by one person though in different inks. Entries for the years 1990 are up to Entry 64 whereafter entries of 1991 are made again apparently by the same person. Entry 36 relates to Rajnath Chauhan, son of Firato Chauhan. In all the entries except Entry 32, after 5-1-1990 in column 12 instead of age some date is mentioned which, according to the defence is the date of birth of the student concerned. In Entry 32 the age of the student concerned has been recorded. In column 12 again in the entries with effect from 9-1-1992, the age of the students are mentioned and not their dates of birth. The manner in which the register has been maintained does not inspire confidence of the Court to put any reliance on it. Learned defence counsel has also not referred to any provision of law for accepting its authenticity in terms of Section 35 of the Evidence Act. The entries made in such a register cannot be taken as a proof of age of the accused for any purpose."

28. We are, however, not oblivious of a decision of this Court in [Bhola Bhagat Vs. State of Bihar](#), wherein an obligation has been cast on the court that where such a plea is raised having regard to the beneficial nature of the socially-oriented legislation, such a plea should be examined with great care. We are, however, of the opinion that the same would not mean that a person who is not entitled to the said benefit would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit. Each case has to be considered on the basis of the materials brought on records.

30. Mr. Mishra, however, relied upon [Umesh Chandra Vs. State of Rajasthan](#), Therein a register maintained by a public school of repute had been produced. This Court relied thereupon, opining that Section 35 cannot be read with Sections 73 and 74 of the Evidence Act. If a public school maintains a register in ordinary course of business, the same would be admissible in evidence.

31. We have not been shown as to whether any register was required to be maintained under any statute. We have further not been shown as to whether any register was maintained in the school at all. The original register has not been produced. The authenticity of the said register, if produced, could have been looked into. No person had been examined to prove as to who had made entries in the register. The school leaving certificate which was not issued by a person who was in the school at the time when the appellant was admitted therein, cannot be relied upon.

34. The age of a person as recorded in the school register or otherwise may be used for various purposes; namely, for obtaining admission for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum, e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted."

9. The cited case would not entitle the petitioner to any relief because the entry of date of birth in the School Leaving Certificate in the present case was purportedly made on the basis of an earlier School Leaving Certificate, as has been stated by AW-1 Paramjeet Kaur. Her cross-examination reads as under:

"Date of Birth of Pawan as on 10.2.1991 was recorded on the basis of his date of birth recorded in his school leaving certificate issued by the Head Master of Govt. Primary School, Assan Kalan. As per said school leaving certificate, he studied in that school from 20.4.2000 to 31.3.2004."

10. The basis of entry was not placed before the court for its consideration. It has not been disclosed that the register was required to be maintained under any statute. The Birth Certificate was the best evidence which would also have been the basis of entry in the school at the time of admission or school leaving. The Birth Certificate, however, has not been placed on record. Contrary to the date of birth indicated in the certificate, is the statement of accused at the time of his arrest. The conclusion that can be drawn on consideration of statement of the mother, who appeared as AW-2, is also in tune with the statement of the accused, as noticed earlier. It is, therefore, clear that the School Leaving Certificate in the facts and circumstances of the case, is not conclusive evidence/proof of age of the accused.

11. In Balkar Singh's case (supra), one of the judgments that has been relied on is Bhoop Ram v. State of U.P., 1989 (1) RCR (Criminal) 573 (SC) , which had been considered by the Hon"ble Supreme Court of India in Ravinder Singh Gorkhi's case (supra), to which reference has been made in extenso in earlier part of the judgment. It has been held (in para-10) that "while dealing with the case of juvenile based on the school certificate, Hon"ble Apex Court held that in the absence of any thing showing that the entries in the school leaving certificate did not relate to the accused or were incorrect, the same cannot be rejected on the basis of surmise that generally parents understate the age of their children at the time of admission to school."

12. In the case in hand, however, the statement of mother Smt. Murti, who appeared as AW-2, relevant portion of which has been reproduced in the earlier part of this judgment, has indicated that the age of the accused was 19 years. In view of the judgment rendered by the Hon"ble Supreme Court of India in Ravinder Singh Gorkhi's case (supra), the petitioner cannot derive any mileage out of Balkar Singh's case (supra) as the facts, material and evidence in that case were different.

13. In Manoj Kumar's case (supra), the Delhi High Court held that it is not necessary that the Birth Certificate must be produced by a person claiming to be a juvenile. There are other pieces of evidence which can be looked into and the school certificate was one such piece of evidence. Having regard to the facts and circumstances of the present case viz., the accused himself declared his age as 19 years at the time of his arrest and the statement of his mother, the judgment is not applicable to the facts and circumstances of the case.

14. In Manjeet's case (supra), the Delhi High Court was considering a case where along with the School Leaving Certificate, radiological bone age of the accused was also considered.

15. In the case in hand, however, as has been held by the court below, a collective reading and consideration of the evidence that has come on the record indicates that the accused was not a juvenile on the date of incident. The School Leaving Certificate has been placed on record, however, the teacher-Paramjeet Kaur, who appeared as AW-1 and produced the School Leaving Certificate, disclosed to the court on oath, that it was on the basis of another School Leaving Certificate that the age had been reflected in the certificate produced in court. The earlier certificate has not been produced on record. There is no material on the record to indicate that the School Leaving Certificate was maintained under any Statute. The Birth Certificate could be the best evidence to indicate the age of the accused, which has not been produced. Evidence to the contrary is available i.e. by way of admission of the accused as also the conclusion drawn from the statement of mother of the accused who appeared as AW-2, as discussed earlier.

In view of the above, no ground for interference is made out in this petition. The petition is dismissed.